# Academy of Court-Appointed Neutrals

## Using Court-Appointed Neutrals

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# Appendix A

## Sample Appointment Orders

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## Sample Appointment Order 1:
## Where Neutral Will Serve as Mediator and Was Previously Serving as Mediator Through an ADR Administrator

After reviewing the progress of mediation in this action before _____, and with the consent of all parties, this Court finds that the appointment of a Neutral for purposes of further mediation and settlement is justified and necessary.

Pursuant to Federal Rule of Civil Procedure 53 it is **ORDERED** that the current mediator, _____, is appointed as Neutral for purposes of mediation and settlement.

The Court-Appointed Neutral shall have the following authority, which shall be exercised with all reasonable diligence in accord with Rule 53:

1. To direct and facilitate the settlement negotiations among the parties and their insurers.
2. To schedule mediation sessions, telephone conference calls, and other forms of communication among the parties, and to require the parties, counsel, expert consultants, and insurers to attend and participate in mediation sessions and/or other communications. The Special Master will make reasonable efforts to take into consideration the convenience of attendees when selecting locations for mediation sessions.
3. To require that parties and their insurers appear at and participate in mediation sessions with full authority to negotiate in a good faith effort to reach a settlement.
4. To take all appropriate measures to perform fairly and efficiently the responsibilities of a mediator in an effort to effectuate a complete settlement of this action.
5. To report to the Court at regularly scheduled status conferences the progress and status of the settlement negotiations.

[ADR administrator] shall charge $__/hour for _____'s services as Court-Appointed Neutral, plus the normal [ADR administrator] administrative fee of 10% of the professional charges. [Add details about what the master will/will not charge for.]

Pursuant to the parties' agreement, the parties shall pay the charge for the Court-Appointed Neutral's service [add details about how the parties will share responsibility for paying these charges.] If any party is added to or removed from the case, the pro rata shares shall be reallocated as the parties agree or by order of the Court. At the request of any party, the Court shall review and approve the charges for the Court-Appointed Neutral's services.

The parties may have *ex parte* communications with the Court-Appointed Neutral as to all matters related in any way to the mediation process. The Court-Appointed Neutral may communicate *ex parte* with the Court as deemed necessary concerning the status of the mediation process, but shall not disclose to the Court the specifics of any party's settlement position without the consent of that party.

The Court-Appointed Neutral need not preserve any record of activities.

The clerk is directed to add Court-Appointed Neutral _____to the court's electronic service list at _____.

IT IS SO ORDERED.

## Sample Appointment Order 2:
## Where Neutral Will Supervise Discovery in a Criminal Case

Upon consideration of [motions, objections, etc.], it is hereby:

1. ORDERED, that _____, a member of the bar of _____, is hereby appointed a Neutral; and it is

2. FURTHER ORDERED, that, in the execution of this reference the Neutral shall possess and may exercise all powers conferred upon Neutrals in like cases; shall likewise possess and may exercise, to the extent permitted by law and the Constitution, all powers conferred upon U.S. Magistrate Judges by 28 U.S.C. § 636; including all powers to make such orders as may be necessary and appropriate to fulfill the duties assigned to the Neutral under this Order, subject to review by the Court; and it is

3. FURTHER ORDERED, that the Neutral shall supervise and issue orders and reports appropriate and necessary to resolve all discovery disputes in this case, including but not limited to: _____ [include itemized list, where appropriate] (all referred to as "discovery"); and it is

4. FURTHER ORDERED, that the Neutral shall take all steps necessary, including issuing scheduling orders, issuing orders to compel, holding periodic hearings, and recommending sanctions as may be appropriate, to ensure that discovery in this case is thorough and complete in accordance with all the requirements of the Rules of Criminal Procedure, the Orders of this Court, and the law; and it is

5. FURTHER ORDERED, that the Neutral shall report to the Court on all relevant matters within 60 days of the date of this Order, and shall periodically report to the Court on the progress of discovery in this case; and it is

6. [For cases involving a Protective Order:] FURTHER ORDERED, that the Neutral shall apply to and be processed by the Court Security Officer for the necessary security clearance, shall sign the Memorandum of Understanding and be bound by the Court's Protective Order. Upon fulfilling these requirements, the Neutral shall be provided with and shall review any classified portions of the pleadings of each party filed with the Court and shall review the underlying documents submitted therewith to determine whether those documents or any portion thereof are properly discoverable under either Federal Rule of Criminal Procedure 16 or *Brady;* and it is

7. FURTHER ORDERED, that the Government shall submit to the Neutral any other relevant classified documents, to the extent they are not submitted directly to the defendants. The Neutral shall review those classified documents and determine the extent to which those classified documents are to be provided to the defendants, including the appropriateness and adequacy of any substitutions or redactions proposed by the Government; and it is

8. FURTHER ORDERED, that within 30 days of the date of this Order, the Government shall provide to the defendants all materials that the defendants have requested under *Brady* as well as any other materials that fall within the ambit of *Brady.* If there is any question as to whether particular materials fall within the ambit of *Brady,* those materials are to be submitted to the Neutral within 30 days of this Order for the Neutral's review and recommendation as to whether those documents are to be produced to the defendants. In addition, if the Government, after the initial production of materials to the defendants or the Neutral under this section of this Order, comes into possession of materials or determines that

any materials that have not been previously produced may fall within the ambit *of Brady,* it shall provide those materials to the defendants or the Neutral, as is appropriate, immediately after such acquisition or determination is made. The Neutral shall review any documents so provided and determine, within 30 days of the submission, whether they contain material properly discoverable by the defendants under *Brady;* and it is

9. FURTHER ORDERED, that any party may object to any order or report issued by the Neutral by filing such objection with the Court within 7 days of the issuance of such order or report. Any response to such objection must be filed within 7 days of the filing of the objection. The Court will determine whether, based on the reasons provided in the party's objection, it is appropriate to review the Neutral's orders or report under a *de novo* or other appropriate standard, and whether the objection is well founded; and it is

10. FURTHER ORDERED, that this referral is limited to the duties specified herein unless the Court shall expand the Neutral's duties. This reference shall terminate upon submission by the Neutral of his Final Report, unless extended by further order of the Court; and it is

11. FURTHER ORDERED, that the Neutral shall receive compensation for services at the hourly rate of $ _____. The Neutral's fee and other costs incurred by the Special Neutral in connection with this reference shall be borne by the Government pursuant to United States Attorneys Manual § 3-8.400; and it is

FURTHER ORDERED, that this Order is subject to amendment by the Court *sua sponte,* or upon application of the parties or the Neutral. Jurisdiction of this action is retained by the Court.

IT IS SO ORDERED.

**Sample Appointment Order 3:**
**Where Neutral Will Serve as Monitor in a Class Action**

The Consent Decree entered in this case on [date], provided for the appointment of an Independent Monitor to carry out certain enumerated duties. Those duties are listed in paragraph ___ of the Consent Decree. The Consent Decree, negotiated by the parties, provides a limited, clearly defined role for the Monitor. On [date], this Court issued an Order appointing [name] as the Independent Monitor in this case.

In accordance with the terms of the Consent Decree and its remedial purposes, [and any other grounds], and pursuant to the Court's inherent power, it is hereby

ORDERED that the Monitor, as an agent and officer of the Court, shall have the responsibilities, powers, and protections as set forth in the Consent Decree and in this Order of Reference; it is

FURTHER ORDERED that the Monitor shall have the full cooperation of the parties, their counsel, and the Facilitator, Adjudicator and Arbitrator, who shall promptly provide any and all documentation and information requested by the Monitor, whether requested orally or in writing, and in whatever form requested, provided that the Monitor is authorized to request only non-privileged materials that are not otherwise prohibited from disclosure and that are necessary to enable performance of the duties; and it is

FURTHER ORDERED that:

1. The Monitor shall have *ex parte* access to this Court without prior notice to or consultation with the parties.

2. The Monitor shall have the right to confer and conduct confidential working sessions informally and on an *ex parte* basis with the parties and with the Facilitator, Adjudicator and Arbitrator on matters affecting the discharge of the Monitor's duties and the implementation of the Consent Decree.

3. The Monitor shall have authority to make informal suggestions to the parties in whatever form the Monitor deems appropriate in order to facilitate and aid implementation of the Consent Decree and compliance with Orders of the Court and shall have the authority to make recommendations to the Court.

4. As an agent and officer of the Court, the Monitor shall enjoy the same protections from being compelled to give testimony and from liability for damages as those enjoyed by other federal court-appointed neutrals performing similar functions.

5. In addition to the power and authority granted elsewhere in this Order, the Monitor shall have all the responsibilities and powers enumerated in the Consent Decree. Specifically, as set forth in paragraph 12 of the Consent Decree, the Monitor shall:

   a. Make periodic written reports (not less than every six months) to the Court, the Secretary of Agriculture, Class Counsel, and Government Counsel on the good faith implementation of the Consent Decree;

   b. Attempt to resolve any problems that any class member may have with respect to any aspect of the Consent Decree;

   c. Direct the Facilitator, Adjudicator, or Arbitrator to reexamine a claim where the Monitor determines that a clear and manifest error has occurred in the screening, adjudication, or arbitration of the claim and has resulted or is likely to result in a fundamental miscarriage of justice; and

d. Be available to class members and the public through a toll-free telephone number in order to facilitate the lodging of any Consent Decree complaints and to expedite their resolution.

If the Monitor is unable within thirty (30) days to resolve a problem brought to attention pursuant to subparagraph (b), above, the Monitor may file a report with the parties' counsel, any of whom may, in turn, seek enforcement of the Consent Decree pursuant to paragraph 13 of the Decree.

6. In carrying out the duties under paragraph l2(b)(i) of the Consent Decree (issuance of written reports), the Monitor shall make such reports available to the public upon request. The Monitor shall not include in those reports any information that is prohibited from disclosure by the Privacy Act.

7. In carrying out duties under paragraph 12(b)(ii) of the Consent Decree (resolving class members' problems), the Monitor has broad authority to work with claimants [and any others] through correspondence, by telephone, and, if necessary, in person to attempt to resolve class members' problems, including problems involving injunctive relief (defined in paragraph ____ of the Consent Decree) [and any other specifically enumerated problems]. To fully carry out the duties, the Monitor is encouraged to establish a mechanism through which claimants can be met personally when necessary.

In carrying out duties under paragraph ____ of the Consent Decree (directing reexamination of claims), upon the filing of a Petition for Monitor Review, the Monitor shall review relevant materials and decide whether to order reexamination in accord with the following procedures:

a. Standard of Review. Pursuant to paragraph 12(b)(iii) of the Consent Decree, the Monitor may direct reexamination only when the Monitor determines that a clear and manifest error has occurred in the screening, adjudication, or arbitration of the claim and has resulted or is likely to result in a fundamental miscarriage of justice.

b. Reexamination Only. When the Monitor finds that the standard noted above has been met, the Monitor may direct the Facilitator, Adjudicator, or Arbitrator to reexamine the claim. The Monitor does not have the power to reverse any decision.

c. Filing of Petitions. Claimants or the government may file Petitions for Monitor Review by sending the Monitor a letter that explains why the Petitioner believes that the decision of the Facilitator, Adjudicator, or Arbitrator is in error. With respect to Track A claims only, claimants or the government may include with the Petition for Monitor Review any documents that help the Petitioner to explain or establish that an error occurred. Petitions for Monitor Review should be sent to the following address:

[address]

Claimants are encouraged to seek the assistance of counsel in preparing their Petitions for Monitor Review, but they are not required to have the assistance of counsel. Claimants may obtain such assistance at no charge from Class Counsel. Claimants may contact Class Counsel by writing, telephoning, or emailing:

[name & address]

Petitions must be filed in writing online or in paper, and the Monitor's review of the Petition will be a document review, that is, it will not be supplemented by a personal or phone interview.

d. Filing of Responses to Petitions. The non-petitioning party may file a response to any Petition for Monitor Review and, with respect to petitions regarding Track A

claims, the non-petitioning party may include documents as described in paragraph 8(e)(i), below. The Monitor shall establish a system for notifying the non-petitioning party of the pendency of the Petition and for forwarding to the non-petitioning party copies of the Petition and any additional materials submitted by the Petitioner. The non-petitioning party shall have thirty (30) days to file a response, after which the right to file a response shall be waived.

e. Materials Constituting Basis of Monitor Review. Generally, the Monitor's review will be based only on the Petition for Monitor Review, any response thereto, the record that was before the Facilitator, Adjudicator or Arbitrator, and the decision that is the subject of the Petition for Monitor Review.

(i) Review of Track A Claims. The Monitor may consider additional materials submitted by the claimant or by the government with a Petition for Monitor Review of a Track A claim or with a response to such a Petition only when such materials address a potential flaw or mistake in the claims process that in the Monitor's opinion would result in a fundamental miscarriage of justice if left unaddressed. The decision to consider additional materials regarding this flaw or mistake and to permit those materials to be made part of the record for review upon reexamination by the Facilitator or Adjudicator is within the discretion of the Monitor.

(ii) Review of Track B Claims. The Consent Decree provides for the development of a more comprehensive record in Track B than is possible Track A. Therefore, in Track B claims, the Monitor will not be permitted to consider additional materials on review or to supplement the record for review upon reexamination.

(f) Communication Regarding Reexamination. When the Monitor directs the Facilitator, Adjudicator, or Arbitrator to reexamine a claim, the Monitor shall send to the Facilitator, Adjudicator or Arbitrator a brief written explanation of the basis of the decision to direct reexamination (reexamination letters), which shall be attached to the Petition for Monitor Review. The explanation will clearly specify the error(s) identified by the Monitor. The Monitor will promptly forward to the claimant (and counsel, if any) and to USDA copies of all reexamination letters with the attached Petitions for Monitor Review and any additional materials admitted into the record by the Monitor pursuant to paragraph 8(e)(i). These materials will become part of the record for purposes of the Facilitator's, Adjudicator's or Arbitrator's reexamination.

9. Contacting the Monitor. In carrying out duties under paragraph ____ of the Consent Decree, the Monitor will be available to class members and to the public through the following toll-free telephone number and email: _____.

10. Where to Direct Communications. Inquiries, petitions and pleadings in this case should be directed as follows:

a. Inquiries regarding the status of Track A adjudication claims and regarding the timing of payments of approved claims should be directed to the Claims Facilitator at _____.

b. Motions seeking review of non-final rulings by an arbitration panelist, including issues relating to discovery and scheduling, should be directed to _____.

c. Petitions for Monitor Review of final decisions in both Track A and Track B claims should be directed to the Monitor's office as explained in paragraph 8(c) above.

d. Inquiries regarding problems with injunctive relief or with other aspects of the Consent Decree should be directed to the Monitor's office as explained in paragraph 9 above.

e. Pleadings regarding attorneys' fees should be directed to the Court. None of the matters described in subparagraphs (a) - (d), above, shall be filed with, or otherwise presented to, the Court.

11. Monitor Staff. The Monitor shall have the authority to employ and/or contract with all necessary attorney, paralegal, administrative, and clerical staff within a budget cap approved by the Court. The staff and contractors of the Office of the Monitor shall have whatever access to records and documents the Monitor believes is necessary to fulfill the staff or contracting role; however, the staff and contractors shall be given access only to non-privileged materials that are not otherwise prohibited from disclosure and that are necessary to enable the Monitor to perform duties under the Consent Decree.

12. Fees and Expenses. Pursuant to paragraph 12(a) of the Consent Decree, the United States Department of Agriculture ("USDA") shall pay the fees and expenses of the Monitor and the staff salaries.

13. Approval of Budgets. The Monitor shall submit budgets to the Court for approval. Each budget shall cover a period of at least three (3) months but not more than twelve (12) months. Copies of each budget shall be made available to USDA and class counsel, who will have a period of ten (10) working days from their receipt of the budget within which they may file with the Court, with copies to the Monitor and the opposing party, written objections to the budget. Any party that does not object to a budget within these ten (10) days shall be deemed to have waived any objection permanently. At the end of the ten (10) days, the Court will enter an order approving a total budget amount for the relevant time period.

14. Timing of Budget Submissions. The Monitor generally will submit proposed budgets to the Court one (1) month in advance of the beginning of the budget period.

15. Invoicing. The Monitor shall submit a statement to the Court approximately monthly for approval of fees and expenses with copies to counsel for both parties. Objections to the statement shall be filed with the Court, with copies to the Monitor and to the opposing party, within ten (10) days of the submission of the statement. Any party that does not object to a fee statement within ten (10) days of its submission shall be deemed to have waived any objection permanently. At the conclusion of the 10-day period, the Court will enter an order directing payment of any sums approved. Any sum approved by the Court shall be paid within fifteen (15) days unless otherwise ordered or agreed upon.

16. Records. The Monitor shall keep a complete record of all of fees and expenses, which shall be made available at the Court's or the parties' request for their inspection.

17. Payment into Court Registry. Within fifteen (15) days after the Court's approval of the first budget, USDA shall deposit with the Clerk of Court, United States District Court for the District of Columbia, the pro-rata portion of the approved budget for the month of April 2000. Within the first fifteen (15) days of May 2000, and within the first fifteen (15) days of each month thereafter during the Monitor's tenure, USDA shall deposit with the Clerk of Court a sum equal to a pro-rata month's portion of the approved budget. All deposits made by USDA shall be placed by the Clerk of Court in an interest-bearing account. Any monies on deposit with the Clerk of Court that are unspent in a given month shall be carried over and applied to payment of future fees and expenses of the Monitor.

18. Refund of Surplus. At such point as the Monitor's duties are completed, surplus funds on deposit with the Clerk's Office will be refunded to USDA. If the Court determines at any time that the Monitor will require supplemental funds, the Court may so order USDA to make additional deposits.

## Sample Appointment Order 4:
## Where Neutral Will Serve as a Conference Judge in a Criminal Case

The Court, having considered this cause appropriate for referral to an Alternative Dispute Resolution (ADR) process pursuant to [relevant Rules or Code, if any], ORDERS that the case be so referred for an ADR process to be conducted with [name of adjunct], a dispute resolution organization as defined in [relevant rules] (if necessary), and that [name of adjunct] is appointed as an impartial third party to conduct the ADR process and to facilitate settlement negotiations among the parties.

Unless written objections to this order are filed in accordance with [relevant rules], the parties are directed to communicate with [name of adjunct], located at [address] within ten (10) days from the date of this order to make arrangements regarding: (1) the payment of the expenses of the proceeding; and (2) the date, time, and place the proceeding will be conducted. Unless the parties otherwise agree, all fees and expenses shall be borne equally by the parties. [Or: The fees of [name of adjunct] shall be paid by the Court as Court Costs subject to reimbursement by the defendant.]

All counsel and all parties (or their duly authorized representatives with settlement authority) are directed to attend and participate in the proceeding.

The Court recognizes that Defendant has the right to remain silent and relies on 5th Amendment Rights under the United States Constitution against self-incrimination even though participating in this process. It is therefore ORDERED, ADJUDGED, AND DECREED that no statement, utterance, or conduct of Defendant during the proceeding will be used at any subsequent trial against the Defendant.

Unless the parties agree in writing to waive their right of confidentiality, all matters, including the conduct and the demeanor of the parties and their counsel during the settlement process, will remain confidential and will not be disclosed to anyone, including this Court. Upon completion of this proceeding, the conference judge is directed to advise the Court when the process was conducted, whether the parties and their counsel appeared as ordered, and whether a settlement resulted.

## Sample Appointment Order 5:
## Where the Neutral Will Serve Various Roles in Multi-District Litigation

On [date], [parties] in this matter filed a motion for appointment of a Neutral. The parties having had notice and an opportunity to be heard, that motion is GRANTED and, with the advice and consent of the parties, the Court now APPOINTS as Court-Appointed Neutral [name and address].

This appointment is made pursuant to Fed. R. Civ. P. 53 and the inherent authority of the Court.[1] As Rule 53 requires, the Court sets out below the duties and terms of the Court-Appointed Neutral and reasons for appointment, and ORDERS the Court-Appointed Neutral to "proceed with all reasonable diligence," Rule 53(b)(2).

I. BACKGROUND.

[Description of how Multi-District Litigation came into being and the specific reasons that appointment of a Neutral is appropriate].

It is clear that this MDL presents many difficult issues and will require an inordinate amount of attention and oversight from the Court. Other MDL courts, facing similar challenges, have easily concluded that appointment of a Court-Appointed Neutral was appropriate to help the Court with various pretrial, trial, and post-trial tasks.[2] Indeed, the appointment of a Court-

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[1] "Beyond the provisions of [Fed. R. Civ. P. 53] for appointing and making references to Neutrals, a Federal District Court has `the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential.'" *Schwimmer v. United States,* 232 F.2d 855, 865 (8th Cit. 1956) *(quoting In re: Peterson,* 253 U.S. 300, 311 (1920)); *see Ruiz v. Estelle,* 679 F.2d 1115, 1161 n.240 (5th Cir. 1982), *cert. denied,* 460 U.S. 1042 (1983) (same); *Reed v. Cleveland Bd of Edu.*, 607 F.2d 737, 746 (6th Cir. 1979) (the authority to appoint "expert advisors or consultants" derives from either Rule 53 or the Court's inherent power). The Court's inherent power to appoint a Neutral, however, is not without limits. *See Cobell v. Norton,* 334 F.3d 1128, 1 142 (D.C. Cir. 2003) (in the absence of consent by the parties, the inherent authority of the court does extend to allow appointment of Court-Appointed Neutrals to exercise "wide-ranging extrajudicial duties" such as "investigative, quasi-inquisitorial, quasi-prosecutorial role[s]").

This Court first discussed with the parties the advisability of appointing a Neutral during a case management conference on [date]. *See* Fed. R. Civ. P. 16(c)(8, 12) ("At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to . . . (8) the advisability of referring matters to a magistrate judge or neutral; [or] . . . (12) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems").

[2] *See, e.g., In re: Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liab. Litig.,* 1999 WL 782560 at *2 (E.D. Pa. Sept. 27, 1999) (MDL No. 1203) (noting that the court had earlier appointed a Special Master to oversee discovery matters and "facilitate the timely remand of individual civil actions to their respective transferor courts;" the court later broadened the Court-Appointed Neutral's duties to include oversight and administration of the settlement trust funds); *In re: Bridgestone/Firestone Inc., ATX, ATX II, and Wilderness Tires Products Liab. Litig.,* Order at 3-5, docket no. 14 (MDL No. 1373) (S.D. Ind. Nov. 1, 2000) (available at www.insd.uscourts.gov/Firestone) (appointing a Neutral to assist the court with all phases of the litigation, from "formulating a governance structure of [the] MDL" in its earliest stage to assisting with "attorneys fees" issues and "settlement negotiations" during the latter stages of the litigation); *In re: Baycol Products Liab. Litig.,* 2004 WL 32156072 (D. Minn. Mar. 25, 2002) (MDL No. 1431) (appointing a Neutral early in the case and assigning all available "rights, powers, and duties provided in Rule 53;" the court has since appointed two additional neutrals to assist the first Neutral); *In re: Propulsid Products Liab. Litig_,* 2004 WL 1541922 (E.D. La. June 25, 2004) (MDL No. 1355) (appointing a Special Master and setting out a variety of duties).

Appointed Neutral in cases such as this is common. The 2003 amendments to Rule 53 specifically recognize the pretrial, trial, and post-trial functions of masters in contemporary litigation. Thus, the Court agrees with the parties that appointment of a Neutral to assist the Court in both effectively and expeditiously resolving their disputes.

II. RULE 53(B)(2).

Rule 53 was amended on December 1, 2003, and now requires an order of appointment to include certain contents. *See* Fed. R. Civ. P. 53(b)(2). The following discussion sets forth the matters required.

A. Master's Duties.

Rule 53(a)(1)(A) states that the Court may appoint a neutral to "perform duties consented to by the parties." [If applicable: The parties in this case consented to having a Court-Appointed Neutral: 1) assist the Court with legal analysis of the parties' submissions; and 2) perform any and all other duties assigned to him by the Court (as well as any ancillary acts required to fully carry out those duties) as permitted by both the Federal Rules of Civil Procedure and Article III of the Constitution. The parties [further] request, however, that the Court retain sole authority to issue final rulings on matters formally submitted for adjudication. Motion for appointment at 2.][3] The Court has reviewed recent legal authority addressing the duties of a Court-Appointed Neutral that are permitted under the "Federal Rules of Civil Procedure and Article III of the Constitution."[4] Consonant with this legal authority, the currently-anticipated needs of the court, and the parties' broad consent, the Court states that the Court-Appointed Neutral in these proceedings shall have the authority to:[5]

1. assist with preparation for attorney conferences (including formulating agendas), court scheduling, and negotiating changes to the case management order;
2. establish discovery and other schedules, review and attempt to resolve informally any discovery conflicts (including issues such as privilege, confidentiality, and access to medical and other records), and supervise discovery;
3. oversee management of docketing, including the identification and processing of matters requiring court rulings;
4. compile data and assist with, or make findings and recommendations with regard to, interpretation of scientific and technical evidence;

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[3] In addition, the Court may appoint a neutral to: (1) "address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district;" and (2) "hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury," if warranted by certain conditions. Rule 53(a)(1)(B, C).

[4] *See, e.g.,* Fed. R. Civ. P. 53, advisory committee's notes (discussing the range of duties and authority of the Special Master). *See also* Mark Fellows & Roger Haydock, *Federal Court Special Masters: A Resource in the Era of Complex Litigation*, 31 Wm. Mitchell L. Rev.1269 (2005); David Ferleger, *Neutrals in Complex Litigation and Amended Rule 53,* Special Master Conference 2004 Course Materials (Nat'l Arbitr. Forum ed., 2004) (unpublished); Margaret Farrell, *Special Masters in the Federal Courts Under Revised Rule 53: Designer Roles,* Special Masters Conference 2004 Course Materials (Nat'l Arbitr. Forum ed., 2004) (unpublished). These three articles, written by federal court-appointed neutrals, note the increasing use and need for such appointments, and discuss the range of duties and limits of appointment. The articles are contained in reference materials distributed at the October, 2004 National Special Neutrals Conference.

[5] This list is meant to be illustrative, not comprehensive.

5. assist with legal analysis of the parties' motions or other submissions, whether made before, during, or after trials, and make recommended findings of fact and conclusions of law;
6. assist with responses to media inquiries;
7. help to coordinate federal, state and international litigation;
8. direct, supervise, monitor, and report upon implementation and compliance with the Court's Orders, and make findings and recommendations on remedial action if required;
9. interpret any agreements reached by the parties;
10. propose structures and strategies for settlement negotiations on the merits, and on any subsidiary issues, and evaluate parties' class and individual claims, as may become necessary;
11. propose structures and strategies for attorney fee issues and fee settlement negotiations, review fee applications, and evaluate parties' individual claims for fees, as may become necessary;
12. administer, allocate, and distribute funds and other relief, as may become necessary;
13. adjudicate eligibility and entitlement to funds and other relief, as may become necessary;
14. monitor compliance with structural injunctions, as may become necessary;
15. make formal or informal recommendations and reports to the parties, and make recommendations and reports to the Court, regarding any matter pertinent to these proceedings; and
16. communicate with parties and attorneys as needs may arise in order to permit the full and efficient performance of these duties. *See* discussion below.

B. Communications with the Parties and the Court.

Rule 53(b)(2)(B) directs the Court to set forth "the circumstances—if any—in which the master may communicate ex parte with the court or a party." The Court-Appointed Neutral may communicate ex parte with the Court at the Neutral's discretion, without providing notice to the parties, in order to "assist the Court with legal analysis of the parties' admissions" (e.g., the parties' motions). Motion for appointment at 2. The Court-Appointed Neutral may also communicate ex parte with the Court, without providing notice to the parties, regarding logistics, the nature of activities, management of the litigation, and other appropriate procedural matters. The Court may later limit the Court-Appointed Neutral's ex parte communications with the Court with respect to certain functions, if the role of the Court-Appointed Neutral changes.[6]

[6] If, for example, the Court later finds it desirable to use the Court-Appointed Neutral as a mediator regarding the merits of a particular dispute, which mediation would require disclosure of information by the parties to the Court-Appointed Neutral that the parties would prefer to keep from a final adjudicator, the Court may redefine the scope of allowed ex parte communications with the Court regarding that dispute. *See, e.g., In re: Propulsid Products Liab. Litig.,* 2002 WL 32156066 (E.D. La. Aug. 28, 2002) (after the Court-Appointed Neutral was given additional mediation duties, the scope of ex parte communications with the parties and the Court, as well as record-keeping obligations, changed); Rule 53(b)(4) (noting that an order of appointment may be amended). On the other hand, such imposition of different limits on ex parte communications does not necessarily require amendment of the order.

The Court-Appointed Neutral may communicate ex parte with any party or attorney, as the Special Master deems appropriate, for the purposes of ensuring the efficient administration and management of this MDL, including the making of informal suggestions to the parties to facilitate compliance with Orders of the Court; such ex parte communications may, for example, address discovery or other procedural issues. Such ex parte communications shall not, however, address the merits of any substantive issue, except that, if the parties seek assistance from the Special Master in resolving a dispute regarding a substantive issue, the Court-Appointed Neutral may engage in ex parte communications with a party or attorney regarding the merits of the particular dispute, for the purpose of mediating or negotiating a resolution of that dispute, only with the prior permission of those opposing counsel who are pertinent to the particular dispute.[7]

C. Neutral's Record.

Rule 53(b)(2)(c) states that the Court must define "the nature of the materials to be preserved and filed as a record of the master's activities." The Court-Appointed Neutral shall maintain normal billing records of time spent on this matter, with reasonably detailed descriptions of activities and matters worked upon. See also section II.E of this Order, below. If the Court asks the Court-Appopinted Neutral to submit a formal report or recommendation regarding any matter, the Special Master shall either submit such report or recommendation in writing, for electronic filing on the case docket. The Court-Appointed Neutral need not preserve for the record any documents created by the Court-Appointed Neutral that are docketed in this or any other court, nor any documents received by the Court-Appointed Neutral from counsel or parties in this case. The Court may later amend the requirements for the Court-Appointed Neutral's record if the role of the Special Master changes.[8]

D. Review of the Court-Appointed Neutral's Orders.

Rule 53(b)(2)(D) directs the Court to state "the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations." The Court-Appointed Neutral shall either: (1) reduce any formal order, finding, report, or recommendation to writing and file it electronically on the case docket via Electronic Case Filing ("ECF"); or (2) issue any formal order, finding, report, or recommendation on the record, before a court reporter. Pursuant to Rule 53(g)(2), any party may file an objection to an order, finding, report, or recommendation by the Special Master within 14 calendar days of the date it was electronically filed; failure to meet this deadline results in permanent waiver of any objection to the Special Master's orders, findings, reports, or recommendations.[9] Absent timely objection, the orders, findings, reports, and recommendations

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[7] To the extent it may be considered a "substantive issue," the Court-Appointed Neutral may engage in ex parte communications with a party or counsel, without first obtaining the prior permission of opposing counsel, to resolve privilege or similar questions and in connection with in camera inspections.

[8] *See, e.g., In re: Propulsid Products Liab. Litig.,* 2004 WL 1541922 (E.D. La. June 25, 2004) (setting out additional record-keeping requirements after the Special Master was charged with new duties of administering a settlement program).

[9] Rule 53(g)(2) provides that parties may file objections "no later than 20 days from the time the neutral's order, report, or recommendations are served, unless the court sets a different time." The Court chooses to set a period of 14 calendar days (NOT business days) in order to expedite final resolution of matters formally reported upon by the Special Master. Motions for extensions of time to file objections will not normally be granted unless good cause is shown. The Special Master may, however, provide in an order, finding, report, or recommendation that the period for filing objections to that particular document is some period longer than 14 calendar days, if a longer period appears

of the Court-Appointed Neutral shall be deemed approved, accepted, and ordered by the Court, unless the Court explicitly provides otherwise.

As provided in Rule 53(g)(4, 5), the Court shall decide de novo all objections to conclusions of law made or recommended by the Court-Appointed Neutral; and the Court shall set aside a ruling by the Court-Appointed Neutral on a procedural matter only for an abuse of discretion. The Court shall retain sole authority to issue final rulings on matters formally submitted for adjudication, unless otherwise agreed by the parties, and subject to waiver of objection to written orders or recommendations as noted above. To the extent the Court-Appointed Neutral enters an order, finding, report, or recommendation regarding an issue of fact, the Court shall review such issue de novo, if any party timely objects pursuant to the Rules and within the 14 calendar day time period set forth herein; see Rule 53(g)(3). Failure to meet this deadline results in permanent waiver of any objection to the Court-Appointed Neutral's findings of fact.

E. Compensation.

Rule 53(b)(2)(E) states that the Court must set forth "the basis, terms, and procedure for fixing the master's compensation;" see also Rule 53(h) (addressing compensation). The Court-Appointed Neutral shall be compensated at the rate of [$ per hour], with the parties bearing this cost equally (50% by the plaintiffs and 50% by the defendants). The Court-Appointed Neutral shall incur only such fees and expenses as may be reasonably necessary to fulfill duties under this Order, or such other Orders as the Court may issue. Within 14 days of the date of this Order, the parties shall **REMIT** to the Court-Appointed Neutral an initial, one-time retainer of [$____] (50% by the plaintiffs and 50% by the defendants); the Court will not order additional payments by the parties to the Court-Appointed Neutral until the retainer is fully earned. The Court has "consider[ed] the fairness of imposing the likely expenses on the parties and [has taken steps to] protect against unreasonable expense or delay." Rule 53(a)(3).

From time to time, on approximately a monthly basis, the Court-Appointed Neutral shall submit to the Court an Itemized Statement of fees and expenses, which the Court will inspect carefully for regularity and reasonableness. Given that, at this juncture in the litigation, one of the duties of the Court-Appointed Neutral is to assist the Court with legal analysis of the parties' submissions, the Court expects these Itemized Statements will reveal confidential communications between the Court-Appointed Neutral and the Court. Accordingly, the Court shall maintain these Itemized Statements under seal, and they shall not be made available to the public or counsel. The Court-Appointed Neutral shall attach to each Itemized Statement a Summary Statement, which shall not reflect any confidential information and shall contain a signature line for the Court, accompanied by the statement "approved for disbursement." If the Court determines the Itemized Statement is regular and reasonable, the Court will sign the corresponding Summary Statement and transmit it to the parties. The parties shall then remit to the Court-Appointed Neutral their half-share of any court approved amount, within 20 calendar days of Court approval.[10]

Finally, the Court-Appointed Neutral shall not seek or obtain reimbursement or compensation for support personnel, absent approval by the Court.[11]

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warranted.

[10] The Court adopts this procedure from Judge Sarah Evans Barker, who used it in *In re: Bridgestone/Firestone. See* www.insd.uscourts.gov/Firestone/, docket no. 593 ("Entry concerning fees of Special Neutral").

[11] *Cf. Triple Five of Minnesota, Inc. v. Simon,* 2003 WL 22859834 at *2 (D. Minn. Dec. 1, 2003) (authorizing the

F. Other Matters.

1. Affidavit.

Rule 53(b)(3) notes that the Court may enter an Order of appointment "only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. §455." See also Rule 53(a)(2) (discussing grounds for disqualification). Attached to this Order is the affidavit earlier submitted to the Court by the Special Master.

2. Cooperation.

The Special Master shall have the full cooperation of the parties and their counsel. Pursuant to Rule 53(c), the Court-Appointed Neutral may, if appropriate, "impose upon a party a non-contempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty." As an agent and officer of the Court, the Court-Appointed Neutral shall enjoy the same protections from being compelled to give testimony and from liability for damages as those enjoyed by other federal court-appointed neutrals performing similar functions.[12] The parties will make readily available to the Court-Appointed Neutral any and all facilities, files, databases, and documents which are necessary to fulfill the Special Master's functions under this Order.

IT IS SO ORDERED.

Court-Appointed Neutral to "hire accountants, real estate consultants, attorneys, or others as necessary to assist in carrying out duties under this Order" and further stating: "The special master shall be compensated at the rate of $400.00 per hour. Additionally, the parties shall pay the usual and customary rates for work which the special master delegates to others.."). In light of the complexity of this litigation, and depending on how it proceeds, it may become appropriate for the Court-Appointed Neutral to retain consultants or otherwise obtain assistance.

[12] *See Atkinson-Baker & Associates, Inc. v. Kolts,* 7 F.3d 1452, 1454-55 (9th Cir. 1993) (applying the doctrine of absolute quasi-judicial immunity to a Special Neutral).

# Appendix B
## ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation

The Guidelines are located at:

https://www.americanbar.org/content/dam/aba/directories/policy/mid-year-2019/100-midyear-2019.pdf

**AMERICAN BAR ASSOCIATION ADOPTED BY THE HOUSE OF DELEGATES JANUARY 28, 2019 RESOLUTION**

RESOLVED, That the American Bar Association adopts the *ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation*, dated January 2019.

FURTHER RESOLVED, That Bankruptcy Rule 9031 should be amended to permit courts responsible for cases under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases.

## ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation

**Consistent with the Federal Rules of Civil Procedure or applicable state court rules:**

1. **(1) It should be an accepted part of judicial administration in complex litigation (and in other cases that create particular needs that a special master might satisfy), for courts and the parties to consider using a special master and to consider using special masters not only after particular issues have developed, but at the outset of litigation.**
2. **(2) In considering the possible use of a special master, courts, counsel and parties should be cognizant of the range of functions that a special master might be called on to perform and roles that a special master might serve.**
3. **(3) In determining whether a case merits appointment of a special master, courts should weigh the expected benefit of using the special master, including reduction of the litigants' costs, against the anticipated cost of the special master's services, in order to make the special master's work efficient and cost effective.**

4. **(4) Participants in judicial proceedings should be made aware that special masters can perform a broad array of functions that do not usurp judicial functions, but assist them. Among the functions special masters have performed are:**

   **a. discovery oversight and management, and coordination of cases in multiple jurisdictions;**

   2. **Facilitating resolution of disputes between or among co-parties;**
   3. **Pretrial case management;**
   4. **advice and assistance requiring technical expertise;**
   5. **conducting or reviewing auditing or accounting;**
   6. **conducting privilege reviews and protecting the court from exposure to privileged material and settlement issues; monitoring; class administration;**
   7. **conducting trials or mini-trials upon the consent of the parties;**
   8. **settlement administration;**
   9. **claims administration; and**
   10. **receivership and real property inspection.**

   **In these capacities special masters can serve numerous roles, including management, adjudicative, facilitative, advisory, information gathering, or as a liaison.**

5. **(5) Courts should develop local rules and practices for selecting, training, and evaluating special masters, including rules designed to facilitate the selection of special masters from a diverse pool of potential candidates.**

**(6) Courts should choose special masters with due regard for the court's needs and the parties' preferences and in a manner that promotes confidence in the selection process by helping to ensure that qualified and appropriately skilled and experienced candidates are identified and chosen.**

6. **(7) The referral order appointing the special master should describe the scope of the engagement, including, but not limited to, the special master's duties and powers, the roles the special master may serve, the rates and manner in which the special master will be compensated, power to conduct hearings or to facilitate settlement, requirements for issuing decisions and reporting to the court, and the extent of permissible ex parte contact with the court and the parties. Any changes to the scope of the referral should be made by a modification to the referral order.**
7. **(8) Courts and the bar should develop educational programs to increase awareness of the role of special masters and to promote the acquisition and dissemination of information concerning the effectiveness of special masters.**

8. **(9) Courts and, where applicable, legislatures should make whatever modifications to laws, rules, or practices that are necessary to effectuate these ends.**

# REPORT Introduction

The American Bar Association ("ABA") has long advanced the use of dispute resolution tools to promote efficiency in the administration of justice. Thirty years ago, the ABA was a leading voice in favor of various forms of alternative dispute resolution ("ADR"). Today, there is an underutilized dispute resolution tool that could aid in the "just, speedy and inexpensive" resolution of cases: appointment of special masters.

In 2016, the Lawyers Conference of the ABA Judicial Division formed a Committee on Special Masters to promote research and education concerning special masters and to make proposals concerning using their use.[1] This Committee concluded that one of the difficulties faced by both courts and practitioners is the lack of a methodical and consistent approach to the appointment and use of special masters.[2]

To address this lack of standardization and to urge greater use of this valuable resource, the Committee brought together stakeholders from diverse segments of the ABA to propose best practices in using special masters. The ABA formed a Working Group in the fall of 2017 and included representatives of the Judicial Division (including three of its conferences – the National Conference of Federal Trial Judges, the National Conference of State Trial Judges and the Lawyers Conference), the ABA Standing Committee on the American Judicial System, and the ABA's Section of Litigation, Business Law Section, Section of Dispute Resolution, Section of Intellectual Property Law, Tort Trial and Insurance Practice Section, and Section of Antitrust. The membership

[1] Currently, 49 states have rules or statutes that provide for the appointment of court adjuncts to assist courts in the administration of justice. *See* Lynn Jokela and David F. Herr "Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool," WILLIAM MITCHELL LAW REVIEW, Vol. 31, No. 3, Art. (2005) "In fact, Illinois is the only state that does not have any mechanism governing appointment of special masters." *Id.* Courts have also recognized their inherent power to appoint special masters to assist judges in case management. *See id*. at 1302 n. 18. *See also* n.30, *infra.*

[2] Even the name for these judicial adjuncts is a source of confusion. These Guidelines use the term employed by Rule 53 of the Federal Rules of Civil Procedure – "special master" – to refer to any adjunct a court determines to be necessary and appropriate to appoint to serve any case-management function or to manage or supervise some aspect of a case. The term applies to persons appointed by any court to serve any of a wide variety of functions, regardless of whether statute, rules or practice have described these persons with other titles, such as "master," "discovery master," "settlement master," "trial master," "referee," "monitor," "technical advisor," "auditor," "administrator." Even states whose rules mirror the Federal Rules, use different titles to describe the court adjunct's officers. For example, a Rule 53 adjunct in Maine is a "referee." *See* Maine R. Civ. P. 53. States using the pre-2003 version of the Federal Rules often refer to a "master" as "any person, however designated, who is appointed by the court to hear evidence in connection with any action and report facts," suggesting more of a trial function than a pretrial role. *See* e.g., Mass. R. Civ. P. 53. *See also* 2006 Kan. Code § 60-253 (" may suggest a more limited function").

included current and former federal and state judges, ADR professionals and academics, and litigators who represent plaintiffs, defendants, or both in numerous fields.[3]

The Working Group also obtained information from other interested and knowledgeable agencies, organizations, and individuals, including the Federal Judicial Center ("FJC"), federal and state judges, court ADR program administrators, private dispute resolution professionals, representatives of a number of state bar associations, the academic community, professional groups (including the Academy of Court[-]Appointed Masters ("ACAM")), litigators, and in-house counsel. The Group has also benefitted from discussions among judges and stakeholders organized by the Emory Law School Institute for Complex Litigation and Mass Claims, which has worked with the FJC to explore ways of improving the administration of multidistrict and class action litigation.

Based upon the recommendation of federal and state judges both within and outside the Judicial Division and the Working Group's analysis, and consistent with the best practices described below, the ABA encourages courts to make greater and more systematic use of special masters to assist in civil litigation in accordance with these Guidelines.

**Discussion and Rationale for the Guidelines**

Courts and parties have long recognized that, in far too many cases, civil litigation takes too long and costs too much. Since 1938, Rule 1 of the Federal Rules of Civil Procedure has declared (in a principle echoed in many state rules) that the Rules are intended to deliver "a just, speedy, and inexpensive determination of every action and proceeding." Since December 1, 2015, the Rules have declared that they are to be "employed by the court and the parties to secure" that end. Indeed, virtually every amendment to the Federal Rules over the past thirty-five years has been intended, at least in part, to address concerns regarding the expense and duration of civil litigation.[4]

[3] The Working Group comprises representatives from the Judicial Division (Hon. J. Michelle Childs; Hon. David Thomson; Merril Hirsh (Convener); Cary Ichter (Reporter); Christopher G. Browning; David Ferleger and Mark O'Halloran); the ABA Standing Committee on the American Judicial System (Hon. Shira A. Scheindlin (ret.)); the Business Law Section (William Johnston (convener, policy subgroup); Hon. Clifton Newman; Richard L. Renck; Hon. Henry duPont Ridgely (ret.); Hon J. Stephen Schuster; and Hon. Joseph R. Slights III); the Section of Litigation (Mazda Antia, John M. Barkett, David W. Clark, Koji Fukumura and Lorelie S. Masters); the Section of Dispute Resolution (Hon. Bruce Meyerson (ret.); Prof. Nancy Welsh); the Section of Intellectual Property Law (David L. Newman; Scott Partridge; Gale R. ("Pete") Peterson); the Section of Antitrust Law (Howard Feller, James A. Wilson) and the Tort Trial and Insurance Practice Section (Sarah E. Worley). The members also wish to thank Hon. Frank J. Bailey and his staff, and ABA Staff members Amanda Banninga, Denise Cardman, Julianna Peacock, and Tori Wible for their assistance.

[4] *See, e.g.*, Fed. R. Civ. P. 26 Advisory Committee Note: "There has been widespread criticism of abuse of discovery"; 1983: the "first element of the standard, Rule 26(b)(1)(i), is designed to minimize redundancy in discovery and encourage attorneys to be sensitive to the comparative costs of different methods of securing information"; Rule 26(g) "provides a deterrent to both excessive discovery and

evasion"; 1993: "A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner

All too often, however, modifications to procedural rules intended to make the litigation process more efficient have merely changed the subject of the dispute: for example, limiting the number of interrogatories can lead to conflict over how to count interrogatories and subparts.[5] Unfortunately, the Rules are not self-executing.

Ensuring that parties will not gain an advantage by unreasonable conduct or delay requires a proportionate level of judicial case management. This case management is possible only where adequate resources are available to implement strategies designed to minimize the likelihood of unnecessary disputes, to facilitate the resolution of disputes that do arise, and to focus the parties on fairly resolving the issues in controversy.[6]

Judges, including magistrate judges, must dedicate the time needed to manage the pretrial process, and it is important to use their time most effectively. When warranted, appointment of a special master to manage the pretrial process can relieve courts of the burden of reviewing voluminous discovery materials or information withheld as privileged or proprietary, or addressing other disputes, allowing courts to focus on merits-based resolution of issues on a concise record. Where a case warrants this type of assistance, special masters have time that courts do not. The goal of these guidelines is not to detract in any way from the role of judges, including magistrate judges. It is to assist them.[7]

Courts at all levels face three particularly significant obstacles to effective case management. First, courts often lack sufficient resources to manage certain cases–particularly complex commercial cases or the practical ability to increase resources when

to achieve those objectives"; 2006: Rule 26(b)(2) is amended to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information and to regulate discovery from sources "that are accessible only by incurring substantial burdens or costs." 2015: Amendments that, among other things, expressly limit discovery to be "proportional to the needs of the case"; clarify when sanctions are appropriate for failure to preserve e-discovery; and specify that the rules not only be "construed," but also "administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

[5] *See* Merril Hirsh, James M. Rhodes and Karl Bayer, "Special Masters: A Different Answer to a Perennial Problem, JUDGES JOURNAL, v. 55, No. 2 at 28 (Spring 2016).
[6] *See id.* at 29-31; Merril Hirsh, "Special Masters: How to Help Judges Extend Their Reach ... And Exceed Their Grasp," ALTERNATIVES (June 2017), available at http://altnewsletter.com/sample-articles/special-masters--how-to-help-judges--extend-their-reach--and-exceed-their-grasp.aspx

[7] Appointed masters are also used in other settings. Courts have appointed special masters in criminal cases, for example, to consider *Brady* obligations, *see, e.g., United States v. McDonnell Douglas*, 99-CR-353 (D.D.C.), or to shield investigators from privileged documents that might be obtained through warrants executed at attorney offices, *see, e.g., United States v. Stewart*, No. 02 CR. 396 JGK, 2002 WL 1300059 (S.D.N.Y. June 11, 2002); United States Attorneys Manual § 9–13.420, at § F, available at

https://famguardian.org/Publications/USAttyManual/title9/13mcrm.htm#9-13.420. Masters are also appointed in non-judicial contexts (for example, by legislation, such as the appointment to administer the September 11 Victims Compensation Fund; by private entities to administer settlement funds designed to compensate injured parties in mass disasters, such as the BP Deep Water Horizon fund; and by government agencies to investigate and make recommendations, as with the special master appointed to investigate the student loan crisis). Many agencies and entities also use ombudsman to serve numerous functions, including avoiding and resolving disputes and facilitating communication among stakeholders. These roles illustrate the utility and flexibility of using masters as a tool. A thorough discussion of appointments outside the civil litigation context, however, is beyond the scope of these Guidelines.

such a case is filed. In the federal system and in some state courts, magistrate judges are available; in others they are not. In some courts, a few complex cases, or a single, particularly complex case, can strain a docket. Resources allocated to one case can consume resources that would otherwise be available for other cases. Special masters can offer the time and attention complex cases require without diverting judicial time and attention from other cases.

Second, some cases benefit from specialized expertise. This is particularly true in federal multidistrict litigation ("MDL"), which accounts for nearly forty percent of the federal case load, excluding prisoner and social security cases.[8] Managing those cases oftentimes requires a diverse set of skills (e.g., managing discovery, reviewing materials withheld as privileged or proprietary, facilitating settlement of pretrial issues or the entire case, addressing issues related to expert qualifications and opinions, resolving internecine disputes among plaintiff and/or defense counsel, allocating settlement funds or awards, evaluating fee petitions, or providing other needed expertise).

Judges in MDLs and other large, complex cases are called upon to bring to bear knowledge of many fields, including, for example, science, medicine, accounting, insurance, management information systems, business, economics, engineering, epidemiology, operations management, statistics, cybersecurity, sociology, and psychology. No one person can be an expert in all these fields. Special masters who have specialized expertise in relevant fields can provide a practical resource to courts in cases that would benefit from subject-matter expertise.

Third, the judicial role limits the involvement judges can have in some aspects of the litigation process. Judicial ethics limit the ability of judges to facilitate informal resolutions of issues and cases, particularly if the process requires *ex parte* meetings with parties or proposing resolutions of issues on which the court may eventually need to rule.[9]

Federal Rule 16(c)(2)(H) and certain state rules provide that "[a]t any pretrial conference, the court may consider and take appropriate action on...referring matters to a magistrate judge or a master...." As previously noted,[10] however, the experience of the Working Group suggests that it is rare for courts to make use of this provision, especially when compared to the use made of other settlement procedures described in Rule 16(c)(2)(I).[11] Few courts have a practice of regularly considering the appointment of a

[8] Andrew D. Bradt, "The Long Arm of Multidistrict Litigation," 59 WM. & MARY L. REV. 1, 2 (2017); Elizabeth Chamblee Burch, "Monopolies in Multidistrict Litigation," 70 VAND. L. REV. 67, 72 (2017). The Judicial Panel on Multidistrict litigations reports that, as of April 16, 2018, 123,293 cases were part of pending MDL actions. http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-April-16-2018.pdf

[9] *See* Ellen E. Deason, *Beyond "Managerial Judges": Appropriate Roles in Settlement*, 78 Ohio St. L. J. 73, 105-127 (2018) (describing the ethical, due process and decision-making difficulties that arise when a judge plays both an adjudicative and settlement role in a case); Nancy A. Welsh, *Magistrate Judges, Settlement and Procedural Justice*, 16 Nev. L. J. 983, 1004-1014, 1018-1023, 1028-35 (2016).

[10] *See supra* nn.5-6 and accompanying text.
[11] Rule 16(c)(2)(I) provides as follow: "At any pretrial conference, the court may consider and take appropriate action on... settling the case and using specialized procedures to assist in resolving the dispute when authorized by statute or local rule."

special master when they are preparing a scheduling order.[12]

Despite the considerable assistance special masters can offer, appointing special masters has historically been viewed as an extraordinary measure to be employed only on rare occasions.[13] This view appears to have stemmed from concerns regarding delegation of judicial authority and the costs that the parties will incur. But neither concern justifies limiting consideration of using masters to "rare occasions."

The Supreme Court has long used special masters in original jurisdiction cases and has vested in those individuals extraordinarily broad powers, including the responsibility to conduct trials on the merits. Thus, at least at the federal level, if the use of special masters were an improper delegation of judicial power, courts would be barred from using them, and obviously they are not.[14]

Moreover, as a matter of logic, a concern about delegating authority should apply only to situations where the special master is asked to perform an adjudicative role. And, unless the parties agree otherwise, a special master's "adjudication" is merely a report and recommendation that can be appealed to the trial court as a matter of right. The ultimate decision-making authority continues to reside with the court.

Cost concerns actually animate these Guidelines. Effective special masters reduce costs by dealing with issues before they evolve into disputes and by swiftly and efficiently disposing of disputes that do arise. Although no scientific study has empirically established that special masters reduce the cost of litigation, there is broad consensus that anticipating and preventing disputes before they arise or resolving them quickly as they emerge significantly improves the effectiveness and efficiency of dispute resolution.[15] Special masters can also inculcate a culture of compliance with procedural

[12] There are exceptions. *See infra* n.25.
[13] *See, e.g.*, 2003 Advisory Committee Note to Fed. R. Civ. P. 53 (noting, even as it revised the rule "extensively to reflect changing practices in using masters" for a broader array of functions that "[t]he core of the original [1938] Rule 53 remains, including its prescription that appointment of a master must be the exception not the rule"); Manual for Complex Litigation 4th, §10.14 at 14 (2004) ("Referral of pretrial

management to a special master (not a magistrate judge) is not advisable for several reasons. Rule 53(a)(1) permits referrals for trial proceedings only in nonjury cases involving "some exceptional conditions" or in an accounting or difficult computation of damages. Because pretrial management calls for the exercise of judicial authority, its exercise by someone other than a district or magistrate judge is particularly inappropriate. The additional expense imposed on parties also militates strongly against such appointment. Appointment of a special master (or of an expert under Federal Rule of Evidence 706) for limited purposes requiring special expertise may sometimes be appropriate (e.g., when a complex program for settlement needs to be devised)").

[14] *See* n.30 *infra* (discussing inherent authority of courts to appoint special masters to assist their judicial administration). *See also Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1944 (2015) ("The entitlement to an Article III adjudicator is 'a personal right' and thus ordinarily 'subject to waiver.' ... But allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process").

[15] *See* Thomas D. Barton and James P. Groton, "The Votes Are In: Focus on Preventing and Limiting Conflicts, DISPUTE RESOLUTION, v. 24 n.3, 9, 10 (Spring 2018). Barton and Groton report that a Global Pound Conference survey of more than 2,000 business leaders, in-house counsel, outside counsel or advisors,

rules by strictly monitoring the parties' compliance with the rules and ensuring that parties do not gain leverage or time from non-compliance.

Special masters may be particularly helpful in assisting parties to implement the December 2015 Amendments to the Federal Rules of Civil Procedure. Those amendments were designed to make litigation more efficient by, among other things, requiring discovery to be "proportional to the needs of the case"[16] and requiring objections to "state whether any responsive materials are being withheld on the basis of that objection."[17] Having a special master work with the parties in appropriate cases to apply these requirements as they propound or respond to discovery requests should promote cooperation and efficiency. Those benefits from using special masters do not detract from judicial administration; they enhance it.

A significant purpose of the 2015 Amendments was to use more proactive case management to prevent problems from arising or solving problems before they become needlessly expensive and time-consuming. Where warranted, if parties are unable to resolve disputes that have the potential to multiply, having a special master assist in the resolution helps to fulfill that goal and frees judicial resources for substantive decision-making and case resolution.

Hence, in all appropriate cases, the court should assess whether appointment of a special master will contribute to a fair and efficient outcome. Special masters can make those contributions by:

- Enabling faster and more efficient resolution of disputes.
- Relieving burdens on limited judicial resources.
- Allowing for specialized expertise in any field that assists judicial administration.
- Allowing for creative and adaptable problem solving.
- Serving in roles that judges are not, or may not be, in a position to perform.
- Facilitating the development of a diverse and experienced pool of masters by

introducing an expanded universe of practitioners to work as masters.

- Helping courts to monitor implementation of orders and decrees.

It is unclear whether the failure to use masters arises from hostility toward the concept or the unfamiliarity borne of under-utilization, or both. Indeed, the use of (or even consideration of using) special masters is so rare that the very idea is alien to many judges and lawyers. Other barriers to use include:

academics, members of the judiciary and government and dispute resolution providers concluded that, by far, the step that should be prioritized to achieve effective dispute resolution is to employ processes to resolve matters pre-dispute or pre-escalation. Although the survey focused on preventing disputes before litigation begins, there is no reason why the same principle would not apply to preventing disputes within litigation before they start or escalate. *See also* *http://globalpound.org/wp-content/uploads/2017/11/2017- 09-18-Final-GPC-Series-Results-Cumulated-Votes-from-the-GPC-App-Mar.-2016-Sep.-2017.pdf* at 42

[16] Fed. R. Civ. P. 26(b)(1) (2015).
[17] Fed. R. Civ. P. 34(b)(2)(C) (2015).

- A general lack of awareness among courts, counsel and parties about special masters and the ways in which they can be used.
- A concern among parties and their counsel of losing control of the litigation.
- A lack in many courts of structures and procedures for vetting, selecting, employing, and evaluating special masters (either as a matter of court

administration or as a practice of individual judges).

- Increased cost and delay.
- The introduction of another layer between the court and counsel.

Regardless of the reason, the failure to consider using special masters in appropriate cases may disserve the goal of securing “a just, speedy, and inexpensive determination.” This failure has also led to appointments being made without systems or structures to support selection, appointment, or use of special masters and, frequently, after cases have already experienced management problems. Although anecdotal evidence indicates that courts and parties are satisfied with their experiences with special masters,[18] the *ad hoc* nature of appointments can lead to inconsistent results and perceptions that undercut the legitimacy of appointees. Moreover, because special masters are rarely used, courts and academicians have not thoroughly addressed such basic issues as what qualifications special masters should possess, how those qualifications should vary based upon the role the special master is performing, what the best practices for special masters should be, and what ethical rules should govern the conduct of special masters. Adopting standards for the appointment of special masters and making their use more common will allow for more research into

ways to make the process more predictable and the work of special masters more effective.

### Highlights of Specific Recommendations

**(1) It should be an accepted part of judicial administration in complex litigation and in other cases that create particular needs that a special master might satisfy, for courts and the parties to consider using a special master and to consider using special masters not only after particular issues have developed, but at the outset of litigation.**

Because courts do not typically consider appointing a special master at the outset of cases, special masters are most frequently appointed after case-management issues have emerged. Although special masters can be of use in these situations, this timing prevents courts and stakeholders from obtaining early case management that often eliminates the need for dispute resolution.

A special master can, for example, address discovery issues and privilege issues before discovery responses are due, thereby preventing disputes before they arise. While conferences that deal with discovery issues before the parties resort to costly motion

[18] Barbara Meierhoefer, "Special Master Case Studies" (2018) available at

https://www.americanbar.org/content/dam/aba/publications/judicial_division/2018lc-specialmasterscasestudy.authcheckdam.pdf

practice is useful, intervening before parties serve responses would be even more efficient and could reduce conflicts among counsel and costs to the parties.

**(2) In considering the possible use of a special master, courts, counsel and parties should be cognizant of the range of functions that a special master might be called on to perform and roles that a special master might serve.**

The suggestions offered here on how special masters might be used to assist in civil litigation are meant to be illustrative, not exhaustive. Indeed, it is not possible to list every conceivable role a special master can play. Courts, counsel, and parties are encouraged to consider creative approaches to integrating special masters into case management for the benefit of all participants.

Moreover, there are often different ways to serve the judicial process. For example, a special master charged with assisting in resolving discovery disputes could adjudicate issues relating to pending discovery motions or could assist counsel in working through discovery needs and obligations without motion practice, or both.

Special masters can address motions dealing with the admissibility of opinion testimony based upon the qualifications of a proposed expert or the soundness of the opinion expressed or methodology employed in reaching it. Special masters can also perform an advisory function, providing information and guidance to the court or the parties in areas that require technical expertise.

Special masters can also provide information to the court. For example, a special master could conduct a privilege review,[19] analyze damages calculations, or summarize and report on the content of voluminous records to prepare the court for a hearing or trial. Special masters can perform these functions in different ways from a court[-]appointed expert (for example, providing adjudication and not merely an opinion), using different procedures (for example, in a process that does not contemplate party-appointed experts or depositions of the independent adjunct). Rather than the parties and the court bearing the expense associated with several experts, there would be only one special master and challenges would be made by objection to the special master's rulings.

Special masters can productively serve as a flexible resource to address a range of problems. The order of appointment should describe the issues the master is to address and the powers afforded the master to do so. Once the court finds a need, the only practical limit that should constrain the decision to use special masters is whether the appointment of a master would impose a cost that outweighs the benefit.

[19] *See, e.g., In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789 (E. D. La. 2007). 8

**(3) In determining whether a case merits appointment of a special master, courts should weigh the expected benefit of using the special master, including reduction of the litigants' costs, against the anticipated cost of the special master's services, and with the view of making the special master's work efficient and cost effective.**

The appointment of a special master must justify the cost. In most instances, the potential for disputes is a function of the amount of money at stake, the number of parties involved, the number of issues and their factual or legal complexity, the number of lawyers representing the parties, and the level of contentiousness between or among the parties or counsel. In many, if not most, of those cases, the cost of procedural skirmishes vastly outstrips the costs of paying a special master to deter, settle, or quickly dispose of issues when they arise.

The benefits of a special master cannot always be measured entirely in dollars. The value of special masters to courts and stakeholders lies in the extraordinary flexibility their use offers to import resources, expertise, and processes that can be flexibly adapted to the needs of each case. In some cases, particularly those involving non-financial concerns, using a special master may be justified if the master adds a

resource, expertise, or process that enhances the effective administration of justice. Determining whether that value outweighs the cost requires a case-by-case assessment.

**(4) Participants in judicial proceedings should be made aware that special masters can perform a broad array of functions that do not usurp judicial functions, but assist it. Among the functions special masters have performed are:**

**a. discovery oversight and management, coordination of cases in multiple jurisdictions;**

2. **Facilitating resolution of disputes between or among co-parties;**
3. **Pretrial case management;**
4. **advice and assistance requiring technical expertise;**
5. **conducting or reviewing auditing or accounting;**
6. **conducting privilege reviews and protecting the court from exposure to privileged material and settlement issues; monitoring; class administration;**
7. **conducting trials or mini-trials upon the consent of the parties;**
8. **settlement administration;**
9. **claims administration; and**
10. **receivership and real property inspection.**

**In these capacities special masters can serve numerous roles, including management, adjudicative, facilitative, advisory, information gathering, or as a liaison.**

Special masters can be used creatively and thoughtfully in a wide array of situations. It is not possible to identify all the ways in which special masters could be used, however, the functions that special masters have performed include:

- Discovery oversight and management.
- Coordinating cases in multiple jurisdictions or between state and federal courts.
- Facilitating resolution of disputes between co-parties and/or their counsel in multi-plaintiff and/or multi-defendant settings.
- Providing technical advice and assistance for example in managing patent claim construction disputes in patent infringement litigation.
- Auditing/Accounting.
- Serving as a firewall that allows the benefit of master involvement while avoiding exchanges of information or *ex parte* contacts between the judge and stakeholders in a way that might otherwise be perceived as unfair.
- Addressing class action administration and related issues.
- Real property inspections.
- Mediating or facilitating settlement.

- Trial administration.[20]
- Monitoring and claims administration.
- Receivership.

Depending upon the function(s) the special master is performing, the special master may serve in different types of roles, including:

- Adjudicative.
- Facilitative.
- Advisory
- Informatory
- Liaison.[21]

The role a special master performs in a case is subject to ethical and legal constraints, the court's control, and, in some instances, the consent of the parties. For example, a special master serving as a mediator may be subject to mediation-specific statutory or ethical obligations, such as confidentiality or a mediation privilege, and these mediation-specific obligations could be inconsistent with other roles the special master is required to play, particularly adjudicative or informatory roles.[22]

These Guidelines do not direct any particular use of special masters or identify all the legal or ethical obligations that might apply to their activities. Rather, they seek to help courts and parties by increasing awareness of the potential for using special masters creatively and effectively, while highlighting some of the legal or ethical obligations that might apply. As discussed under Point 8 below, one advantage of a greater acceptance of special masters is that experience will foster creativity and promote understanding of the appropriate legal and ethical obligations that apply to special masters.

[20] In some jurisdictions, if the parties consent, special masters are empowered to oversee trials, or to conduct "mini-trials" of specific, perhaps technical, issues. These proceeding differ from arbitrations in a number of ways and often, for example, are subject to review in ways that arbitrations usually are not.

[21] "Liaison" refers to situations in which a special master is being used as go-between to provide information to the court while insulating it from matters such as settlement discussions or privileged information.

[22] *See* n.9 *supra*. Fed. R. Civ. P. 53(a)(2), and accompanying Advisory Committee Notes (2003). The considerations may be different in the discovery context. As the parties sort through discovery issues with the special master acting as an adjudicator, opportunities often arise for the parties and the master to discuss and explore together voluntary solutions to discovery disputes.

**(5) Courts should choose special masters with due regard for the court's needs and the parties' preferences and in a manner that promotes confidence in the process and the choice by helping to ensure that qualified and appropriately skilled and experienced candidates are identified and chosen.**

The choice of who is to serve as a special master, like the issue of what function and role the special master is to perform, requires careful consideration. Courts need to ensure that the selection and use of special masters is fair.

Courts should afford parties the opportunity to propose acceptable special master candidates.[23] As discussed below, *see* Point 7, by maintaining rosters, courts can assist the parties and identify a pool of candidates who bring a diverse range of experience. Courts should always give serious consideration to any candidate identified by the parties, although the court should also always vet candidates to ensure that they have the time, qualifications, and independence to discharge their special-master duties. Involving the parties in the selection process should minimize the parties' perception that a candidate was forced upon them by the court and should eliminate any possible concern of bias.

**(6) The referral order appointing the special master should describe the scope of the engagement, including, but not limited to, the special master's duties and powers, the roles the special master may serve, the rates and manner in which the special master will be compensated, power to conduct hearings or to facilitate settlement, requirements for issuing decisions and reporting to the court, and the extent of permissible ex parte contact with the court and the parties. Any changes to the scope of the referral should be made by a modification to the referral order.**

Federal Rule of Civil Procedure 53(b)(2) and similar state rules require that the appointing order "direct the master to proceed with all reasonable diligence" and state:

> (A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);
>
> (B) the circumstances, if any, in which the master may communicate *ex parte* with the court or a party;
>
> (C) the nature of the materials to be preserved and filed as the record of the master's activities;
>
> (D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and
>
> (E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(g).

[23] *See* Fed. R. Civ. P. 53(b)(1) ("Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment").

The Court should consider adapting these terms (or adding others) consistent with the special master's role in the case. For example, the Court is empowered to align the incentives with the process, for example, by making compensation in a particular case hourly, fixed or a mixture of both and providing for review of billing afterwards.[24]

**(7) Courts should develop local rules and practices for selecting, training and evaluating special masters, including rules designed to facilitate the selection of special masters from a diverse pool of potential candidates.**

Few courts have adopted a system for the selection, vetting, or training of special masters. As a consequence, court decisions and available relevant literature do not extensively examine special masters' qualifications or how those qualifications should vary depending upon the role the special master is performing.[25]

Depending on the appointing court's circumstances, local custom, and preferences, courts may wish to consider and adapt the following processes:

- Develop a list of the roles special masters will be expected to perform.
- Adopt and notify the bar of the considerations for selection of special masters, including a commitment to diversity and inclusivity.
- Sponsor interactive discussions on the use of special masters.
- Adopt a method to ensure confidentiality during the appointment process.
- Develop a public (or, if the court prefers, an internal) database/list of qualified, screened individuals who meet basic criteria for consideration as special masters.
- Create an application and confidential vetting process that recognizes the needed functions and ensures that that a diverse spectrum of qualified candidates (including first-time special master candidates) may be included.
- Designate administrators to be responsible for implementing the program and assisting judges and/or parties in identifying matches for particular cases.
- Develop methods for evaluation, feedback and discipline.[26]

[24] The website of the Academy of Court[-]Appointed Masters [now the Academy of Court-Appointed Neutrals] includes a Bench Book with guidance and examples of form orders that address additional issues raised by the appointment of special masters. *See* [*https://www.courtappointedneutrals.org/benchbook/appointing-neutrals-handbook/*] . *See also* Advisory Committee Notes to Fed. R. Civ. P. 53(b) (discussing ethical issues in appointing special masters).

[25] The Indiana Commercial Courts Pilot Project and the Western District of Pennsylvania E-Discovery Special Masters Pilot Program are exceptions that offer guidance on developing rules. The United States District Court for the District of Delaware has a standing order under which special masters serve 4-year terms at the pleasure of the judges of the Court. The Court notifies the Bar when it is considering appointing new Panel members, allowing bar members to submit background information.
http://www.ded.uscourts.gov/sites/default/files/forms/SpecialMastersOrder2014.pdf *See also*

https://www.discoverypilot.com/ (Seventh Circuit eDiscovery pilot program incorporating master mediation).

[26] For a discussion of how state and federal courts have enabled feedback, *see* Nancy A. Welsh, Magistrate Judges, Settlement and Procedural Justice, 16 NEVADA LAW JOURNAL 983 (2016) and Nancy A. Welsh, Donna Stienstra & Bobbi McAdoo, *The Application of Procedural Justice Research to Judicial Actions and Techniques in Settlement Sessions*, *in* THE MULTI-TASKING JUDGE: COMPARATIVE JUDICIAL DISPUTE RESOLUTION (Tania Sourdin and Archie Zariski, eds., 2013).

While exploring the different systems and structures for appointing and training special masters is beyond the scope of these Guidelines, some suggestions include: inviting applicants to self-nominate; creating and implementing qualifications criteria; establishing a diverse roster of approved masters; establishing a performance review component; and adopting training programs for masters.

Developing rosters of special master candidates could facilitate vetting, qualifying, and training candidates to help ensure quality and confidence in the legitimacy of the choice. Vetting could also recognize and assist in implementing existing ABA guidance on increasing diversity among those who serve as special masters.[27]

Whether in designing a roster system or in making individual selections, some factors the court should consider include:

- Developing a diverse pool of persons who qualify for appointment.
- Ensuring the process is properly calibrated to the functions and roles special masters perform.
- Ensuring candidates make appropriate disclosures and have no conflicts of interest with the parties or issues being addressed.
- Ensuring the process properly assesses candidates' talents and experience.
- Determining whether subject matter expertise is necessary.
- Ensuring the ability of the prospective master to be fair and impartial and to engage with the parties and others with courtesy and civility.

**Courts and the bar should develop educational programs to increase awareness of the role of special masters and to promote the acquisition and dissemination of information concerning the effectiveness and appropriate use of special masters.**

Because special masters are appointed infrequently, many counsel have had no experience working with a special master.[28] Promulgating local rules and procedures to systematize the consideration and use of special masters would assist in familiarizing practitioners with the appointment process and how masters are used. When parties are aware that courts intend to make more effective use of special masters, the parties will be more likely to inform themselves about the selection process, potential candidates, and the role the special masters will play in the process. It is also important that the legal community develop educational programs available to both bench and bar on the

use of special masters. Greater use of special masters will also assist the advancement of appropriate professional standards for the multiple roles they perform.

[27] *See* American Bar Association Resolution 17M (urging the United States Supreme Court to consider racial, ethnic, disability, sexual orientation, gender identity, and gender diversity in the process for selecting *amicus curiae*, special masters, and other counsel).
[28] *See, e.g.*, David R. Cohen, "The Judge, the Special Master, and You," LITIGATION v. 20, No. 1 (2015).

Courts should have regular mechanisms to monitor the quality of special masters' work. An appointing court could require that the master make periodic progress reports on issues that have been addressed and resolved, the procedural posture of the case, and when the case will be trial ready. Courts should also identify mechanisms that allow the parties to provide feedback and, if applicable, raise concerns regarding their experience with, and the performance of, the special master.[29]

Monitoring special master performance and stakeholder satisfaction will allow courts to identify and correct problems. If a special master proves inappropriate, the court can replace the special master with a more suitable candidate. If tasks are too much for one special master to handle, the court can consider dividing tasks among more than one master. If the process is ineffective, the court could consider vacating the appointment.

When cases conclude, it should be a regular practice for participants to complete a brief confidential survey concerning the special master's work. These surveys would provide, for the first time, a source of data researchers can use to assess the use of special masters and make recommendations for improvement.

**(9) Courts and, where applicable, legislatures should make whatever modifications to laws, rules or practices that are necessary to effectuate these ends, including amending Bankruptcy Rule 9031 to permit courts responsible for cases under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases.**

Federal Rule 53 and many state rules and authority on inherent judicial power, appear sufficiently flexible to allow for more effective use of special masters. However, depending on the jurisdiction, rule or statutory changes may be necessary or desirable.

In addition, where the rules of civil procedure permit, courts should consider whether it is appropriate to adopt local procedures calling for more extensive, flexible, and systematic vetting, selection, use and evaluation of special masters. Rule-making bodies should also consider whether particular aspects of existing rules, including terms used, should be modified to promote uniformity and the effective use of special master.

**Bankruptcy Rule 9031 should be amended to permit courts responsible for cases under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases.**

Bankruptcy Rule 9031 states that Federal Rule of Civil Procedure 53 "does not apply in

cases under the [Bankruptcy] Code." This rule is confusing. The 1983 Advisory Committee comments state that Bankruptcy Rule 9031 "precludes the appointment of masters in cases and proceedings under the Code"; but the rule purports to instead preclude application of Federal Rule of Civil Procedure 53. Rule 53 is not the sole or ultimate source of authority for appointing special masters; it addresses the manner in which courts exercise their *inherent* power to appoint special masters as a part of case management.[30]

Moreover, if Rule 9031 actually precluded the use of special masters for cases "under the Code," it would not be limited to bankruptcy judges. It would operate on the inherent authority of Article III judges when they decide cases under the Bankruptcy Code, as opposed to any other statute.[31] However, the only other published official explanation for Rule 9031 says otherwise. The Advisory Committee on Bankruptcy Rules' preface to the then proposed Rules of Bankruptcy Procedure states that "[t]here does not appear to be any need for the appointment of special masters in bankruptcy cases *by bankruptcy judges*." (Emphasis added) [32]

In any event, there is no justification today for a rule that assumes that bankruptcy judges can never make effective use of special masters. Bankruptcy dockets include many especially complex cases in which special masters could be of great utility. Depriving court of equity of the ability to use special masters, disserves the goal of achieving a "just, speedy and inexpensive determination of every case and proceeding," which is the mandate of Bankruptcy Rule 1001, just as it is the mandate of Federal Rule 1.[33] Amending Rule 9031 to eliminate this confusing limitation serves this end.

**Conclusion**

Courts should make more effective and systematic use of special masters to assist in civil litigation. The ABA is available to assist courts in implementing these recommendations.

[29] *See supra* n.26, supra for methods of feedback.

[30] It "is well-settled that" federal "courts have inherent authority to appoint Special Masters to assist in managing litigation." *United States v. Black*, No. 16-20032-JAR, 2016 WL 6967120, at *3 (D. Kan. Nov. 29, 2016) (*citing Schwimmer v. United States*, 232 F.2d 855, 865 (8th Cir. 1956) *(quoting In re: Peterson, 253 U.S. 300, 311 (1920)); see also, e.g., Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 746 (6th Cir. 1979) (the authority to appoint "expert advisors or consultants" derives from either Rule 53 or the Court's inherent power); *Regents of the Univ. of Cal. v. Micro Therapeutics, Inc.,* No. C 03-05669 JW, 2006 WL 1469698, at *1 (N.D. Cal. May 26, 2006) (to similar effect). Courts have relied on this authority, for example, to appoint special masters in criminal cases even though the Federal Rules of Criminal Procedure have no analog to Rule 53. Indeed, the power to appoint special masters has existed long before the Federal Rules (from at least eighteenth century in the United States and perhaps even in Roman law). Paulette J. Delk, "Special Masters in Bankruptcy: The Case Against Bankruptcy Rule 9031," 67 MO. L. REV. 29, 30-31 (Winter 2002). [31] *See* Paulette J. Delk, *supra.* n.30, 67 MO. L. REV. at 40-41 & nn.60-62.

[32] *See* Paulette J. Delk, *supra.*n.30, 67MO.L.REV. at 41-42 &nn.64-65.

[33] *See* Paulette J. Delk, *supra.*n.30, 67MO.L.REV. at 41-42 & nn.65-68.

# Appendix C

# ABA Resolution 23A516 (Amending Guidelines and Calling for Use of Term Court-Appointed Neutral)

**AMERICAN BAR ASSOCIATION**

**JUDICIAL DIVISION**
**SECTION OF DISPUTE RESOLUTION**

**REPORT TO THE HOUSE OF DELEGATES**

## RESOLUTION

RESOLVED, That the American Bar Association amends the *ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation* ("Guidelines"), adopted January 2019 (Resolution 100, 19M100), by retitling the Guidelines, "*ABA Guidelines for the Appointment and Use of Court-Appointed Neutrals in Federal and State Civil Litigation*" and replacing the terms "Special Master" and "Master" with "Court-Appointed Neutral;"

FURTHER RESOLVED, That the American Bar Association further amends ABA Resolution 100, 19M100, to urge that Bankruptcy Rule 9031 and other provisions of rules or law related to Bankruptcy be amended to permit courts responsible for cases under the Bankruptcy Code to use court-appointed neutrals (whether identified as "masters" or otherwise) in the same way as they are used in other federal cases; and

FURTHER RESOLVED, That the American Bar Association supports rule and legislative changes designed to replace the term "master" or "special master" with "court-appointed neutral."

# ABA Guidelines for the Appointment and Use of Court-Appointed Neutrals in Federal and State Civil Litigation

**Consistent with the Federal Rules of Civil Procedure or applicable state court rules:**

**(1) It should be an accepted part of judicial administration in complex litigation (and in other cases that create particular needs that a court-appointed neutral might satisfy), for courts and the parties to consider using a court-appointed neutral and to consider using court-appointed neutrals not only after particular issues have developed, but at the outset of litigation.**

**(2) In considering the possible use of a court-appointed neutral, courts, counsel and parties should be cognizant of the range of functions that a court-appointed neutral might be called on to perform and roles that a court-appointed neutral might serve.**

**(3) In determining whether a case merits appointment of a court-appointed neutral, courts should weigh the expected benefit of using the court-appointed neutral, including reduction of the litigants' costs, against the anticipated cost of the court-appointed neutral's services, in order to make the court-appointed neutral's work efficient and cost effective.**

**(4) Participants in judicial proceedings should be made aware that court-appointed neutrals can perform a broad array of functions that do not usurp judicial functions, but assist them. Among the functions court-appointed neutrals have performed are:**

- **a. discovery oversight and management, and coordination of cases in multiple jurisdictions;**
- **b. facilitating resolution of disputes between or among co-parties;**
- **c. pretrial case management;**
- **d. advice and assistance requiring technical expertise;**
- **e. conducting or reviewing auditing or accounting;**
- **f. conducting privilege reviews and protecting the court from exposure to privileged material and settlement issues; monitoring; class administration;**
- **g. conducting trials or mini-trials upon the consent of the parties;**
- **h. settlement administration;**
- **i. claims administration; and**
- **j. receivership and real property inspection.**

**In these capacities court-appointed neutrals can serve numerous roles, including management, adjudicative, facilitative, advisory, information gathering, or as a liaison.**

**(5) Courts should develop local rules and practices for selecting, training, and evaluating court-appointed neutrals, including rules designed to facilitate the selection of court-appointed neutrals from a diverse pool of potential candidates.**

**(6) Courts should choose court-appointed neutrals with due regard for the court's needs and the parties' preferences and in a manner that promotes confidence in the selection process by helping to ensure that qualified and appropriately skilled and experienced candidates are identified and chosen.**

**(7) The referral order appointing the court-appointed neutral should describe the scope of the engagement, including, but not limited to, the court-appointed neutral's duties and powers, the roles the court-appointed neutral may serve, the rates and manner in which the court-appointed neutral will be compensated,**

**power to conduct hearings or to facilitate settlement, requirements for issuing decisions and reporting to the court, and the extent of permissible ex parte contact with the court and the parties. Any changes to the scope of the referral should be made by a modification to the referral order.**

**(8) Courts and the bar should develop educational programs to increase awareness of the role of court-appointed neutrals and to promote the acquisition and dissemination of information concerning the effectiveness of court-appointed neutrals.**

**(9) Courts and, where applicable, legislatures should make whatever modifications to laws, rules, or practices that are necessary to effectuate these ends.**

## Introduction

At its midyear meeting in January 2019, the American Bar Association ("ABA") House of Delegates adopted Resolution 100.[1] This Resolution approved the ABA Guidelines on the Appointment and Use of Special Masters in Federal and State Civil Litigation (the "Guidelines") and urged that Bankruptcy Rule 9031 be amended to permit courts responsible for cases under the Bankruptcy Code to use "special masters" in the same way as they are used in other federal cases.

The Guidelines and the conclusion that courts responsible for cases under the Bankruptcy Code should be permitted to use neutrals adopted by the House of Delegates resulted from 18 months of effort by a working group that included representatives of the National Conference of Federal Trial Judges, the National Conference of State Trial Judges, the Lawyers Conference, the ABA Standing Committee on the American Judicial System, and the ABA's Litigation, Business Law, Dispute Resolution, Intellectual Property Law, Tort Trial and Insurance Practice, and Antitrust Sections on best practices concerning the use, selection, administration, and evaluation of court-appointed neutrals. The central principle of the Guidelines is that "[i]t should be an accepted part of judicial administration in complex litigation and in other cases that create particular needs that a special master might satisfy, for courts and the parties to consider using a special master and to consider using special masters not only after particular issues have developed, but at the outset of litigation."[2]

Since the House of Delegates adopted Resolution 19M100, what is now the ABA Judicial Division Lawyers Conference Court-Appointed Neutrals Committee (the "Committee") has worked on implementing the Guidelines' precepts and changing the applicable Bankruptcy Rule. The Committee includes both active and retired federal and state judges, practicing lawyers with a wide range of experience and dockets, ADR professionals with a wide range of experience (some of whom have and others who have not practiced as court-appointed neutrals), academics, and leadership from the Judicial Division and other divisions, sections and forums, many of whom designated liaisons to participate in, and to report back and comment on, the Committee's work.

This Committee is working to implement Resolution 19M100 in many ways. For example, the Committee has worked on developing principles of ethics for court-appointed neutrals; drafting criteria for selecting court-appointed neutrals to a roster and a survey instrument to evaluate the work of court-appointed neutrals; drafting articles and making presentations concerning the Guidelines and how they might be applied and urging that Bankruptcy Rule 9031 be amended to permit courts responsible for cases under the Bankruptcy Code to use court-appointed neutrals in the same way federal courts responsible for other proceedings do.

One of the lessons learned from the efforts to implement the Resolution has been that it would much better serve both ABA goals generally and the goals of the Guidelines

[1] "Guidelines." Available at www.americanbar.org/content/dam/aba/directories/policy/midyear-2019/100-midyear-2019.pdf; *see also American Bar Ass'n Policy and Procedures Handbook 2022-2023* at 193 ("*Greenbook* ").
[2] Guideline 1, *supra* n.1.

to promote the use of the term "court-appointed neutral," instead of "special master" or "master," to describe both the appointment and the people who serve in this role. As explained below, there are many reasons why the term "court-appointed neutrals" both better serves and better describes the assistance the Guidelines contemplate these appointees providing. Another lesson is that, implementing the related principle of the Resolution—that courts responsible for Bankruptcy matters should be permitted to use neutrals in the same way as they are used in other federal proceedings—may require other rule or legislative changes in addition to changes to Bankruptcy Rule 9031, itself.

This Resolution amends Resolution 19M100 based on these lessons. It does not change the substance of any of the Guidelines or the goal the ABA endorsed of affording courts the ability to use neutrals in Bankruptcy proceedings. Rather, it renames and amends the 2019 Guidelines and the Resolution that adopted it (19M100) to use the term "Court-Appointed Neutrals," rather than "Master" or "Special Master." The current resolution also supports efforts to use the new term to rebrand the profession of those who serve courts in this role in a far more positive way that better serves the purposes of the Guidelines and ABA Policy. This Resolution also seeks to amend Resolution 19M100 to specify that Bankruptcy Rule 9031 *and other provisions of rules or law related to Bankruptcy* should be amended to permit courts responsible for cases under the Bankruptcy Code to use *court-appointed neutrals (whether identified as "masters" or otherwise)* in the same way as they are used in other federal cases.

This Resolution is the result of hundreds of additional hours of discussion involving dozens of people both inside and outside the ABA both about whether to use a new term for the profession and which term best serves the administration of justice. It is intended to be considered in conjunction with the Resolution to adopt a Model State Rule to implement the 2019 Guidelines. The Model Rule uses the term "Court-Appointed Neutrals," to have a term that both accounts for the many jurisdictions that have never or do not now use the term "master," and fairly reflects the principles of the Guidelines the Rule was drafted to implement.

Taken together, these two Resolutions further the ABA's efforts to rethink the appointment and use of court-appointed neutrals in a way that makes decisions on whether to appoint neutrals more open, selections on who to appoint come from a more diverse range of applicants, and the use of those selectees more flexible and helpful to the administration of justice.

## Discussion and Rationale for the Resolution

**The historic use of court-appointed neutrals.** Courts' use of neutrals to assist in resolving disputes probably dates back more than a thousand or perhaps even two thousand years. "The office of master in chancery, of French origin and imported [to England] with the Norman Conquest, is one of the oldest institutions in Anglo-American law."[3] Indeed, some historians trace the practice to "civilian judex of the Roman Republic and Early Empire—a private citizen appointed by the praetor or other magistrate to hear

[3] Wayne D. Brazil, "*Referring Discovery Tasks to Special Masters: Is Rule 53 a Source of Authority and Restrictions?*," 8 American Bar Foundation Research Journal, 143 at n.31 and accompanying text (Winter 1983), (citing *United States v. Manning*, 215 F. Supp (W.D. La. 1963)).

the evidence, decide the issues and report to the [appointing] court."[4]

The United States Supreme Court appointed a committee of neutrals to assist in deciding the very first case filed on its docket.[5] Thus, as the Court noted over one hundred years ago, the inherent power of the judiciary "includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause. From the commencement of our government it has been exercised by the federal courts, when sitting in equity, by appointing either with or without the consent of the parties, special masters. . . ."[6]

Historically, court-appointed neutrals have performed a wide variety of functions. Indeed, "[i]t is not possible to identify all the ways in which special masters could be used, however, the functions that special masters have performed include:

- Discovery oversight and management.
- Coordinating cases in multiple jurisdictions or between state and federal courts.
- Facilitating resolution of disputes between co-parties and/or their counsel in multi-plaintiff and/or multi-defendant settings.
- Providing technical advice and assistance for example in managing patent claim construction disputes in patent infringement litigation.
- Auditing/Accounting.
- Serving as a firewall that allows the benefit of neutral involvement while avoiding exchanges of information or ex parte contacts between the judge and stakeholders in a way that might otherwise be perceived as unfair.
- Addressing class action administration and related issues.
- Real property inspections.
- Mediating or facilitating settlement.
- Trial administration.
- Monitoring and claims administration.
- Receivership."[7]

Moreover, depending upon the function(s) the court-appointed neutral is performing, the neutral "may serve in different types of roles, including:

- Adjudicative.
- Facilitative.
- Advisory.
- Informatory.
- Liaison."[8]

**The history of the name for court-appointed neutrals.** Despite the long history of courts appointing neutrals, courts and rule-makers have never completely settled on a single term to refer to a neutral appointed by a court to perform one or more of these

[4] *Id.*
[5] *Vanstophorst v. Md.*, 2 U.S. 401 (1791).
[6] *In re Peterson*, 253 U.S. 300, 312 (1920). *See also* Paulette J. Delk, *"Special Masters in Bankruptcy: The Case Against Bankruptcy Rule 9031,"* 67 Mo. L. Rev., 29, 30-31, 54-57 & nn. 10-12, 131-43 (Winter 2002).
[7] Report, submitted in support of Resolution 19M100 and seeking adoption of the Guidelines ("Report"), at 9-10.
[8] *Id*. at 10.

functions or to serve in one or more of these roles. Since 2003, Federal Rule of Civil Procedure 53, and state rules that adopt the federal language, have used the term "master." But legislatures and courts have used dozens of other terms that often have their own meanings in other contexts. These terms include "adjunct," "special magistrate," "hearing examiner," "special facilitator," "discovery facilitator," "appointed mediator," "monitor," "court advisor," "investigator," "claims administrator," "claims evaluator," "ombuds," "court mediator," "case evaluator," "referee," "receiver," "judicial ombuds," "commissioner," and others.

Court-appointed neutrals have these different titles because they serve roles so diverse that they are limited only by our creativity. Where the term "master" suggests someone brought in to adjudicate, these many types of court-appointed neutrals are more like a Swiss Army Knife: a multipurpose tool that could be used for quasi-adjudicative work, but could also be used for facilitative, investigative, intermediary, informatory, administrative, monitoring, implementing or many other purposes.

Moreover, in recent years, at least two states—Maryland and Pennsylvania—have changed relevant provisions to substitute a different term for "masters." In Pennsylvania's case, the move followed a resolution of the Philadelphia Bar Association that raised a number of concerns about appointing someone called a "master."[9] That resolution noted that the term "creates a sense of separation, anxiety, and confusion" because it suggests that some people are subject to others.[10]

Last year, the Judicial Division Lawyers Conference Committee that has been leading the effort to implement the Guidelines cited these efforts and changed its name from the "Special Masters Committee" to the "Court-Appointed Neutrals Committee."[11] The primary organization of these professionals also changed its name last year from the "Academy of Court-Appointed Masters" to the "Academy of Court-Appointed Neutrals."[12] And in October 2022, the National Association of Women Judges adopted a "Resolution in Support of Ceasing to Use the Term "Master" or "Special Master" and the Use of "Court-Appointed Neutrals."[13]

In recent years, other professions have questioned whether the term "master" continues to be appropriate in their context. "Master" has a number of positive connotations. It can refer to admirable qualities, like expertise, proficiency, accomplishment, scholarship or leadership. However, "master" also has obvious negative connotations that have led many professions in many contexts to consider using different terms. For example, electrical and software engineers are discussing whether they should continue (as they have for decades) to use master and slave to refer to situations in which one device exercises asymmetric control over others. Colleges, including Harvard, Yale and Rice, have stopped using "master" as an academic title or the name for the head of

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[9] *See* *https://philadelphiabar.org/?pg=ResNov20_1*

[10] *Id.*

[11] https://www.americanbar.org/groups/judicial/conferences/lawyers_conference/committees/court-appointed-neutrals/committee-name-change/

[12] *See* *www.courtappointedneutrals.org/acam/assets/file/public/namechange/on%20becoming%20the%20academy%20of%20court-appointed%20neutrals.pdf*

[13] Available at www.nawj.org/uploads/files/resolutions/resolutionsupportingcourtappointedneutrals10-22-2022.pdf

a residential college. Real estate professionals are debating whether "master" bedroom is the best name.

No one associated with using the term "master" in the context of court-appointed neutrals intended the term to connote negative or restrictive images. But that does not mean that it makes sense to continue using the term. Indeed, it is only reasonable that the ABA consider whether there is a better term.

**Coming to the Term "Court-Appointed Neutral."** As work progressed on efforts to implement the Guidelines, it became apparent that one of the most significant steps the ABA could take to advance this effort would be to change and standardize the name used to refer to professionals who serve this function. The Guidelines recognized that, properly used, court-appointed neutrals were a significant potential resource for courts, but that the lack of a methodical and consistent approach to considering the use of court-appointed neutrals has left this potential resource poorly understood, rarely used and less effective.[14]

The Report that accompanied Resolution 19M100 identified several advantages to making it an accepted part of judicial administration to consider using court-appointed neutrals in cases that might warrant their use. Among other things, a regular process for considering appointment of these professionals in appropriate cases would be expected:

- To make people more familiar with what these professionals do, ensuring that courts can use them effectively and creatively to improve the administration of justice.
- To help diversify and improve the quality of those selected by, for example, facilitating the use of rosters and systems for vetting potential neutrals in advance of appointment.
- To afford litigants a clearer idea of why neutrals are being appointed; what they will be doing (or not doing); how they will be paid; and how they are going to proceed.
- To increase accountability by fostering training and evaluation systems and scholarly study of litigants' and lawyers' experience with neutrals.

Standardizing the name "Court-Appointed Neutrals," and using it to replace "master" or "special master" helps to attain these advantages:

**Familiarity/Effective Use.** The Report accompanying Resolution 19M100 noted that "the use of (or even consideration of using) "special masters" is so rare that the very idea is alien to many judges and lawyers."[15] It is not possible to know the reasons why the idea is so alien. The Report suggests some possible reasons, but the use or even discussion of using a neutral is so rare that there are no statistics on how the role is currently perceived.[16]

Having a name that does not describe the tool, however, cannot possibly help.

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[14] *See* Report supra n.7 at 6-7.
[15] *Id.* at 7.
[16] In connection with what became the 2003 Amendments to Federal Rule of Civil Procedure 53, a Subcommittee of the Judicial Conference Advisory Committee on Civil Rules asked the Federal Judicial Center for information on how "masters" were being used. The Center concluded that courts considered using "masters" in only .3% of federal cases and actually appointed "masters" in .2% of federal cases. Thomas Willging, et. al., "*Special Masters' Incidence and Activity*," Federal Judicial Center at 3 (2000). Even that data is now 23 years old.

Calling someone "Master" suggests that they are being brought in to make decisions for others. That misdescribes someone who is used to facilitate or otherwise assist the parties in reaching their own resolution of differences; or to offer expertise about science, or particular industries like construction, or forensic accounting; or to serve numerous other roles. Indeed, even when the role is ostensibly quasi-adjudicative, a significant benefit from appointing a neutral can come from helping the parties work out differences without the need for motions in the first place.

"Court-Appointed Neutral" better describes a disinterested professional brought in as a special officer appointment to help, rather than to take over specific functions in a litigation. It makes it easier for parties to appreciate that this is a multi-faceted tool and to focus the consideration on whether and which facet might be useful in a particular case and whether the benefit from using the tool in a particular case outweighs the costs.

"Court-Appointed Neutral" also better captures the wide variety of names that jurisdictions use for this tool. In effect, using the term "master" or "special master" picks a term—albeit the most common, but not even close to the only one—that many states do not use and at least two have specifically abandoned. Having a term that broadly encompasses the many terms jurisdictions use facilitates the process of encouraging states to adopt the Model Rule that is the subject of a companion resolution and focuses the discussion more effectively on the broad uses the tool can offer.

Standardizing this term also helps to clarify the scope of our rules and ensures that the change does not impede existing alternative dispute resolution programs, including those implemented in accordance with the ADR Act of 1998. Historically, jurisdictions have used many function-specific terms that can be confusingly limited when used to refer to an array of roles. Terms like "master" "special master," "special magistrate," "hearing examiner," and "referee," for example, suggest that the role is quasi-adjudicative, and do not clearly delineate that a facilitative or advisory role may be appropriate. Terms like "special facilitator" and "discovery facilitator," suggest that the role is facilitative, and arguably limit a court's ability to benefit from specialized judgment or expertise that is appropriate for a given case.. "Monitor," "court advisor," "investigator," "claims administrator," and "forensic analyst," connote specialized roles that may or may not be applicable to a given case. Other terms like "mediator," "arbitrator," "case evaluator," or "ombuds," potentially create confusion with those who serve these roles in other settings. Accordingly, the use of one or another of these terms could confuse the role of an individual a judge is empowered to designate for a given case.

The use of these terms also may leave unclear when provisions of rules apply at all. For example, a court may rely on a state rule that tracks the current version of Federal Rule of Civil Procedure 53 to appoint a "master." But if the court appoints someone as a "monitor," or "referee" or "discovery facilitator" or "special magistrate," it may not be clear under existing provisions whether that appointment is subject to other provisions of the Rule. Standardizing and defining the term "court-appointed neutral" to encompass the broad roles the Guidelines envision clarifies these rules.

**Diversifying and improving the quality of the selection.** Using "Court-Appointed Neutral" rather than "master" reinforces the effort to recruit appointees from a

diverse and non-traditional pool. The Report accompanying Resolution 19M100 noted that because courts have not regularly considered using neutrals, a practice has developed to consider these appointments *ad hoc* (often when a particular judge favors the approach).[17] Guideline 5 specifically calls for courts to change this system in to one that approaches selection more broadly—"to develop local rules and practices for selecting, training, and evaluating [court-appointed neutrals], including rules designed to facilitate the selection of [court-appointed neutrals] from a diverse pool of potential candidates." It is sensible to rename the profession in a way that captures its breadth and does not have the negative connotations of "master." Renaming also facilitates the development of a "best practice" to improve the quality of the selection by searching more widely before making appointment to develop lists of candidates that are broader not only demographically but also in skill sets.

**Affording litigants a clearer idea of why the appointees are chosen.** Having a term that does not describe what "court-appointed neutrals" do engenders confusion. Standardizing the term helps serve the goal of familiarizing litigants with the "broad array of functions" neutrals can provide, as contemplated by Guideline 4 and focuses the inquiry on what services might be useful in a particular case.

**Increasing accountability.** The patchwork of multiple names for this role makes more difficult the process of developing generalized training, evaluation and methods of improving the work of court-appointed neutrals. A common term, with a common definition, helps to solve that problem.

> **Resolution 19M100's mandate supporting affording courts responsible for cases under the Bankruptcy Code the ability to appoint neutrals should be amended to support using the term "court-appointed neutral," and to contemplate the amendment or adoption of supporting changes to achieve that end.**

As the 2019 Report explained, "there is no justification today for a rule that assumes that bankruptcy judges can never make effective use of special masters."[18] Bankruptcy Rule 9031 purports to do that, by stating that Federal Rule of Civil Procedure 53 "does not apply in cases under the [Bankruptcy] Code." Resolution 19M100 called for amending Bankruptcy Rule 9031 "to permit courts responsible for cases under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases." In seeking to amend the Guidelines to use "court-appointed neutral" instead of "master" or "special master," the current Resolution also seeks to amend the reference in the discussion of amending Bankruptcy Rule 9031.

The current Resolution makes a clarifying amendment to the 2019 language.

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[17] Report, supra.n.7, at 7 & n.18.

[18] Report, supra n.7, at 15. *See also* Merril Hirsh and Sylvia Mayer, "*Time To Stop Hamstringing Bankruptcy Judges: Amending Bankruptcy Rule 9031 To Recognize and Permit the Use of Court-Appointed 'Masters*,'" ABA Judicial Division JUDGES JOURNAL, v. 61, no. 4 (Fall 2022) 4 (examining the history of Bank. R. 9031 and explaining the reasons for changing the rule); ); Paulette J. Delk, "*Special Masters in Bankruptcy: The Case Against Bankruptcy Rule 9031*," 67 MO. L. REV. 29, 30-31 (Winter 2002); R. Spencer Clift, III, "*Should the Federal Rules of Bankruptcy Procedure Be Amended to Expressly Authorize United States District and Bankruptcy Courts to Appoint a Special Master in an Appropriate and Rare Bankruptcy Case or Proceeding?*," 31 U. MEM. L. REV. 353 (2001).

Resolution 19M100 discussed achieving the goal of permitting the use of neutrals in Bankruptcy proceedings by amending Bankruptcy Rule 9031. In pursuing efforts to implement this change, it has become apparent that fulfilling this objective may require, or benefit from, other changes. For example, Part VII of the Federal Rules of Bankruptcy Procedure govern adversary proceedings.[19] "The content and numbering of these Part VII rules correlates to the content and numbering of the [Fed. R. Civ. P.] Most, but not all, of the [Fed. R. Civ. P.] have a comparable Part VII rule. When there is no Part VII rule with a number corresponding to a particular [Fed. R. Civ. P.], Parts V and IX of these rules must be consulted to determine if one of the rules in those parts deals with the subject."[20] Accordingly, it may be appropriate to urge that a new Bankruptcy Rule 7053 be adopted to incorporate Federal Rule of Civil Procedure 53 by reference.

Also, while there is existing statutory authority to treat the payment of some appointed neutrals (a trustee or examiner), as an administrative claim under a bankruptcy,[21] it may not be clear that this language would apply to the appointment of neutrals for other purposes. Accordingly, it may be appropriate to urge this clarification.

The current resolution amends Resolution 19M100 to ensure the flexibility in the approach necessary to achieve the objective of 19M100 of permitting courts responsible for cases under the Bankruptcy Code to use court-appointed neutrals in the same way as they are used in other federal cases.

**The Report Accompanying Resolution 19M100 Should Be Interpreted as if It Used the Term "Court-Appointed Neutral" Rather than "Master" or "Special Master."**

Although the Report that accompanies any Resolution is not official ABA Policy, it is useful in helping to understand the background of the Resolution. The Report was a product of 18 months of efforts by numerous representatives across the sections, divisions and forums of the ABA and discusses the thinking behind this important Resolution.

That thinking has not changed. Nothing in this Resolution changes either the substantive provisions of the Guidelines or the guidance provided in the Report. For convenience, the Court-Appointed Neutrals Committee may produce an unofficial "reference" version of the report using the new terminology.

**The ABA Should Support Rule and Legislative Changes Designed to Substitute the term "Court-Appointed Neutral" for "Master" or "Special Master."**

Ultimately obtaining the benefits of "court-appointed neutral" as a name for the profession requires standardizing the name. As a practical matter, it is very difficult to expect courts or litigants to use a new name when rules or legislation use an old name. As changing the name to "Court-Appointed Neutrals" is the right thing to do for the

[19] *See* Bankr. R. 7001 ("[a]n adversary proceeding is governed by the rules of this Part VII."
[20] Advisory Committee Notes to Bankr. R. 7001.
[21] *See* 11 U.S.C. §1104.

Guidelines, it is also the right thing to do for rules and legislation. Like the National Association of Women Judges,[22] the ABA should support the effort to make this change.

**Conclusion**

In Midyear Resolution 19M100, in 2019, the ABA endorsed a broader way of thinking about how courts could make use of neutrals to assist the process of judicial administration. In this Resolution, the ABA gives that broad way of thinking a name—court-appointed neutral.

Respectfully submitted,

Hon. Ernestine S. Gray. (ret.), Chair
Judicial Division

Brian Pappas, Chair
Section of Dispute Resolution

August 2023

[22] *See* supra n.13 and accompanying text.

# Appendix D

# Fed. R. Civ. P. 53

**FEDERAL RULES OF CIVIL PROCEDURE**
**VI. TRIALS**

## Rule 53. Masters

(a) APPOINTMENT.

(1) *Scope.* Unless a statute provides otherwise, a court may appoint a neutral only to:

(A) perform duties consented to by the parties;

(B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by:

(i) some exceptional condition; or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.

(2) *Disqualification.* A master must not have a relationship to the parties, attorneys, action, or court that would require disqualification of a judge under 28 U.S.C. § 455, unless the parties, with the court's approval, consent to the appointment after the master discloses any potential grounds for disqualification.

(3) *Possible Expense or Delay.* In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

(b) ORDER APPOINTING MASTER.

(1) *Notice.* Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment.

(2) *Contents.* The appointing order must direct the master to proceed with all reasonable diligence and must state:

(A) The master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);

(B) the circumstances, if any, in which the master may communicate ex parte with the court or a party;

(C) the nature of the materials to be preserved and filed as the record of the master's activities;

(D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(g).

(3) *Issuing.* The court may issue the order only after:

(A) the master files an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455; and

(B) if a ground is disclosed, the parties, with the court's approval, waive the disqualification.

(4) *Amending.* The order may be amended at any time after notice to the parties and an opportunity to be heard.

(c) MASTER'S AUTHORITY.

(1) *In General.* Unless the appointing order directs otherwise, a master may:

(A) regulate all proceedings;

(B) take all appropriate measures to perform the assigned duties fairly and efficiently; and

(C) if conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence.

(2) *Sanctions.* The master may by order impose on a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

(d) MASTER'S ORDERS. A master who issues an order must file it and promptly serve a copy on each party. The clerk must enter the order on the docket.

(e) MASTER'S REPORTS. A master must report to the court as required by the appointing order. The master must file the report and promptly serve a copy on each party, unless the court orders otherwise.

(f) ACTION ON THE MASTER'S ORDER, REPORT, OR RECOMMENDATIONS.

(1) *Opportunity for a Hearing; Action in General.* In acting on a master's order, report, or recommendations, the court must give the parties notice and an opportunity to be heard; may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions.

(2) *Time to Object or Move to Adopt or Modify.* A party may file objections to — or a motion to adopt or modify — the master's order, report, or recommendations no later than 21days after a copy is served, unless the court sets a different time.

(3) *Reviewing Factual Findings.* The court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval, stipulate that:

(A) the findings will be reviewed for clear error; or

(B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.

(4) *Reviewing Legal Conclusions.* The court must decide de novo all objections to conclusions of law made or recommended by a master.

(5) *Reviewing Procedural Matters.* Unless the appointing order establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

(g) COMPENSATION.

(1) *Fixing Compensation.* Before or after judgment, the court must fix the master's compensation on the basis and terms stated in the appointing order, but the court may set a new basis and terms after giving notice and an opportunity to be heard.

(2) *Payment.* The compensation must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

(3) *Allocating Payment.* The court must allocate payment among the parties after considering the nature and amount of the controversy, the parties' means, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

(h) APPOINTING A MAGISTRATE JUDGE. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge states that the reference is made under this rule.

**HISTORY:**

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Mar. 27, 2003, eff. Dec. 1, 2003; Apr. 30, 2007, eff. Dec. 1, 2007.)

**HISTORY; ANCILLARY LAWS AND DIRECTIVES**

Other provisions:

**Notes of Advisory Committee on Rules.** *Subdivision (a).* This is a modification of former Equity Rule 68 (Appointment and Compensation of Masters).

*Subdivision (b).* This is substantially the first sentence of former Equity Rule 59 Reference to Master—Exceptional, Not Usual) extended to actions formerly legal. See *Ex parte Peterson,* 253 US 300, 40 S Ct 543, 64 L Ed 919 (1920).

*Subdivision (c).* This is former Equity Rules 62 (Powers of Master) and 65 (Claimants before Master Examinable by Him) with slight modifications. Compare former Equity Rules 49 (Evidence Taken Before Examiners, Etc.) and 51 (Evidence Taken Before Examiners, Etc.).

*Subdivision (d).* (1) This is substantially a combination of the second sentence of former Equity Rule 59 (Reference to Master—Exceptional, Not Usual) and former Equity Rule 60 (Proceedings Before Master). Compare former Equity Rule 53 (Notice of Taking Testimony Before Examiner, Etc.).

(2) This is substantially former Equity Rule 52 (Attendance of Witnesses Before Commissioner, Master, or Examiner).

(3) This is substantially former Equity Rule 63 (Form of Accounts Before Master).

*Subdivision (e).* This contains the substance of former Equity Rules 61 (Master's Report--Documents Identified but not Set Forth), 61 1/2 (Master's Report--Presumption as to Correctness--Review), and 66 (Return of Master's Report--Exceptions--Hearing), with modifications as to the form and effect of the report and for inclusion of reports by auditors, referees, and examiners, and references in actions formerly legal. Compare former Equity Rules 49 (Evidence Taken Before Examiners, Etc.) and 67 (Costs on Exceptions to Master's Report). See *Camden v Stuart,* 144 US 104, 12 S Ct 585, 36 L Ed 363 (1892); *Ex parte Peterson,* 253 US 300, 40 S Ct 543, 64 L Ed 919 (1920).

**Notes of Advisory Committee on 1966 amendments.** These changes are designed to preserve the admiralty practice whereby difficult computations are referred to a commissioner or assessor, especially after an interlocutory judgment determining liability. As to separation of issues for trial see Rule 42(b).

**Notes of Advisory Committee on 1983 amendments.** *Subdivision (a).* The creation of full-time magistrates, who serve at government expense and have no nonjudicial duties competing for their time, eliminates the need to appoint standing masters. Thus the prior provision in Rule 53(a) authorizing the appointment of standing masters is deleted. Additionally,

the definition of "master" in subdivision (a) now eliminates the superseded office of commissioner.

The term "special master" is retained in Rule 53 in order to maintain conformity with *28 U.S.C. § 636(b)(2),* authorizing a judge to designate a magistrate "to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States District Courts." Obviously, when a magistrate serves as a special master, the provisions for compensation of masters are inapplicable, and the amendment to subdivision (a) so provides.

Although the existence of magistrates may make the appointment of outside masters unnecessary in many instances, see, e.g., *Gautreaux v. Chicago Housing Authority,* 384 F. Supp. 37 (N.D. Ill. 1974), mandamus denied sub nom., *Chicago Housing Authority v. Austin,* 511 F.2d 82 (7th Cir. 1975); *Avco Corp. v. American Tel. & Tel. Co.,* 68 F.R.D. 532 (S.D. Ohio 1975), such masters may prove useful when some special expertise is desired or when a magistrate is unavailable for lengthy and detailed supervision of a case.

*Subdivision (b).* The provisions of 28 U.S.C. § 636(6)(2) not only permit magistrates to serve as masters under Rule 53(b) but also eliminate the exceptional condition requirement of Rule 53(b) when the reference is made with the consent of the parties. The amendment to subdivision (b) brings Rule 53 into harmony with the statute by exempting magistrates, appointed with the consent of the parties, from the general requirement that some exceptional condition requires the reference. It should be noted that subdivision (b) does not address the question, raised in recent decisional law and commentary, as to whether the exceptional condition requirement is applicable when private masters who are not magistrates are appointed with the consent of the parties. See Silberman, Masters and Magistrates Part II: The American Analogue, 50 N.Y.U. L.Rev. 1297, 1354 (1975).

*Subdivision (c).* The amendment recognizes the abrogation of Federal Rule 43(c) by the Federal Rules of Evidence.

*Subdivision (f).* The new subdivision responds to confusion flowing from the dual authority for references of pretrial matters to magistrates. Such references can be made, with or without the consent of the parties, pursuant to Rule 53 or under *28 U.S.C. § 636(b)(I)(A)* and (b)(1)(B). There are a number of distinctions between references made under the statute and under the rule. For example, under the statute nondispositive pretrial matters may be referred to a magistrate, without consent, for final determination with reconsideration by the district judge if the magistrate's order is clearly erroneous or contrary to law. Under the rule, however, the appointment of a master, without consent of the parties, to supervise discovery would require some exceptional condition (Rule 53(b)) and would subject the proceedings to the report procedures of Rule 53(e). If an order of reference does not clearly articulate the source of the court's authority the resulting proceedings could be subject to attack on grounds of the magistrate's noncompliance with the provisions of Rule 53. This subdivision therefore establishes a presumption that the limitations of Rule 53 are not applicable unless the reference is specifically made subject to Rule 53.

A magistrate serving as a special master under 28 U.S.C. § 636(b)(2) is governed by the provisions of Rule 53, with the exceptional condition requirement lifted in the case of a consensual reference.

**Notes of Advisory Committee on 1987 amendments.** The amendments are technical. No substantive change is intended.

**Notes of Advisory Committee on 1991 amendment.** The purpose of the revision is to expedite proceedings before a master. The former rule required only a filing of the master's report, with the clerk then notifying the parties of the filing. To receive a copy, a party would

then be required to secure it from the clerk. By transmitting directly to the parties, the master can save some efforts of counsel. Some local rules have previously required such action by the master.

**Notes of Advisory Committee on 1993 amendments.** This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.

**Notes of Advisory Committee on 2003 amendments.** Rule 53 is revised extensively to reflect changing practices in using masters. From the beginning in 1938, Rule 53 focused primarily on special masters who perform trial functions. Since then, however, courts have gained experience with masters appointed to perform a variety of pretrial and post-trial functions. See Winging, Hooper, Leary, Miletich, Reagan, & Shapard, Special Masters' Incidence and Activity (FJC 2000). This revised Rule 53 recognizes that in appropriate circumstances masters may properly be appointed to perform these functions and regulates such appointments. Rule 53 continues to address trial masters as well, but permits appointment of a trial master in an action to be tried to a jury only if the parties consent. The new rule clarifies the provisions that govern the appointment and function of masters for all purposes. Rule 53(g) also changes the standard of review for findings of fact made or recommended by a master. The core of the original Rule 53 remains, including its prescription that appointment of a master must be the exception and not the rule.

Special masters are appointed in many circumstances outside the Civil Rules. Rule 53 applies only to proceedings that Rule 1 brings within its reach.

*Subdivision (a)(1).* District judges bear primary responsibility for the work of their courts. A master should be appointed only in limited circumstances. Subdivision (a)(1) describes three different standards, relating to appointments by consent of the parties, appointments for trial duties, and appointments for pretrial or posttrial duties.

*Consent Masters.* Subparagraph (a)(1)(A) authorizes appointment of a master with the parties' consent. Party consent does not require that the court make the appointment; the court retains unfettered discretion to refuse appointment.

*Trial Masters.* Use of masters for the core functions of trial has been progressively limited. These limits are reflected in the provisions of subparagraph (a)(1)(B) that restrict appointments to exercise trial functions. The Supreme Court gave clear direction to this trend in *La Buy v. Howes Leather Co.,* 352 U.S. 249 (1957); earlier roots are sketched in *Los Angeles Brush Mfg. Corp. v. James,* 272 U.S. 701 [1 L. Ed. 2d 290] (1927). As to nonjury trials, this trend has developed through elaboration of the "exceptional condition" requirement in present Rule 53(b). This phrase is retained, and will continue to have the same force as it has developed. Although the provision that a reference "shall be the exception and not the rule" is deleted, its meaning is embraced for this setting by the exceptional condition requirement.

Subparagraph (a)(1)(B)(ii) carries forward the approach of present Rule 53(b), which exempts from the "exceptional condition" requirement "matters of account and of difficult computation of damages." This approach is justified only as to essentially ministerial determinations that require mastery of much detailed information but that do not require extensive determinations of credibility. Evaluations of witness credibility should only be assigned to a trial master when justified by an exceptional condition.

The use of a trial master without party consent is abolished as to matters to be decided by a jury unless a statute provides for this practice.

Abolition of the direct power to appoint a trial master as to issues to be decided by a jury leaves the way free to appoint a trial master with the consent of all parties. A trial master should be appointed in a jury case, with consent of the parties and concurrence of the court, only if the parties waive jury trial with respect to the issues submitted to the master or if the master's

findings are to be submitted to the jury as evidence in the manner provided by former Rule 53(e)(3). In no circumstance may a master be appointed to preside at a jury trial.

The central function of a trial master is to preside over an evidentiary hearing on the merits of the claims or defenses in the action. This function distinguishes the trial master from most functions of pretrial and post-trial masters. If any master is to be used for such matters as a preliminary injunction hearing or a determination of complex damages issues, for example, the master should be a trial master. The line, however, is not distinct. A pretrial master might well conduct an evidentiary hearing on a discovery dispute, and a post-trial master might conduct evidentiary hearings on questions of compliance.

Rule 53 has long provided authority to report the evidence without recommendations in nonjury trials. This authority is omitted from Rule 53(a)(1)(B). In some circumstances a master may be appointed under Rule 53(a)(1)(A) or (C) to take evidence and report without recommendations.

For nonjury cases, a master also may be appointed to assist the court in discharging trial duties other than conducting an evidentiary hearing.

*Pretrial and Post-Trial Masters.* Subparagraph (a)(1)(C) authorizes appointment of a master to address pretrial or post-trial matters. Appointment is limited to matters that cannot be addressed effectively and in a timely fashion by an available district judge or magistrate judge of the district. A master's pretrial or posttrial duties may include matters that could be addressed by a judge, such as reviewing discovery documents for privilege, or duties that might not be suitable for a judge. Some forms of settlement negotiations, investigations, or administration of an organization are familiar examples of duties that a judge might not feel free to undertake.

*Magistrate Judges.* Particular attention should be paid to the prospect that a magistrate judge may be available for special assignments. United States magistrate judges are authorized by statute to perform many pretrial functions in civil actions. 28 U.S.C. § 636(6)(1). Ordinarily a district judge who delegates these functions should refer them to a magistrate judge acting as magistrate judge.

There is statutory authority to appoint a magistrate judge as special master. 28 U.S.C. § 636(b)(2). In special circumstances, or when expressly authorized by a statute other than § 636(b)(2), it may be appropriate to appoint a magistrate judge as a master when needed to perform functions outside those listed in § 636(b)(1). There is no apparent reason to appoint a magistrate judge to perform as master duties that could be performed in the role of magistrate judge. Party consent is required for trial before a magistrate judge, moreover, and this requirement should not be undercut by resort to Rule 53 unless specifically authorized by statute; see 42 U.S.C. § 2000e-5(f)(5).

*Pretrial Masters.* The appointment of masters to participate in pretrial proceedings has developed extensively over the last two decades as some district courts have felt the need for additional help in managing complex litigation. This practice is not well regulated by present Rule 53, which focuses on masters as trial participants. Rule 53 is amended to confirm the authority to appoint and to regulate the use of pretrial masters.

A pretrial master should be appointed only when the need is clear. Direct judicial performance of judicial functions may be particularly important in cases that involve important public issues or many parties. At the extreme, a broad delegation of pretrial responsibility as well as a delegation of trial responsibilities can run afoul of Article III.

A master also may be appointed to address matters that blur the divide between pretrial and trial functions. The court's responsibility to interpret patent claims as a matter of law, for example, may be greatly assisted by appointing a master who has expert knowledge of the field in which the patent operates. Review of the master's findings will be de novo under Rule

53(g)(4), but the advantages of initial determination by a master may make the process more effective and timely than disposition by the judge acting alone. Determination of foreign law may present comparable difficulties. The decision whether to appoint a master to address such matters is governed by subdivision (a)(1)(C), not the trial-master provisions of subdivision (a)(1)(B).

*Post-Trial Masters.* Courts have come to rely on masters to assist in framing and enforcing complex decrees. Present Rule 53 does not directly address this practice. Amended Rule 53 authorizes appointment of post-trial masters for these and similar purposes. The constraint of subdivision (a)(l)(C) limits this practice to cases in which the master's duties cannot be performed effectively and in a timely fashion by an available district judge or magistrate judge of the district.

Reliance on a master is appropriate when a complex decree requires complex policing, particularly when a party has proved resistant or intransigent. This practice has been recognized by the Supreme Court, see *Local 28, Sheet Metal Workers' Internat. Assn. v. EEOC,* 478 U.S. 421, 481-482 [92 L. Ed. 2d 344, 391-392] (1986). The master's role in enforcement may extend to investigation in ways that are quite unlike the traditional role of judicial officers in an adversary system.

*Expert Witness Overlap.* This rule does not address the difficulties that arise when a single person is appointed to perform overlapping roles as master and as court-appointed expert witness under Evidence Rule 706. Whatever combination of functions is involved, the Rule 53(a)(1)(B) limit that confines trial masters to issues to be decided by the court does not apply to a person who also is appointed as an expert witness under Evidence Rule 706.

*Subdivision (a)(2), and (3).* Masters are subject to the Code of Conduct for United States Judges, with exceptions spelled out in the Code. Special care must be taken to ensure that there is no actual or apparent conflict of interest involving a master. The standard of disqualification is established by 28 U.S.C. § 455. The affidavit required by Rule 53(b)(3) provides an important source of information about possible grounds for disqualification, but careful inquiry should be made at the time of making the initial appointment. The disqualification standards established by § 455 are strict. Because a master is not a public judicial officer, it may be appropriate to permit the parties to consent to appointment of a particular person as master in circumstances that would require disqualification of a judge. The judge must be careful to ensure that no party feels any pressure to consent, but with such assurances and with the judge's own determination that there is no troubling conflict of interests or disquieting appearance of impropriety-consent may justify an otherwise barred appointment.

One potential disqualification issue is peculiar to the master's role. It may happen that a master who is an attorney represents a client whose litigation is assigned to the judge who appointed the attorney as master. Other parties to the litigation may fear that the attorney-master will gain special respect from the judge. A flat prohibition on appearance before the appointing judge during the time of service as master, however, might in some circumstances unduly limit the opportunity to make a desirable appointment. These matters may be regulated to some extent by state rules of professional responsibility. The question of present conflicts, and the possibility of future conflicts, can be considered at the time of appointment. Depending on the circumstances, the judge may consider it appropriate to impose a non-appearance condition on the lawyer master, and perhaps on the master's firm as well.

*Subdivision (b).* The order appointing a pretrial master is vitally important in informing the master and the parties about the nature and extent of the master's duties and authority. Care must be taken to make the order as precise as possible. The parties must be given notice and opportunity to be heard on the question whether a master should be appointed and on the terms

of the appointment. To the extent possible, the notice should describe the master's proposed duties, time to complete the duties, standards of review, and compensation. Often it will be useful to engage the parties in the process of identifying the master, inviting nominations, and reviewing potential candidates. Party involvement may be particularly useful if a pretrial master is expected to promote settlement.

The hearing requirement of Rule 53(b)(1) can be satisfied by an opportunity to make written submissions unless the circumstances require live testimony.

Rule 53(b)(2) requires precise designation of the master's duties and authority. Clear identification of any investigating or enforcement duties is particularly important. Clear delineation of topics for any reports or recommendations is also an important part of this process. And it is important to protect against delay by establishing a time schedule for performing the assigned duties. Early designation of the procedure for fixing the master's compensation also may provide useful guidance to the parties.

Ex parte communications between a master and the court present troubling questions. Ordinarily the order should prohibit such communications, assuring that the parties know where authority is lodged at each step of the proceedings. Prohibiting ex parte communications between master and court also can enhance the role of a settlement master by assuring the parties that settlement can be fostered by confidential revelations that will not be shared with the court. Yet there may be circumstances in which the master's role is enhanced by the opportunity for ex parte communications with the court. A master assigned to help coordinate multiple proceedings, for example, may benefit from off-the-record exchanges with the court about logistical matters. The rule does not directly regulate these matters. It requires only that the court exercise its discretion and address the topic in the order of appointment.

Similarly difficult questions surround ex parte communications between a master and the parties. Ex parte communications may be essential in seeking to advance settlement. Ex parte communications also may prove useful in other settings, as with in camera review of documents to resolve privilege questions. In most settings, however, ex parte communications with the parties should be discouraged or prohibited. The rule requires that the court address the topic in the order of appointment.

Subdivision (b)(2)(C) provides that the appointment order must state the nature of the materials to be preserved and filed as the record of the master's activities, and (b)(2)(D) requires that the order state the method of filing the record. It is not feasible to prescribe the nature of the record without regard to the nature of the master's duties. The records appropriate to discovery duties may be different from those appropriate to encouraging settlement, investigating possible violations of a complex decree, or making recommendations for trial findings. A basic requirement, however, is that the master must make and file a complete record of the evidence considered in making or recommending findings of fact on the basis of evidence. The order of appointment should routinely include this requirement unless the nature of the appointment precludes any prospect that the master will make or recommend evidence-based findings of fact. In some circumstances it may be appropriate for a party to file materials directly with the court as provided by Rule 5(e), but in many circumstances filing with the court may be inappropriate. Confidentiality is important with respect to many materials that may properly be considered by a master. Materials in the record can be transmitted to the court, and filed, in connection with review of a master's order, report, or recommendations under subdivisions (f) and (g). Independently of review proceedings, the court may direct filing of any materials that it wishes to make part of the public record.

The provision in subdivision (b)(2)(D) that the order must state the standards for reviewing the master's orders, findings, and recommendations is a reminder of the provisions of

subdivision (g)(3) that recognize stipulations for review less searching than the presumptive requirement of de novo decision by the court. Subdivision (b)(2)(D) does not authorize the court to supersede the limits of subdivision (g)(3).

In setting the procedure for fixing the master's compensation, it is useful at the outset to establish specific guidelines to control total expense. The court has power under subdivision (h) to change the basis and terms for determining compensation after notice to the parties.

Subdivision (b)(3) permits entry of the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 *U.S.C.* § *455.* If the affidavit discloses a possible ground for disqualification, the order can enter only if the court determines that there is no ground for disqualification or if the parties, knowing of the ground for disqualification, consent with the court's approval to waive the disqualification.

The provision in Rule 53(b)(4) for amending the order of appointment is as important as the provisions for the initial order. Anything that could be done in the initial order can be done by amendment. The hearing requirement can be satisfied by an opportunity to make written submissions unless the circumstances require live testimony.

*Subdivision (c).* Subdivision (c) is a simplification of the provisions scattered throughout present Rule 53. It is intended to provide the broad and flexible authority necessary to discharge the master's responsibilities. The most important delineation of a master's authority and duties is provided by the Rule 53(b) appointing order.

*Subdivision (d).* The subdivision (d) provisions for evidentiary hearings are reduced from the extensive provisions in current Rule 53. This simplification of the rule is not intended to diminish the authority that may be delegated to a master. Reliance is placed on the broad and general terms of subdivision (c).

*Subdivision (e).* Subdivision (e) provides that a master's order must be filed and entered on the docket. It must be promptly served on the parties, a task ordinarily accomplished by mailing or other means as permitted by Rule 5(b). In some circumstances it may be appropriate to have the clerk's office assist the master in mailing the order to the parties.

*Subdivision (f).* Subdivision (f) restates some of the provisions of present Rule 53(e)(1). The report is the master's primary means of communication with the court. The materials to be provided to support review of the report will depend on the nature of the report. The master should provide all portions of the record preserved under Rule 53(b)(2)(C) that the master deems relevant to the report. The parties may designate additional materials from the record, and may seek permission to supplement the record with evidence. The court may direct that additional materials from the record be provided and filed. Given the wide array of tasks that may be assigned to a pretrial master, there may be circumstances that justify sealing a report or review record against public access—a report on continuing or failed settlement efforts is the most likely example. A post-trial master may be assigned duties in formulating a decree that deserve similar protection. Such circumstances may even justify denying access to the report or review materials by the parties, although this step should be taken only for the most compelling reasons. Sealing is much less likely to be appropriate with respect to a trial master's report.

Before formally making an order, report, or recommendations, a master may find it helpful to circulate a draft to the parties for review and comment. The usefulness of this practice depends on the nature of the master's proposed action.

*Subdivision (g).* The provisions of subdivision (g)(1), describing the court's powers to afford a hearing, take evidence, and act on a master's order, report, or recommendations are drawn from present Rule 53(e)(2), but are not limited, as present Rule 53(e)(2) is limited, to the report of a trial master in a nonjury action. The requirement that the court must afford an

opportunity to be heard can be satisfied by taking written submissions when the court acts on the report without taking live testimony.

The subdivision (g)(2) time limits for objecting to- or seeking adoption or modification of—a master's order, report, or recommendations, are important. They are not jurisdictional. Although a court may properly refuse to entertain untimely review proceedings, the court may excuse the failure to seek timely review. The basic time period is lengthened to 20 days because the present 10-day period may be too short to permit thorough study and response to a complex report dealing with complex litigation. If no party asks the court to act on a master's report, the court is free to adopt the master's action or to disregard it at any relevant point in the proceedings.

Subdivision (g)(3) establishes the standards of review for a master's findings of fact or recommended findings of fact. The court must decide de novo all objections to findings of fact made or recommended by the master unless the parties stipulate, with the court's consent, that the findings will be reviewed for clear error or—with respect to a master appointed on the parties' consent or appointed to address pretrial or post-trial matters that the findings will be final. Clear-error review is more likely to be appropriate with respect to findings that do not go to the merits of the underlying claims or defenses, such as findings of fact bearing on a privilege objection to a discovery request. Even if no objection is made, the court is free to decide the facts de novo; to review for clear error if an earlier approved stipulation provided clear-error review; or to withdraw its consent to a stipulation for clear-error review or finality, and then to decide de novo. If the court withdraws its consent to a stipulation for finality or clear-error review, it may or reopen the opportunity to object.

Under Rule 53(g)(4), the court must decide de novo all objections to conclusions of law made or recommended by a master. As with findings of fact, the court also may decide conclusions of law de novo when no objection is made.

Apart from factual and legal questions, masters often make determinations that, when made by a trial court, would be treated as matters of procedural discretion. The court may set a standard for review of such matters in the order of appointment, and may amend the order to establish the standard. If no standard is set by the original or amended order appointing the master, review of procedural matters is for abuse of discretion. The subordinate role of the master means that the trial court's review for abuse of discretion may be more searching than the review that an appellate court makes of a trial court.

If a master makes a recommendation on any matter that does not fall within Rule 53(g)(3), (4), or (5), the court may act on the recommendation under Rule 53(g)(1).

*Subdivision (h).* The need to pay compensation is a substantial reason for care in appointing private persons as masters.

Payment of the master's fees must be allocated among the parties and any property or subject-matter within the court's control. The amount in controversy and the means of the parties may provide some guidance in making the allocation. The nature of the dispute also may be important--parties pursuing matters of public interest, for example, may deserve special protection. A party whose unreasonable behavior has occasioned the need to appoint a master, on the other hand, may properly be charged all or a major portion of the master's fees. It may be proper to revise an interim allocation after decision on the merits. The revision need not await a decision that is final for purposes of appeal, but may be made to reflect disposition of a substantial portion of the case.

The basis and terms for fixing compensation should be stated in the order of appointment. The court retains power to alter the initial basis and terms, after notice and an opportunity to be heard, but should protect the parties against unfair surprise.

The provision of former Rule 53(a) that the "provision for compensation shall not apply when a United States Magistrate Judge is designated to serve as a master" is deleted as unnecessary. Other provisions of law preclude compensation.

*Subdivision (i).* Rule 53(i) carries forward unchanged former Rule 53(f).

**NOTES:**

**Related Statutes & Rules:**

Clerks of courts being ineligible to appointment as masters, 28 USCS § 957.

Appointment of master by single judge in three judge court, 28 USCS § 2284.

Pretrial determination as to preliminary reference, USCS Federal Rules of Civil Procedure, Rule 16.

Adoption of master's findings by court, USCS Federal Rules of Civil Procedure, Rule 52(a).

Judgment not being required to recite report, USCS Federal Rules of Civil Procedure, Rule 54(a).

# Appendix E

**AMERICAN BAR ASSOCIATION**

**JUDICIAL DIVISION**
**SECTION OF DISPUTE RESOLUTION**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

RESOLVED, That the American Bar Association adopts the Model Rule on Court-Appointed Neutrals dated August 2023; and

FURTHER RESOLVED, That the American Bar Association urges state, local, territorial and tribal courts to adopt the Model Rule on Court-Appointed Neutrals dated August 2023.

## MODEL RULE ON COURT-APPOINTED NEUTRALS

(a) Definition of Court-Appointed Neutral

A Court-Appointed Neutral is a disinterested professional appointed as an adjunct special officer appointment to assist a court in its case-management, adjudicative or post-resolution responsibilities in accordance with the provisions of this Rule and any standards established by this Court for qualification to hold such an appointment.

(b) Factors to Be Considered in Appointing Court-Appointed Neutrals

(1) Unless prohibited by law, at the outset or other appropriate times, in complex litigation and other cases that create particular needs that a neutral might satisfy, the court and the parties may consider whether use of a neutral would assist with the disposition of issues in the case. A court may consider on its own, or upon the motion of one or more of the parties, whether to appoint a neutral.
(2) In determining whether to appoint a neutral and the scope of any appointment, the court should consider whether the circumstances demonstrate that the likely benefit to the parties of appointing a neutral outweighs the expense, including, without limitation;
  (A) whether the appointment, with its attendant expense, is proportionate to the issues and needs of the case;
  (B) the ability of the parties to pay for the services being provided by the neutral;
  (C) whether the appointment can be made without imposing an unreasonable delay;
  (D) whether a neutral likely could address matters within the scope of the appointment more expeditiously than is practicable without the neutral, considering the court's case load and the issues and needs of the case;

(E) whether the appointment will be otherwise unfair to any party;
(F) whether the appointee has the knowledge, skills, ability, and training to perform the needed tasks; and
(G) whether, notwithstanding the possibility that a court may ultimately need to review privileged or confidential material, a neutral's involvement may assist by insulating the court from the need to review claimed privileged or confidential information that may not be necessary for the court's consideration.[38]

(c) Services a Court May Authorize the Court-Appointed Neutral to Perform

Unless law provides otherwise, and subject to any court rules, procedures (including the provisions of any court-based alternative dispute resolution program) and principles of ethics applicable to the services being performed, in appropriate cases a court may authorize a neutral to perform the following services:

(1) conduct pre-trial case management;
(2) coordinate cases in different jurisdictions;
(3) provide advice or information to the court on complex or specialized subjects;
(4) manage discovery;
(5) conduct reviews of privileged, trade secret, and confidential materials;
(6) investigate and report on factual matters identified by the court;
(7) perform accountings, and calculate damages, attorneys' fees and costs;
(8) facilitate resolution of disputes between or among otherwise aligned parties and/or their counsel;
(9) monitor implementation of and compliance with court orders;
(10) conduct and/or oversee claims administration, including the allocation of funds among claimants;
(11) oversee settlement administration; and,
(12) facilitate the parties' efforts to resolve differences.

Before appointing a neutral to serve in any other role, the Court will provide the parties specific notice and opportunity to be heard concerning any role proposed to be performed.

(d) Authority of the Court-Appointed Neutral

Subject to the provisions of Rule (h) below a neutral may:

(1) With the exception of holding trial proceedings, do the following in order to effectuate the services authorized by the court:

[38] Appointment of a neutral is not intended to supplant direct judicial performance of judicial functions or to impair the parties' ability to have their cases decided by the assigned judge. .It is therefore particularly important that the court obtain the parties' input and seriously consider and weigh these factors. These assessments are intended to ensure the fairness and relative benefits of the appointment, the quality of service and the fit between the neutral and tasks to be performed. The purpose of appointing a neutral is to assist and support the administration of justice and, when relative cost or delay is the rationale for appointment, to reduce the cost and delay associated with litigation. A neutral should be appointed only when the need is clear.

(A) conduct hearings; compel, take and record evidence; and issue orders; recommend findings of fact and conclusions of law relevant to motions or orders;
(B) make evidentiary rulings; and
(C) sanction parties (other than for contempt); and

(2) In addition, but only with the parties' consent and the court's approval, the neutral may:
(A) conduct non-jury trial proceedings;
(B) make findings of fact and conclusions of law for trial proceedings on the merits;
(C) mediate the potential settlement of an action in which the neutral previously served or will serve in a quasi-adjudicative capacity; and
(D) exercise such other powers to which the parties consent and the court approves.

(e) Appointment of Neutral

(1) Selection
(A) Before appointing a neutral or amending an appointing order, a court must provide notice to the parties and permit them to identify any objection they may have to the appointment or amendment, to suggest candidates for appointment and to propose any provisions they may wish to have or not to have included in an appointment order. If the court deems appropriate, it may afford the parties an opportunity for oral argument on these issues.
(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' suggestions, and the needs of the case. The court should make this appointment in a manner that ensures impartial, 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 submit a sworn statement representing that the prospective appointee's (and, if applicable, the individual's firm) has conducted a conflicts check and disclosing:
i) whether the prospective appointee has any information, including but not limited to information regarding any relationship to the parties, their attorneys or the action, any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence from the perspective of any of the parties, including any matters described in [the jurisdiction's equivalent of 28 U.S.C. § 455] governing judicial disqualification; and
ii) The number of times in the past twenty-four (24) months that the prospective appointee has, as of the date of the affidavit, been appointed by (x) the judge making the appointment, and (y) any judge within the court system in which the case is pending, to be a court-appointed neutral.
(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, this rule, and the court's instructions.

(C) Within fifteen (15) 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 or limit its scope.
(G) A neutral, the parties, and their counsel have a continuing obligation throughout the course of the appointment to correct errors in and to supplement information concerning the disclosures described above. Upon good cause shown, a party may be permitted to submit this information to the neutral and the court in confidence.

(f) Appointing Order

(1) The appointing order shall:
(A) identify the particular function(s) under Rule (c) that the neutral is expected to serve and the services the neutral is expected to provide;
(B) identify the court's reasons for making the appointment including the court's consideration of the factors described in Rule (b)(2);
(C) 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;
(D) state the circumstances, if any, in which the neutral may communicate ex parte with the court or a party;
(E) state the circumstances, if any, in which the standards of review will differ from those set forth in Rule (h)(4);
(F) state whether the standard of review has been altered by approved party stipulation in accordance with Rule (h)(4); and
(G) state whether any or all proceedings before the neutral must be transcribed or recorded.
(2) The powers to be exercised by the neutral are those identified in the appointing order. Unless the appointing order directs otherwise, in exercising these powers, a neutral may
(A) regulate all proceedings;
(B) take all appropriate measures to perform the assigned duties fairly and efficiently; and
(C) if conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence;
(3) The court shall determine and set forth in the appointing order the basis and terms of the neutral's compensation, as follows:
(A) at the outset of the appointment, the court shall set the rate of compensation and address reimbursement for expenses. The court shall identify the source of funds, stating whether and how the parties will share

responsibility for the neutral's compensation; shall state whether the neutral may recommend, subject to review under Rule (h)(4)(B), that expenses be reallocated based on the parties' respective responsibilities in connection with particular disputes; and shall direct how and to whom invoices are to be submitted for payment.

(B) The court may modify the neutral's compensation through an amendment of the appointing order at any time subsequent to the appointment, by adjusting the rate of compensation and the source of funds, as the circumstances warrant, including altering responsibility for costs incurred because party has engaged in unreasonable conduct necessitating the expense.

(4) The appointing order may also state any of the following:

(A) whether or the extent to which the neutral is prohibited from providing any of the services described in Rule (c);

(B) whether or the extent to which the neutral is prohibited from exercising any of the authority described in Rule (d)(1);

(C) whether or the extent to which the court will permit the neutral, subject to the parties' consent, to exercise any of the authority described in Rule (d)(2);

(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;

(E) whether and how materials and exhibits should 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 evidentiary or trial proceedings 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;

(F) procedures that will take effect if the neutral is unable to fulfill the duties specified in the appointing order.

(5) The appointing order may be amended by the court on its own or upon motion of a party.

(g) Neutral's Responsibilities

(1) After appointment, the neutral should proceed with diligence to ensure the just, speedy, and inexpensive performance of the neutral's responsibilities.

(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, along with any testimony or exhibits required pursuant to Rule (f)(2)(E), with the court and ensure prompt service of a copy on each party.

(C) A neutral appointed to conduct a non-jury trial proceeding or to make recommendations on 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, and request comments on, a draft order, report or recommendation with all parties before filing the neutral's final version.

(E) A neutral shall provide any additional reports to the court as the appointing order may require.

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

(1) 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.

(2) 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 in no later than 14 calendar days, unless the court sets a different time. Any objection to or motion must show that the argument being asserted was presented to the neutral for consideration. If seeking to challenge a proposed finding of fact, the objection must specifically identify the finding to which the party objects and identify the evidence of record that creates a dispute as to the finding, or the reasons why evidence supporting the finding should have been excluded.

(B) The court's rules governing motion practice apply to responses and replies, unless the court orders otherwise.

(3) Action by the Court

(A) In reviewing 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 on any order, report or recommendations by the neutral.

(4) Standards for Review by the Court

In the absence of a stipulation by the parties to waive review entirely under (h)(5) below and subject to applicable law, 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 Rule (h)(2)(A):

(A) the court shall review conclusions of law de novo;

(B) with regard to findings of fact the court shall decide de novo all objections to findings of fact made or recommended by a neutral, unless the parties, with the court's approval, stipulate that:

(i) the findings will be reviewed for clear error; or

(ii) the findings of a neutral will be final; and

(C) procedural rulings shall be reviewed for abuse of discretion.

(5) Stipulations That Waive Review by the Court

Subject to the Court's approval, applicable law and Rule (g)(2)(C), above

(A) If the parties stipulate that the neutral may conduct trial proceedings; or

(B) if the parties stipulate that the neutral may make other final findings of fact and conclusions of law; then

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.

## REPORT TO THE HOUSE OF DELEGATES

## JUDICIAL DIVISION
## SECTION OF DISPUTE RESOLUTION

### Introduction

At its midyear meeting in January 2019, the American Bar Association ("ABA") House of Delegates approved ABA "Guidelines on the Appointment and Use of Special Masters in Federal and State Civil Litigation" (the "Guidelines").[1] The Guidelines presented to and adopted by the House of Delegates resulted from 18 months of effort by a working group that included representatives of the National Conference of Federal Trial Judges, the National Conference of State Trial Judges, the Lawyers Conference, the ABA Standing Committee on the American Judicial System, and the ABA's Litigation, Business Law, Dispute Resolution, Intellectual Property Law, Tort Trial and Insurance Practice, and Antitrust Sections on best practices concerning the use, selection, administration, and evaluation of court-appointed neutrals. The central principle of the Guidelines is that "[i]t should be an accepted part of judicial administration in complex litigation and in other cases that create particular needs that a special master might satisfy, for courts and the parties to consider using a special master and to consider using special masters not only after particular issues have developed, but at the outset of litigation."[2]

Since the ABA adopted the Guidelines, what is now the ABA Judicial Division Lawyers Conference Court-Appointed Neutrals Committee (the "Committee") has worked on implementing the Guidelines' precepts. The Committee includes both active and retired federal and state judges, practicing lawyers with a wide range of experience and dockets, ADR professionals with a wide range of experience (some of whom have and others who have not practiced as court-appointed neutrals), academics, and leadership from the Judicial Division and other divisions, sections and forums, many of whom designated liaisons to participate in, report back, and comment on, the Committee's work.

This Committee is working to implement the Guidelines in many ways. For example, the Committee has worked on developing principles of ethics for court-appointed neutrals; drafting criteria for selecting court-appointed neutrals to a roster and a survey instrument to evaluate the work of court-appointed neutrals; drafting articles and making presentations concerning the Guidelines and how they might be applied and

[1] www.americanbar.org/content/dam/aba/directories/policy/midyear-2019/100-midyear-2019.pdf; see also American Bar Ass'n Policy and Procedures Handbook 2022-2023 at 193 ("Greenbook"). More recent thinking has led many to conclude that "Court-Appointed Neutral" both better serves and better describes the role of individuals appointed in what could be many different ways to assist the Court, and while the Federal Rules of Civil Procedure use "master" to describe this role, various states use dozens of terms including commissioner, special magistrate, examiner, technical advisor, special facilitator, judicial ombuds, court adjunct, civil adjutant, monitor, referee or special referee, investigator, hearing officer and others. The Model Rule uses "Court-Appointed Neutrals" to avoid the use of the term "master," and to capture the role regardless of the many titles that states have been using. The Judicial Division and Section of Dispute Resolution are sponsoring a separate Resolution to revise the in the Guidelines to use the term "Court-Appointed Neutral."

[2] Guideline 1, *supra* n.1.

urging that Bankruptcy Rule 9031 be amended to permit courts responsible for cases under the Bankruptcy Code to use court-appointed neutrals in the same way as they are used in other federal cases.[3]

This Resolution seeks House of Delegates' approval of an integral piece of this effort to implement the Guidelines: the first-ever proposed Model Rule for states to use concerning the appointment and use of court-appointed neutrals. This Model Rule is the product of three years of additional effort. The work began with a Rules Subcommittee of the Court-Appointed Neutrals Committee that researched and characterized the various state rules that have been adopted, analyzed the essential issues addressed by these rules, and drafted language to address those issues in a manner that effectuated the Guidelines.

After months of work on this project, the Subcommittee provided a draft to the full Court-Appointed Neutrals Committee. The full Committee analyzed and revised the draft over an additional period of approximately nine months to produce a "discussion draft."

This discussion draft was then publicized on websites and social media and specifically forwarded for comment to numerous potentially interested sections, divisions, forums and conferences within the ABA, and organizations outside the ABA. The sections, divisions, forums, and conferences within the ABA that the Judicial Division consulted in this process include the Section of Dispute Resolution, the Section of Litigation, the Business Law Section, the Section of Intellectual Property Law, the Section of Antitrust Law, the Tort Trial and Insurance Practice Section, the Forum on Construction Law, the Solo, Small Firm and General Practice Division, the Senior Lawyers Division, the Young Lawyers Division, the Real Property, Trust and Estate Law Section, the National Conference of Federal Trial Judges, the National Conference of State Trial Judges, the Appellate Judges Conference, the National Conference of the Administrative Law Judiciary, the National Conference of Specialized Court Judges, the Tribal Courts Council and the Lawyers Conference. The organizations outside the ABA consulted in this process included: the National Center for State Courts, the National Judicial College, the Federal Judicial Center, the American Judges Association, the National Association of Women Judges, the National Council of Juvenile and Family Court Judges, several of the largest national affinity bars and the Academy of Court-Appointed Neutrals.

This additional year-long process produced a Model Rule that reflects the collective thinking from a wide array of sources. Based on these efforts, the Judicial Division and the Section of Dispute Resolution urge the House of Delegates to adopt this Model Rule and thus encourage state-level jurisdictions to adapt this proposed rule to

[3] ABA policy resulting from adoption of the Guidelines by the House of Delegates in 2019 affirms this objective, stating:

> Adopts the *ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation*, dated January 2019, and recommends that Bankruptcy Rule 9031 be amended to permit courts responsible for matters under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases. 19 M 100

*Greenbook* at 193.

their local needs and then adopt the Model Rule for the Appointment and Use of Court-Appointed Neutrals.[4]

We note at the outset that this Model Rule must not be viewed as an endorsement of or support for any changes to Federal Rule 53 nor of any need for such change. Any revisions to the Federal Rule would entail different law, considerations, and a discrete process for rules amendment than in state, tribal and territorial courts.

## Discussion and Rationale for the Model Rule

**The historic use of court-appointed neutrals.** Courts' use of neutrals to assist in resolving disputes probably dates back more than a thousand, or perhaps even two thousand, years. "The office of master in chancery, of French origin and imported [to England] with the Norman Conquest, is one of the oldest institutions in Anglo-American law."[5] Indeed, some historians trace the practice to "civilian judex of the Roman Republic and Early Empire—a private citizen appointed by the praetor or other magistrate to hear the evidence, decide the issues and report to the [appointing] court."[6]

The United States Supreme Court appointed a committee of neutrals to assist in deciding the very first case filed on its docket.[7] Thus, as the Court noted over one hundred years ago, the inherent power of the judiciary "includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause. From the commencement of our government, it has been exercised by the federal courts, when sitting in equity, by appointing either with or without the consent of the parties, special masters. . . ."[8]

**The development of Federal Rule of Civil Procedure 53 governing "masters."** Although courts' use of inherent authority to appoint court-appointed neutrals has a very long history, it was not until 2003 that the Federal Rules of Civil Procedure were amended to reflect the ways in which judges were actually using court-appointed neutrals. The pre-2003 version of Federal Rule of Civil Procedure 53 was placed in the "trial" section of the Federal Rules. It did not discuss referring cases to a "master" to handle discovery or other pre-trial disputes, assist settlement, or engage in post-trial or post-settlement work such as monitoring or claims administration. Instead, it discussed when a court might issue an "order of reference" to a ***trial*** master – an individual empowered "to receive and report evidence," conduct hearings, and file a report.[9]

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[4] Although the focus of this rule is on civil court practice, neutrals can and have been appointed to serve many purposes in criminal proceedings, and non-court settings, such as administrative adjudications and investigations and arbitrations. Many of the principles in this Model Rule could also be adapted to those settings.

[5] Wayne D. Brazil, "Referring Discovery Tasks to Special Masters: Is Rule 53 a Source of Authority and Restrictions?" 8 American Bar Foundation Research Journal, 143 at n.31 and accompanying text (Winter 1983), (citing *United States v. Manning*, 215 F. Supp (W.D. La. 1963)).

[6] *Id.*

[7] *Vanstophorst v. Md.*, 2 U.S. 401 (1791).

[8] *In re. Peterson*, 253 U.S. 300, 312 (1920). *See also* Paulette J. Delk, *"Special Masters in Bankruptcy: The Case Against Bankruptcy Rule 9031,"* 67 Mo. L. Rev., 29, 30-31, 54-57 & nn. 10-12, 131-43 (Winter 2002).

[9] *See efaidnbmnnnibpcajpcglclefindmkaj/https://tile.loc.gov/storage-services/service/ll/usrep/usrep461/usrep461amendments/usrep461amendments.pdf* at 1104 (Former Rule 53(c)).

In the 1990s, the Judicial Conference Advisory Committee on Civil Rules began to consider a proposal to amend Federal Rule of Civil Procedure 53 to recognize "that in appropriate circumstances masters may properly be appointed to perform [pretrial and posttrial] functions and [regulate] such appointments."[10] In 1999, the Advisory Committee formed a Rule 53 subcommittee chaired by then Judge Shira A. Scheindlin of the United States District Court for the Southern District of New York that asked the Federal Judicial Center to report on how courts were actually using special masters.[11]

The Federal Judicial Center concluded that, "[d]espite Rule 53's failure to address pretrial and posttrial functions," "judges appointed special masters to perform discovery management functions at the pretrial stage and decree monitoring or administration at the posttrial stage"; indeed, these appointments were about as common as those trial functions the Rule actually contemplated and "litigants rarely questioned special masters' authority to perform pretrial and posttrial functions."[12] Thus, "[b]y the end of the twentieth century, the use and practice of appointing special masters had outgrown the then-current version of Rule 53."[13] The Rule 53 Subcommittee rewrote the Rule into its current form effective December 2003.

**State statutes and rules governing the appointment of court-appointed neutrals.** Currently, states take a number of different approaches in statutes and rules that discuss the use of court-appointed neutrals. A plurality of states have adopted rules that generally track the language of the 2003 version of Federal Rule 53.[14] Some, however, have versions that continue to track language from the pre-2003 "trial master" version of Federal Rule 53.[15] Others use different language to discuss the appointment and use of court-appointed neutrals (and often different titles for the position).[16]

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See also Brazil, supra n.3 (arguing that while the 1983 version of Federal Rule of Civil Procedure 53 did not authorize the use of special masters for pre-trial discovery or post-trial proceedings, courts had inherent authority for this appointment); Thomas Willging, et. al., "Special Masters' Incidence and Activity," Federal Judicial Center (2000) ("2000 FJC Report") at 1 (The 1983 version of Rule 53 "contains neither an explicit authorization for nor a prohibition of pretrial or posttrial activities of a special master"); Shira A. Scheindlin and Jonathan A. Redgrave, "Revisions in Federal Rule 53 Provide New Options for Using Special Masters in Litigation," 76 N.Y. St. Bar Ass'n J. 18, 19 (January 2004) (describing the earlier rule).

[10] *See* 2000 FJC Report at 1.

[11] *Id.* at 1-2.

[12] *Id.* at 4.

[13] Shira A. Scheindlin & Jonathan M. Redgrave, "Special Masters and E-Discovery: The Intersection of Two Recent Revisions to the Federal Rules of Civil Procedure," 30 Cardozo L. Rev. 347, 349 (2008); Shira A. Scheindlin and Jonathan A. Redgrave, "Revisions in Federal Rule 53 Provide New Options for Using Special Masters in Litigation," *supra.* n.9, 76 N.Y. St. Bar Ass'n J. at 19.

[14] *See, e.g.*, Ariz. R. Civ. P. 53; Colo. C. C.P.R. 53; D.C. Super. Ct. R. Civ. P. 53; Ga. R. Sup. Ct. 46; Min. R. Civ. P. 53; Nev. R. Civ. P. 53; and N.D. R. Civ. P. 53.

[15] *See, e.g.*, Ala. R. Civ. P. 53; Alaska R. Civ. P. 53; Ark. R. Civ. P. 53; Haw. R. Civ. P. 53; Idaho R. Civ. P. 53 (based primarily on the 1983 federal rule, but includes some language from the 2003 federal rule); Ind. R. Trial P. 53; Iowa R. Civ. P. 1.935 - 1.942; Kan. Stat. Ann. § 60-253; Ky. R. Civ. P. 53.01 – 53.08; Me. R. Civ. P. 53; Mass. R. Civ. P. 53; Miss. R. Civ. P. 53; Mo. R. Civ. P. 68.01; Mont. Code Ann. § 25-20-R. 53; N.J. R. Civ. Prac., 4:41; N.M. R. Civ. P. 1-053; N.C. Gen. Stat. § IA-1, R. 53; Or. R. Civ. P. 65; R.I. R. Civ. P. 53; S.D. Codified Laws § 15-6-53; Tenn. R. Civ. P. 53; Tex. R. Civ. P. 171; Utah R. Civ. P. 53; Vt. R. Civ. P. 53; Va. S. Ct. R. 3:23; Wash. Super. Ct. Civ. R. 53.3; Wis. Stat. § 805.06; and Wyo. R. Civ. P. 53.

[16] *See, e.g.*, Cal. Civ. Proc. Code §§ 638-639; Conn. R. Super. Ct. Proc. Family Matters § 25-53; Del. S. Ct. R. 43; Fla. Stat. Ann. R.C.P. Rule 1.490; La. Rev. Stat. Ann. § 13:4165; Md. Cir. Ct. R. Civ. P. 2-541; Mich. Ct. R. Prac.

**The Guidelines.** The Guidelines articulate best practices for using court-appointed neutrals. The Guidelines recognized that, since Federal Rule of Civil Procedure 53 was adopted in 2003, technology has transformed litigation; costs, delays, backlogs and complexity have increased; and judicial philosophy has increasingly recognized the importance of active case management. As the Report noted, there is a broad consensus that:

- Civil litigation can be too expensive or inefficient and can take too long.[17]
- Rule changes by themselves can serve as only part of a solution; in the absence of effective case management, these procedures may not be able to solve these problems and perceptions.[18]
- Although trial judges and, where they are available, magistrate judges can and have assumed substantial case management responsibilities, serving that role may not always be the best and highest use of judiciary. Docket demands, the need for specialized expertise and ethical limitations create situations in which the judiciary cannot effectively serve this role.[19]
- Courts can use neutrals creatively and in myriad ways to help increase efficiency and decrease the time needed to resolution.[20]
- The lack of a methodical and consistent approach to considering the use of court-appointed neutrals, however, has left this potential resource relatively unknown and rarely used.[21]

As the Report explained, the root of the problem has been that, although the Federal Rules of Civil Procedure and states that used similar provisions placed the possibility of the court appointing a neutral on the list of topics for consideration at pretrial conferences,[22] the actual practice has often been to consider these appointments *ad hoc* (often when a particular judge favors the approach) and *post hoc* (after disputes that the neutral might have been able to avoid in the first place threaten to derail the litigation).[23]

This lack of a regularized process for considering appointments of neutrals at the

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2.411 & 2.412; N.Y. Unif. Trial Ct. R. § 202.14; Neb. Rev. Stat. §§ 25-1129 to -1137; N.H. R. Super. Ct. 85-A; Ohio Rev. Code Civ. R. 53; Okla. Stat. tit. 12, §§ 612-21; 42 Pa. Const. Stat. Ann. § 1126; S.C. R. Civ. P. 53; and W. Va. R. Civ. P. 53. Among the factors that distinguish the various approaches taken by the states are: whether the appointment of a special master is an accepted regular practice or an exception to the norm; whether there are established lists from which special masters must be selected; whether neutrals must have specific credentials or training; whether and the extent to which the consent of the parties is required; whether and the extent to which the standard of review is de novo; whether, the extent to which and how special masters are compensated; and what ethical rules apply to special masters in their roles as such.

[17] Report Accompanying ABA Resolution 19M100 (adopting the Guidelines) ("Report") at 2-3 & n.4.

[18] *Id.* at 3 & nn.5-6.

[19] *Id.* at 3-4 & nn.8-9.

[20] *Id*. at 5-6 & nn.15-17.

[21] *Id.* at 6-7 & n.18.

[22] *See* Fed. R. Civ. P. 16(c)(2)(H).

[23] Report, *supra.* n.20, at 7 & n.18.

appropriate time in litigation can have the following negative consequences:

- A lack of experience with court-appointed neutrals can leave parties and even jurists unfamiliar with what services neutrals could perform and thus, less able to consider how appointment might help the administration of justice.

- *Ad hoc* selection puts a heavy premium on prior association with the judge. This advantages repeat players, gives lawyers and the public less confidence that the choice will be drawn from a diverse pool, increasing the chance that parties will distrust the process or the choice.

- *Post hoc* selection, implemented to address (real or perceived) problems that have already developed, limits the potential benefit that appointment could have been used to avoid these disputes in the first place.

- The general lack of a regular process for considering appointment of neutrals, has led to a lack of procedures that could help guarantee the most effective use of neutrals' work. Procedures that could help provide this guarantee include vetting candidates; conducting organized training; permitting evaluations and feedback; developing professional expectations for court-appointed neutral service and maintaining data for study.

The Guidelines recommend the following:

- Guideline 1: that courts make consideration of using court-appointed neutrals a regular part of the case-management process used at the outset of cases in complex or other cases that present circumstances where use of a neutral might be of assistance.

- Guideline 2: that courts and litigants familiarize themselves with the services court-appointed neutrals can provide.

- Guideline 3: that the court appoint a neutral only after deciding that the benefits outweigh the costs.

- Guideline 4: that, before appointing a neutral, the court consider a broad array of functions the neutral may perform and roles the neutral may serve.

- Guideline 5: that local rules provide for selecting, training, and evaluating court-appointed neutrals and implement a process that will facilitate the selection of neutrals from a diverse pool of potential candidates.

- Guideline 6: that courts choose neutrals in a way that instills confidence in their abilities and the service they will provide.

- Guideline 7: that the referral order specify, among other things, what services the neutral will and will not perform, and in what way, and at what expense to whom.

- Guideline 8: that courts and the bar develop education programs and information that would permit research into the credentials and effectiveness of neutrals.

- Guideline 9: that courts and, where applicable, legislatures should make whatever modifications to laws, rules, or practices necessary to effectuate these ends.

**The Model Rule.** The Model Rule follows from the last of these Guidelines. It puts the Guideline principles into concrete provisions that state, local, territorial or tribal courts or, where applicable, their legislatures can adopt and use; and that, in the future, can become the basis for amendment of the federal rules where appropriate as well.

## Provision-by-Provision Discussion of the Model Rule

**Subdivision (a), Definition,** defines the term "Court-Appointed Neutral." Defining this term clarifies a potential ambiguity in many existing rules. Most jurisdictions have recognized the inherent power of courts to appoint special officers as adjuncts to assist in litigation in some way. There is no general agreement on what term to use to refer to these special officers and using one or another of particular terms in rules or legislation without definition may leave the scope of the rule unclear. For example, a court may rely on a state rule that tracks the current version of Federal Rule of Civil Procedure 53, to appoint a "master." However, if the court appoints someone as a "monitor," or "referee" or "discovery facilitator" or "special magistrate," it may not be clear under existing provisions whether that appointment is subject to other provisions of the Rule.

In addition, many of these terms can be ambiguous because they connote that the appointee will be expected to perform some roles but not others, regardless of the court's actual intent. One of the difficulties with the term "master," is that it connotes that someone is being appointed in some quasi-adjudicative capacity, and not, for example, to facilitate discussions between or among, the parties; or to investigate facts; or to advise the court or the parties on technical or scientific issues or many other uses appointees can serve.

This definition of "court-appointed neutral" seeks to make clear what the Model Rule covers and what it does not. By using the term "court-appointed neutral," the Rule is also intended to implement Guideline 4, by clarifying that there are a broad array of functions a court might potentially appoint a neutral to perform and a broad array of roles a court might wish a neutral to serve.

**Subdivision (b), Factors to Be Considered in Appointing Court-Appointed Neutrals,** is intended to help implement Guidelines 1 and 3 by seeking to make the consideration of whether to appoint a neutral a consistent, informed and fair process. The provision makes it an accepted part of judicial administration in specific types of cases to ***consider*** whether a court-appointed neutral could be helpful at the outset of the litigation or as circumstances develop in the litigation. This subdivision also identifies factors that the court will consider in making an appointment. It directs the court to consider whether the circumstances demonstrate that the likely benefit to the parties of

appointing a neutral outweighs the expense, including, without limitation, whether the costs are proportionate to the needs of the case; the appointment can be made without imposing an unreasonable delay and the neutral likely could address any matter within the scope of the appointment more expeditiously than is practicable without the neutral, considering the court's case load and the issues and needs of the case; whether the particular appointee has the knowledge, skills, ability, and training to perform the needed tasks; and whether a neutral's involvement may assist by obviating the need for the court to review claimed privileged or confidential information that may not be necessary for the court's consideration.

It is particularly important that the court obtain the parties' input and seriously consider these factors. These assessments are intended to ensure the fairness and relative benefits of the appointment, the quality of service and the fit between the neutral and tasks to be performed. The purpose of appointing a neutral is to assist and support the administration of justice and, when relative cost or delay is the rationale for appointment, to reduce the cost and delay associated with litigation. It is not intended to supplant a judge's authority or to impair the parties' ability to have their cases decided by public judges.

These considerations are not intended to be exclusive. The needs and some of the considerations involved in appointing a neutral will vary with individual circumstances.

Nevertheless, the provision is intended to address two of the major concerns identified in the Report that was presented to the House of Delegates in support of Resolution 19M100 seeking adoption of the Guidelines. As the Report explained, "[a]lthough anecdotal evidence indicates that courts and parties are satisfied with their experiences with [court-appointed neutrals], the ad hoc nature of appointments can lead to inconsistent results and perceptions that undercut the legitimacy of appointees."[24] And appointing neutrals post hoc, after problems have arisen, "prevents courts and stakeholders from obtaining early case management that often eliminates the need for dispute resolution."[25]

As this provision and others make clear, the appointment of a neutral is a decision for the court, based on its judgment about what will assist the court and the parties. In adopting this provision, the Committee considered but rejected the idea of giving parties, in essence, a veto power by requiring consent to the appointment. Provisions of current law and rules in some states that require party consent to the appointment are counterproductive. They allow parties inclined to be unreasonable in discovery to avoid measures designed to solve the problem, and appear to be based on a misconception that neutrals are appointed to substitute for the court rather than to assist the court.[26] Indeed, such rules allow parties to prevent the appointment even when the court concludes that the appointment will save the parties money by avoiding unnecessary

[24] Report, *supra*. n.20 at 7 & n.12.
[25] *Id.* at 8.
[26] *See, e.g.*, Merril Hirsh, *Bad Branding for a Great Idea: Making More Effective Use of Special Magistrates (Masters) in Florida*, THE COMMON GROUND (Summer 2022) 11, available at flabaradr.com/wp-content/uploads/2022/07/The-Common-Ground-Summer-2022.pdf

litigation, or the appointment is pro bono.

Affording a party or parties complete veto power is also unnecessary. Parties' legitimate concerns that the costs be proportionate to the litigation, that the benefits outweigh the costs, that the appointment not result in unreasonable delay, and that no party be made to bear an unreasonable financial burden, are much better addressed by direct provisions calling upon the court to consider those factors in Model Rule subdivisions (b)(2), than they are by allowing a party or the parties to be the final arbiters of any appointment. Also, as discussed below in connection with subdivision (c), the parties' legitimate interests in ensuring that courts do not delegate functions that should remain with the court can be protected by identifying specific functions that a neutral cannot be appointed to serve without party consent.

Using a regular and informed process also will help effectuate other Guidelines. For example, if courts regularly consider the possibility of appointing a neutral in cases that might warrant it, the court and parties are more likely to be familiar with the assistance court-appointed neutrals can provide (Guideline 2) and the broad array of functions the neutral may perform and roles the neutral may serve (Guideline 4). Selection through a more regular process based on known factors and procedures also facilitates establishing regular systems to vet, train and evaluate court-appointed neutrals (Guideline 5) and helps to instill confidence in the appointees' abilities and the service they will provide (Guideline 6).

Subdivision (b) of the Model Rule approaches the subject of when a court should appoint a neutral differently from that set forth in current Federal Rule of Civil Procedure 53. In language that dates from 2003, the current version of Federal Rule 53 contemplates that courts could appoint neutrals to perform pretrial or posttrial matters "that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district."[27] This standard affords courts considerable discretion, but also specified factors, to decide whether the circumstances warrant the appointment.

Subdivision (b) embraces the general philosophy of current Federal Rule 53 by treating the decision to appoint a neutral (for non-trial matters) as a matter of discretion for the court to be exercised under guideposts. Rather than directing the inquiry, however, to the court's own effectiveness (what the court can or cannot do on a timely basis), the provisions of subdivision (b) focus the inquiry on the cost and benefit to be received by the parties in having the neutral assist the court (and more specifically, the proportionality, fairness and effect of the appointment on the litigation and the qualifications of the neutral being appointed). As a practical matter, a major factor in deciding whether the cost of a neutral outweighs the benefit will often be the ability of the court to address a matter effectively without incurring the cost. Shifting the focus towards the benefits and costs of the appointment, rather than what the court can and cannot do, however, better captures the relevant considerations.

The reference to things the court can or cannot do implies that the purpose of appointing a neutral is in some way to supplant or substitute for the court—albeit in

[27] *See* Advisory Committee Notes to 2003 Amendments to Fed. R. Civ. P. 53 ("Trial Masters").

circumstances that warrant it. In fact, however, the purpose of appointing a neutral is to support the court, not to supplant it. Appointing a neutral is one tool among many a court can use in those circumstances when the benefit outweighs the cost and functions an appointed-neutral can perform, as Guideline 4 recognizes, "do not usurp judicial functions, but assist it."

Second, in many circumstances the value of appointing a neutral stems from the fact that it is not efficient, desirable or consistent with existing rules for a court to occupy itself with the type of work assigned to a court-appointed neutral. For example, since 2015, the Federal Rules of Civil Procedure and the state rules that have adopted its language have required as part of Rule 1 that not just the court, but the "parties" "construe[], administer[] and employ[]" the rules "to secure the just, speedy, and inexpensive determination of every action and proceeding." This rule contemplates that parties will "cooperate to achieve these ends," and, therefore, that there is a category of issues that should be resolved without need for judicial involvement. A standard that examines only whether a trial or magistrate judge is able to resolve issues that should not have required judicial intervention does not account for the potentially great benefit of appointing a neutral to assist the parties in cooperating to avoid the motion in the first place.

Other similar situations can arise depending upon the task. In theory, a judge could review 1,000 documents for privilege. However, that may not be the court's best and highest use and a different division of labor might be more efficient. In theory, a judge could attempt to facilitate resolutions of disputes before they ripen into motions, but a judge that does that risks being put in the awkward position of having to rule on motions that argue the merits of the court's own suggestion.

A cost-benefit standard better accounts for these situations. The best and highest use of a judge and a court-appointed neutral are different and part of the reason for using a neutral is to allow judges to focus on their best and highest use.

Incorporating concepts of proportionality, fairness, whether the appointment will delay the litigation and the qualifications of the neutral are also an additional way of serving the goal of Guideline 6 by helping to instill confidence in the services the neutral will provide.

**Subdivision (c), Services a Court May Authorize the Court-Appointed Neutral to Perform,** begins with prefatory limitations designed to direct the Model Rule to its purpose. The Rule is intended as a Model Rule of Civil Procedure to be used in individual cases. It is not intended to subsume or overtake other provisions of law or court procedures—such as court-based alternative dispute resolution programs—or to permit appointments that would violate requirements of law, other court procedures or principles of ethics.[28]

[28] The effort to further the discussion of principles of ethics applicable to court-appointed neutrals is the subject of additional work being conducted by the Judicial Division Lawyers Conference Court-Appointed Neutral Committee of the Judicial Division's Lawyers Conference. Additional information concerning ethical principles applicable to court-appointed neutrals is also available in the *Academy of Court-Appointed Neutrals Benchbook*, Section 3 (2023),

Subdivision (c) also further assists to implement Guidelines 2, 4 and 5 by providing a non-exclusive list of examples of functions court-appointed neutrals may perform. Its goal is to encourage parties and the court to consider a broad array of useful services a neutral might perform.

**Subdivision (d), Authority of the Court-Appointed Neutral,** identifies the authority the Court may afford a neutral who has been appointed in accordance with the prefatory limitations in Subdivision (c). It distinguishes powers that a court may authorize a neutral to exercise even if the parties (after notice) do not consent, from those powers that the appointed neutral may exercise only with the parties' consent and the court's approval. As with the current version of Federal Rule 53, the Model Rule does not contemplate (with or without party consent) that a court would appoint a neutral to conduct a jury trial.

In one respect, the Model Rule is more limited than current Federal Rule 53. Federal Rule 53 permits courts, albeit generally in extraordinary circumstances, to refer full non-jury trials on the merits to neutrals without party consent. Although the Model Rule does not require party consent to having a court-appointed neutral do various types of evidentiary fact-finding short of a trial, it does require party consent before a neutral is appointed to conduct a full non-jury trial on the merits.

This follows a pattern in which the "[u]se of [court-appointed neutrals] for core functions of trial has been progressively limited."[29] The 1983 version of Federal Rule of Civil Procedure 53 expressly discussed no other use of a court-appointed neutral besides conducting trials, and expressly contemplated appointing neutrals under some circumstances to conduct jury trials.[30]

The 2003 amendments relegated the use of "trial masters" to a single provision of the Rule,[31] "abolished" the "use of a trial master without party consent as to matters to be decided by a jury unless a statute provides for this practice,"[32] and imposed a strict standard before a court could appoint a neutral to conduct a non-jury trial, while applying a far more flexible standard for appointing a neutral to "address pretrial and posttrial matters."[33]

Since 2003, federal courts have been permitted to appoint a neutral to conduct even a non-jury trial only when the appointment was warranted by "some exceptional condition" or "the need to perform an accounting or resolve a difficult computation of damages."[34] As the Advisory Committee Notes explain, the accounting was to be "essentially ministerial," and the "exceptional condition" language for otherwise appointing

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available at www.courtappointedneutrals.org/acam/assets/file/public/handbook/acan%20benchbook%202023%20edition%20-%20section%203.pdf

[29] *See* Advisory Committee Notes to 2003 Amendments to Fed. R. Civ. P. 53 ("Trial Masters").
[30] *See* Former Rule 53(b) (1983).
[31] *See* Fed. R. Civ. P. 53(a)(1)(B).
[32] *See* Advisory Committee Notes to 2003 Amendments to Fed. R. Civ. P. 53 ("Trial Masters").
[33] Fed. R. Civ. P. 53(a)(1)(C).
[34] Fed. R. Civ. P. 53(a)(1)(B)(i), (ii).

a neutral for a bench trial was intended to "embrace" a philosophy in the 1983 version of the Rule that trial masters should be "the exception and not the rule."[35]

By contrast, the 2003 Rule contemplated that courts could appoint neutrals to perform pretrial or posttrial matters "that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district."[36] While the Rule itself, and the Advisory Committee Notes, do not suggest that a court in such instances needs to find some additional "extraordinary" circumstance to justify the appointment, the Notes nonetheless state that the court's authority is "limited" and require that "a pretrial master should be appointed only when the need is clear."[37]

The Model Rule continues the approach of recognizing that, in trial courts, the best and highest use of neutrals is to assist the court in other proceedings, not to conduct trials themselves. The longstanding practice of appointing neutrals to conduct trials in the United States Supreme Court and appellate courts is a logical adaptation to those courts' functions. Factual issues arise relatively rarely at the appellate level, but when they do, appellate courts often lack a regular facility for trying cases. By contrast, trying cases is a fundamental part of a trial court's role.

**Subdivision (e), Appointment of Neutral,** seeks to implement Guideline 6 (instilling confidence in the selection process) by providing parties with notice and an opportunity to be heard about the decision to use a neutral, the choice of the neutral and the terms under which the neutral will operate. It also establishes broad disclosure obligations similar to those in use for arbitrators that allow parties both to evaluate prospective appointees and to raise concerns about potential conflicts.

The standard "any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence from the perspective of any of the parties," is used in the ABA-AAA Code of Ethics for Arbitrators in Commercial Disputes.[38] It is intended to be a protective standard, but not to impose unreasonable burdens. The Rule contemplates that prospective appointees who work at law firms will have their firms conduct appropriate conflict checks of their records. Absent some particular reason, it does not contemplate that law firms will further survey lawyers who are not involved in the appointment, though proposed appointees must disclose any known information that rises to the standard. A prospective appointee would be expected to disclose, among other things, for example, their firm's prior representation of one of the parties, or their personal prior representation of one of the parties while working at another law firm. The possibility that someone else at the law firm at which the prospective appointee works, who will not be involved in the appointment, may have represented one of the parties at a prior firm is not as likely to be relevant in most circumstances. In all events, the neutral must make disclosures, including any matters described in the jurisdiction's equivalent of 28 U.S.C. § 455 governing judicial

[35] *See* Advisory Committee Notes to 2003 Amendments to Fed. R. Civ. P. 53 ("Trial Masters").
[36] *See* Advisory Committee Notes to 2003 Amendments to Fed. R. Civ. P. 53 ("Trial Masters").
[37] *See* Advisory Committee Notes to 2003 Amendments to Fed. R. Civ. P. 53 ("Pre-Trial Masters").
[38] *See* Canon II(A)(2), available at https://www.adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14.pdf

disqualification and may be subject to disqualification if such disclosures so warrant.

Subdivision (e) also seeks to implement Guideline 5 by suggesting the possibility of establishing rosters that will facilitate a regularized process of ensuring the quality and acceptance of neutrals. Rosters have many potential advantages. For example, they allow for greater involvement of stakeholders in evaluating potential neutrals, which in turn, facilitates understanding and acceptance of neutrals. They facilitate broader entry into the profession of serving as neutrals that expands the potential pool of choices. They make it easier to establish processes for training, evaluating and providing feedback that improves the work of neutrals and create a bank of data and experience for assessing the best use of neutrals. *See* Guideline 8. They also allow for courts to make more creative use of resources, for example, by coupling roster status with a pro bono commitment that can make neutrals available in cases where parties would be otherwise unable to afford the services of neutrals or for non-case specific assistance to the administration of justice (such as evaluating a docket of cases and making recommendations for efficient case management).

**Subdivision (f), Appointment Order,** seeks to implement Guideline 7 by requiring that referral orders explain how the court evaluated the considerations set forth in subdivision (b) for deciding to appoint a neutral and describe the scope of the engagement, including, but not limited to, the court-appointed neutral's duties and powers; the roles the court-appointed neutral may serve; the rates and manner in which the court-appointed neutral will be compensated; the authority to conduct hearings or to facilitate discussions between the parties; the extent of permissible ex parte contact with the court and the parties; and the duration of the appointment. The provision also discusses the record to be maintained to permit review and the potential variation on standards of review by the court. Any changes to the scope of the referral should be made by a modification to the referral order.

**Subdivision (g), Neutral's Responsibilities,** imposes a general requirement of diligence on the neutral and addresses the procedural requirements for reports recommendations and orders. Existing rules in some jurisdictions impose specific time requirements about the first meeting a neutral must conduct with the parties. Although in individual cases a court may wish to specify deadlines, it is a better practice, given the variety of functions a neutral may perform, to afford the court the ability to decide whether deadlines fit the circumstances and what deadline might be appropriate.

**Subdivision (h), Action on Neutral's Order, Report or Recommendations,** identifies the standards and procedures for review and permits the parties, with approval of the court, to waive review or to alter the standards of review for factual determinations. The standards are intended to track those of Rule 53. The provision seeks to harmonize two seemingly competing considerations. On the one hand, because the role of a court-appointed neutral is to support, not the supplant, the court, absent party agreement, the court remains the ultimate arbiter and therefore retains the power to exercise its own judgment on the neutral's order or report and recommendations. On the other hand, a major purpose of appointing neutrals is to save time and expense, not to create additional layers of review.

The provision addresses both of these considerations by (1) allowing the parties to stipulate, with the court's approval, not to seek additional trial court review of the court-appointed neutral's findings and conclusions or to agree on clear error review for factual findings; and (2) providing, in the absence of stipulation, that the process incorporate de novo review but minimize duplication. Absent a showing of good cause, the subdivision generally requires that parties make their record before the court-appointed neutral by raising arguments. It also specifies that, in order to challenge a finding of fact, the party must specifically identify sufficient contradictory evidence to warrant conducting a review, and that, absent a court order based upon good cause, the court's review will be conducted based on the record before the court-appointed neutral. The goal is to provide an opportunity for review and determination by the court when that review is warranted, but to avoid duplication when that review is not.

**Conclusion**

Taken as a whole, the Model Rule provides a concrete structure for implementing the Guidelines. It acts upon all of the principles of the Guidelines, while leaving states free to adopt local rules to pursue more specific initiatives, such as establishing rosters. One takeaway from the Guidelines is that a court-appointed neutral is best viewed as a Swiss army knife affording an array of possible tools that could be used to assist courts. Whether any of these tools are useful in a particular case depends upon the circumstances of the case. Which tools will be the most useful for courts also depends upon the nature of their dockets, their existing resources, and local practices. The Model Rule will help regularize the consideration of court-appointed neutrals; highlighting the uses and powers of court-appointed neutrals; and identifying procedures designed to obtain appropriate party input. In so doing, the Model Rule should advance case administration by helping ensure the most effective use of court-appointed neutrals.

Respectfully submitted,

Hon. Ernestine S. Gray. (ret.), Chair
Judicial Division

Brian Pappas, Chair
Section of Dispute Resolution

August 2023

# Appendix F

## 28 U.S.C. § 455
## Disqualification of Justice, Judge, or Magistrate Judge

**Section 455. Disqualification of justice, judge, or magistrate judge**

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

# Appendix G

## Model Rule of Professional Conduct
## Rule 1.12

***CLIENT-LAWYER RELATIONSHIP***
**RULE 1.12 FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY MASTER**

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party master, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party master. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

# Appendix H

## Code of Conduct for United States Judge

CODE OF CONDUCT
FOR UNITED STATES JUDGES[1]
(Effective July 1, 2009)

**Introduction**

This Code applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges. Certain provisions of this Code apply to special masters and commissioners as indicated in the "Compliance" section. The Tax Court, Court of Appeals for Veterans Claims, and Court of Appeals for the Armed Forces have adopted this Code.

The Judicial Conference has authorized its Committee on Codes of Conduct to render advisory opinions about this Code only when requested by a judge to whom this Code applies. Requests for opinions and other questions[2] concerning this Code and its applicability should be addressed to the Chair of the Committee on Codes of Conduct by email or as follows:

Chair, Committee on Codes of Conduct
c/o General Counsel
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

202-502-1100

[1] The Code of Conduct for United States Judges was initially adopted by the Judicial Conference on April 5, 1973, and was known as the "Code of Judicial Conduct for United States Judges." Since then, the Judicial Conference has made the following changes to the Code:

March 1987: deleted the word "Judicial" from the name of the Code;
September 1992: adopted substantial revisions to the Code;
March 1996: revised part C of the Compliance section, immediately following the Code;
September 1996: revised Canons 3C(3)(a) and 5C(4);
September 1999: revised Canon 3C(1)(c);
September 2000: clarified the Compliance section;
March 2009: adopted substantial revisions to the Code

[2] Procedural questions may be addressed to: Office of the General Counsel, Administrative Office of the United States Courts, Thurgood Marshall Federal Judiciary Building, Washington, D.C., 20544, 202-502-1100.

## CANON 1: A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

COMMENTARY

Deference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn on their acting without fear or favor. Although judges should be independent, they must comply with the law and should comply with this Code. Adherence to this responsibility helps to maintain public confidence in the impartiality of the judiciary. Conversely, violation of this Code diminishes public confidence in the judiciary and injures our system of government under law.

The Canons are rules of reason. They should be applied consistently with constitutional requirements, statutes, other court rules and decisional law, and in the context of all relevant circumstances. The Code is to be construed so it does not impinge on the essential independence of judges in making judicial decisions.

The Code is designed to provide guidance to judges and nominees for judicial office. It may also provide standards of conduct for application in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (28 U.S.C. §§ 332(d)(1), 351-364). Not every violation of the Code should lead to disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the improper activity, the intent of the judge, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system. Many of the restrictions in the Code are necessarily cast in general terms, and judges may reasonably differ in their interpretation. Furthermore, the Code is not designed or intended as a basis for civil liability or criminal prosecution. Finally, the Code is not intended to be used for tactical advantage.

## CANON 2: A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES

A. *Respect for Law.* A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. *Outside Influence.* A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge. A judge should not testify voluntarily as a character witness.

C. *Nondiscriminatory Membership.* A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.

COMMENTARY

**Canon 2A.** An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. This prohibition applies to both professional and personal conduct. A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen. Because it is not practicable to list all prohibited acts, the prohibition is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code.

**Canon 2B.** Testimony as a character witness injects the prestige of the judicial office into the proceeding in which the judge testifies and may be perceived as an official testimonial. A judge should discourage a party from requiring the judge to testify as a character witness except in unusual circumstances when the demands of justice require. This Canon does not create a privilege against testifying in response to an official summons.

A judge should avoid lending the prestige of judicial office to advance the private interests of the judge or others. For example, a judge should not use the judge's judicial position or title to gain advantage in litigation involving a friend or a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office.

A judge should be sensitive to possible abuse of the prestige of office. A judge should not initiate communications to a sentencing judge or a probation or corrections officer but may provide information to such persons in response to a formal request. Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration and by responding to official inquiries concerning a person being considered for a judgeship.

**Canon 2C.** Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Canon 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. *See New York State Club Ass'n. Inc. v. City of New York*, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d

1 (1988); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). Other relevant factors include the size and nature of the organization and the diversity of persons in the locale who might reasonably be considered potential members. Thus the mere absence of diverse membership does not by itself demonstrate a violation unless reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex, or national origin persons who would otherwise be admitted to membership.

Although Canon 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion or national origin, a judge's membership in an organization that engages in any invidiously discriminatory membership practices prohibited by applicable law violates Canons 2 and 2A and gives the appearance of impropriety. In addition, it would be a violation of Canons 2 and 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion, or national origin in its membership or other policies, or for the judge to use such a club regularly. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Canon 2A.

When a judge determines that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Canon 2C or under Canons 2 and 2A, the judge is permitted, in lieu of resigning, to make immediate and continuous efforts to have the organization discontinue its invidiously discriminatory practices. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within two years of the judge's first learning of the practices), the judge should resign immediately from the organization.

## CANON 3: A JUDGE SHOULD PERFORM THE DUTIES OF THE OFFICE FAIRLY, IMPARTIALLY, AND DILIGENTLY

The duties of judicial office take precedence over all other activities. In performing the duties prescribed by law, the judge should adhere to the following standards:

A. *Adjudicative Responsibilities.*

(1) A judge should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings.

(3) A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. A

judge should require similar conduct of those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.

(4) A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law. Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. A judge may:

(a) initiate, permit, or consider ex parte communications as authorized by law;

(b) when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication;

(c) obtain the written advice of a disinterested expert on the law, but only after giving advance notice to the parties of the person to be consulted and the subject matter of the advice and affording the parties reasonable opportunity to object and respond to the notice and to the advice received; or

(d) with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should not make public comment on the merits of a matter pending or impending in any court. A judge should require similar restraint by court personnel subject to the judge's direction and control. The prohibition on public comment on the merits does not extend to public statements made in the course of the judge's official duties, to explanations of court procedures, or to scholarly presentations made for purposes of legal education.

B. *Administrative Responsibilities.*

(1) A judge should diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court personnel.

(2) A judge should not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when that conduct would contravene the Code if undertaken by the judge.

(3) A judge should exercise the power of appointment fairly and only on the basis of merit, avoiding unnecessary appointments, nepotism, and favoritism. A judge should not approve compensation of appointees beyond the fair value of services rendered.

(4) A judge with supervisory authority over other judges should take reasonable measures to ensure that they perform their duties timely and effectively.

(5) A judge should take appropriate action upon learning of reliable evidence indicating the likelihood that a judge's conduct contravened this Code or a lawyer violated applicable rules of professional conduct.

C. *Disqualification.*

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or lawyer has been a material witness;

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding;

(d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person is:

(i) a party to the proceeding, or an officer, director, or trustee of a party;

(ii) acting as a lawyer in the proceeding;

(iii) known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or

(iv) to the judge's knowledge likely to be a material witness in the proceeding;

(e) the judge has served in governmental employment and in that capacity participated as a judge (in a previous judicial position), counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

(2) A judge should keep informed about the judge's personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system; the following relatives are within the third degree of relationship: parent, child, grandparent, grandchild, great grandparent, great grandchild, sister, brother, aunt, uncle, niece, and nephew; the listed relatives include whole and half blood relatives and most step relatives;

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;

(d) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation.

(4) Notwithstanding the preceding provisions of this Canon, if a judge would be disqualified because of a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the judge (or the judge's spouse or minor child) divests the interest that provides the grounds for disqualification.

D. *Remittal of Disqualification.* Instead of withdrawing from the proceeding, a judge disqualified by Canon 3C(1) may, except in the circumstances specifically set out in subsections (a) through (e), disclose on the record the basis of disqualification. The judge

may participate in the proceeding if, after that disclosure, the parties and their lawyers have an opportunity to confer outside the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate. The agreement should be incorporated in the record of the proceeding.

COMMENTARY

**Canon 3A(3).** The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and businesslike while being patient and deliberate.

The duty under Canon 2 to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary applies to all the judge's activities, including the discharge of the judge's adjudicative and administrative responsibilities. The duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias.

**Canon 3A(4).** The restriction on ex parte communications concerning a proceeding includes communications from lawyers, law teachers, and others who are not participants in the proceeding. A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out adjudicative responsibilities. A judge should make reasonable efforts to ensure that law clerks and other court personnel comply with this provision.

A judge may encourage and seek to facilitate settlement but should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the courts.

**Canon 3A(5).** In disposing of matters promptly, efficiently, and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to take reasonable measures to ensure that court personnel, litigants, and their lawyers cooperate with the judge to that end.

**Canon 3A(6).** The admonition against public comment about the merits of a pending or impending matter continues until the appellate process is complete. If the public comment involves a case from the judge's own court, the judge should take particular care so that the comment does not denigrate public confidence in the judiciary's integrity and impartiality, which would violate Canon 2A. A judge may comment publicly on proceedings in which the judge is a litigant in a personal capacity, but not on mandamus proceedings when the judge is a litigant in an official capacity (but the judge may respond in accordance with Fed. R. App. P. 21(b)).

**Canon 3B(3).** A judge's appointees include assigned counsel, officials such as referees, commissioners, special masters, receivers, guardians, and personnel such as law clerks,

secretaries, and judicial assistants. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection.

**Canon 3B(5).** Appropriate action may include direct communication with the judge or lawyer, other direct action if available, reporting the conduct to the appropriate authorities, or, when the judge believes that a judge's or lawyer's conduct is caused by drugs, alcohol, or a medical condition, making a confidential referral to an assistance program. Appropriate action may also include responding to a subpoena to testify or otherwise participating in judicial or lawyer disciplinary proceedings; a judge should be candid and honest with disciplinary authorities.

**Canon 3C.** Recusal considerations applicable to a judge's spouse should also be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship.

**Canon 3C(1)(c).** In a criminal proceeding, a victim entitled to restitution is not, within the meaning of this Canon, a party to the proceeding or the subject matter in controversy. A judge who has a financial interest in the victim of a crime is not required by Canon 3C(1)(c) to disqualify from the criminal proceeding, but the judge must do so if the judge's impartiality might reasonably be questioned under Canon 3C(1) or if the judge has an interest that could be substantially affected by the outcome of the proceeding under Canon 3C(1)(d)(iii).

**Canon 3C(1)(d)(ii).** The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. However, if "the judge's impartiality might reasonably be questioned" under Canon 3C(1), or the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii), the judge's disqualification is required.

## CANON 4: A JUDGE MAY ENGAGE IN EXTRAJUDICIAL ACTIVITIES THAT ARE CONSISTENT WITH THE OBLIGATIONS OF JUDICIAL OFFICE

A judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects. However, a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, lead to frequent disqualification, or violate the limitations set forth below.

A. *Law-related Activities.*

(1) *Speaking, Writing, and Teaching.* A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

(2) *Consultation.* A judge may consult with or appear at a public hearing before an executive or legislative body or official:

(a) on matters concerning the law, the legal system, or the administration of justice;

(b) to the extent that it would generally be perceived that a judge's judicial experience provides special expertise in the area; or

(c) when the judge is acting pro se in a matter involving the judge or the judge's interest.

(3) *Organizations.* A judge may participate in and serve as a member, officer, director, trustee, or nonlegal advisor of a nonprofit organization devoted to the law, the legal system, or the administration of justice and may assist such an organization in the management and investment of funds. A judge may make recommendations to public and private fund-granting agencies about projects and programs concerning the law, the legal system, and the administration of justice.

(4) *Arbitration and Mediation.* A judge should not act as an arbitrator or mediator or otherwise perform judicial functions apart from the judge's official duties unless expressly authorized by law.

(5) *Practice of Law.* A judge should not practice law and should not serve as a family member's lawyer in any forum. A judge may, however, act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

B. *Civic and Charitable Activities.* A judge may participate in and serve as an officer, director, trustee, or nonlegal advisor of a nonprofit civic, charitable, educational, religious, or social organization, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will either be engaged in proceedings that would ordinarily come before the judge or be regularly engaged in adversary proceedings in any court.

(2) A judge should not give investment advice to such an organization but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

C. *Fund Raising.* A judge may assist nonprofit law-related, civic, charitable, educational, religious, or social organizations in planning fund-raising activities and may be listed as an officer, director, or trustee. A judge may solicit funds for such an organization from judges over whom the judge does not exercise supervisory or appellate authority and from members of the judge's family. Otherwise, a judge should not personally participate in fund-raising activities, solicit funds for any organization, or use or permit the use of the prestige of judicial office for that purpose. A judge should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.

D. *Financial Activities.*

(1) A judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should refrain from financial and business dealings that exploit the judicial position or involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves.

(2) A judge may serve as an officer, director, active partner, manager, advisor, or employee of a business only if the business is closely held and controlled by members of the judge's family. For this purpose, "members of the judge's family" means persons related to the judge or the judge's spouse within the third degree of relationship as defined in Canon 3C(3)(a), any other relative with whom the judge or the judge's spouse maintains a close familial relationship, and the spouse of any of the foregoing.

(3) As soon as the judge can do so without serious financial detriment, the judge should divest investments and other financial interests that might require frequent disqualification.

(4) A judge should comply with the restrictions on acceptance of gifts and the prohibition on solicitation of gifts set forth in the Judicial Conference Gift Regulations. A judge should endeavor to prevent any member of the judge's family residing in the household from soliciting or accepting a gift except to the extent that a judge would be permitted to do so by the Judicial Conference Gift Regulations. A "member of the judge's family" means any relative of a judge by blood, adoption, or marriage, or any person treated by a judge as a member of the judge's family.

(5) A judge should not disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's official duties.

E. *Fiduciary Activities.* A judge may serve as the executor, administrator, trustee, guardian, or other fiduciary only for the estate, trust, or person of a member of the judge's family as defined in Canon 4D(4). As a family fiduciary a judge is subject to the following restrictions:

(1) The judge should not serve if it is likely that as a fiduciary the judge would be engaged in proceedings that would ordinarily come before the judge or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary, a judge is subject to the same restrictions on financial activities that apply to the judge in a personal capacity.

F. *Governmental Appointments.* A judge may accept appointment to a governmental committee, commission, or other position only if it is one that concerns the law, the legal system, or the administration of justice, or if appointment of a judge is required by

federal statute. A judge should not, in any event, accept such an appointment if the judge's governmental duties would tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary. A judge may represent the judge's country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

G. *Chambers, Resources, and Staff.* A judge should not to any substantial degree use judicial chambers, resources, or staff to engage in extrajudicial activities permitted by this Canon.

H. *Compensation, Reimbursement, and Financial Reporting.* A judge may accept compensation and reimbursement of expenses for the law-related and extrajudicial activities permitted by this Code if the source of the payments does not give the appearance of influencing the judge in the judge's judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

(1) Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.

(2) Expense reimbursement should be limited to the actual costs of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or relative. Any additional payment is compensation.

(3) A judge should make required financial disclosures, including disclosures of gifts and other things of value, in compliance with applicable statutes and Judicial Conference regulations and directives.

COMMENTARY

**Canon 4.** Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives. As a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice. To the extent that the judge's time permits and impartiality is not compromised, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the law. Subject to the same limitations, judges may also engage in a wide range of non-law-related activities.

Within the boundaries of applicable law (*see, e.g.*, 18 U.S.C. § 953) a judge may express opposition to the persecution of lawyers and judges anywhere in the world if the judge has ascertained, after reasonable inquiry, that the persecution is occasioned by conflict between the professional responsibilities of the persecuted judge or lawyer and the policies or practices of the relevant government.

A person other than a spouse with whom the judge maintains both a household and an intimate relationship should be considered a member of the judge's family for purposes of legal

assistance under Canon 4A(5), fund raising under Canon 4C, and family business activities under Canon 4D(2).

**Canon 4A.** Teaching and serving on the board of a law school are permissible, but in the case of a for-profit law school, board service is limited to a nongoverning advisory board. Consistent with this Canon, a judge may encourage lawyers to provide pro bono legal services.

**Canon 4A(4).** This Canon generally prohibits a judge from mediating a state court matter, except in unusual circumstances (*e.g.*, when a judge is mediating a federal matter that cannot be resolved effectively without addressing the related state court matter).

**Canon 4A(5).** A judge may act pro se in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with governmental bodies. In so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family.

**Canon 4B.** The changing nature of some organizations and their exposure to litigation make it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if the judge's continued association is appropriate. For example, in many jurisdictions, charitable hospitals are in court more often now than in the past.

**Canon 4C.** A judge may attend fund-raising events of law-related and other organizations although the judge may not be a speaker, a guest of honor, or featured on the program of such an event. Use of a judge's name, position in the organization, and judicial designation on an organization's letterhead, including when used for fund raising or soliciting members, does not violate Canon 4C if comparable information and designations are listed for others.

**Canon 4D(1), (2), and (3).** Canon 3 requires disqualification of a judge in any proceeding in which the judge has a financial interest, however small. Canon 4D requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of the judge's judicial duties. Canon 4H requires a judge to report compensation received for activities outside the judicial office. A judge has the rights of an ordinary citizen with respect to financial affairs, except for limitations required to safeguard the proper performance of the judge's duties. A judge's participation in a closely held family business, while generally permissible, may be prohibited if it takes too much time or involves misuse of judicial prestige or if the business is likely to come before the court on which the judge serves. Owning and receiving income from investments do not as such affect the performance of a judge's duties.

**Canon 4D(5).** The restriction on using nonpublic information is not intended to affect a judge's ability to act on information as necessary to protect the health or safety of the judge or a member of a judge's family, court personnel, or other judicial officers if consistent with other provisions of this Code.

**Canon 4E.** Mere residence in the judge's household does not by itself make a person a member of the judge's family for purposes of this Canon. The person must be treated by the judge as a member of the judge's family.

The Applicable Date of Compliance provision of this Code addresses continued service as a fiduciary.

A judge's obligation under this Code and the judge's obligation as a fiduciary may come into conflict. For example, a judge should resign as a trustee if it would result in detriment to the trust to divest holdings whose retention would require frequent disqualification of the judge in violation of Canon 4D(3).

**Canon 4F.** The appropriateness of accepting extrajudicial assignments must be assessed in light of the demands on judicial resources and the need to protect the courts from involvement in matters that may prove to be controversial. Judges should not accept governmental appointments that could interfere with the effectiveness and independence of the judiciary, interfere with the performance of the judge's judicial responsibilities, or tend to undermine public confidence in the judiciary.

**Canon 4H.** A judge is not required by this Code to disclose income, debts, or investments, except as provided in this Canon. The Ethics Reform Act of 1989 and implementing regulations promulgated by the Judicial Conference impose additional restrictions on judges' receipt of compensation. That Act and those regulations should be consulted before a judge enters into any arrangement involving the receipt of compensation. The restrictions so imposed include but are not limited to: (1) a prohibition against receiving "honoraria" (defined as anything of value received for a speech, appearance, or article), (2) a prohibition against receiving compensation for service as a director, trustee, or officer of a profit or nonprofit organization, (3) a requirement that compensated teaching activities receive prior approval, and (4) a limitation on the receipt of "outside earned income."

**CANON 5: A JUDGE SHOULD REFRAIN FROM POLITICAL ACTIVITY**

A. *General Prohibitions.* A judge should not:

(1) act as a leader or hold any office in a political organization;

(2) make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office; or

(3) solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or attend or purchase a ticket for a dinner or other event sponsored by a political organization or candidate.

B. *Resignation upon Candidacy.* A judge should resign the judicial office if the judge becomes a candidate in a primary or general election for any office.

C. *Other Political Activity.* A judge should not engage in any other political activity. This provision does not prevent a judge from engaging in activities described in Canon 4.

COMMENTARY

The term "political organization" refers to a political party, a group affiliated with a political party or candidate for public office, or an entity whose principal purpose is to advocate for or against political candidates or parties in connection with elections for public office.

COMPLIANCE WITH THE CODE OF CONDUCT

Anyone who is an officer of the federal judicial system authorized to perform judicial functions is a judge for the purpose of this Code. All judges should comply with this Code except as provided below.

A. *Part-time Judge.* A part-time judge is a judge who serves part-time, whether continuously or periodically, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge. A part-time judge:

(1) is not required to comply with Canons 4A(4), 4A(5), 4D(2), 4E, 4F, or 4H(3);

(2) except as provided in the Conflict-of-Interest Rules for Part-time Magistrate Judges, should not practice law in the court on which the judge serves or in any court subject to that court's appellate jurisdiction, or act as a lawyer in a proceeding in which the judge has served as a judge or in any related proceeding.

B. *Judge Pro Tempore.* A judge pro tempore is a person who is appointed to act temporarily as a judge or as a special master.

(1) While acting in this capacity, a judge pro tempore is not required to comply with Canons 4A(4), 4A(5), 4D(2), 4D(3), 4E, 4F, or 4H(3); further, one who acts solely as a special master is not required to comply with Canons 4A(3), 4B, 4C, 4D(4), or 5.

(2) A person who has been a judge pro tempore should not act as a lawyer in a proceeding in which the judge has served as a judge or in any related proceeding.

C. *Retired Judge.* A judge who is retired under 28 U.S.C. § 371(b) or § 372(a), or who is subject to recall under § 178(d), or who is recalled to judicial service, should comply with all the provisions of this Code except Canon 4F, but the judge should refrain from judicial service during the period of an extrajudicial appointment not sanctioned by Canon 4F. All other retired judges who are eligible for recall to judicial service (except those in U.S. territories and possessions) should comply with the provisions of this Code governing part-time judges. A senior judge in the territories and possessions must comply with this Code as prescribed by 28 U.S.C. §§ 373(c)(5) and (d).

APPLICABLE DATE OF COMPLIANCE

Persons to whom this Code applies should arrange their financial and fiduciary affairs as soon as reasonably possible to comply with it and should do so in any event within one year after appointment. If, however, the demands on the person's time and the possibility of conflicts of interest are not substantial, such a person may continue to act, without compensation, as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of the person's family if terminating the relationship would unnecessarily jeopardize any substantial interest of the estate or person and if the judicial council of the circuit approves.

# Appendix I

## Code of Conduct for Judicial Employees*

CHAPTER II. CODES OF CONDUCT FOR JUDICIAL EMPLOYEES

A. Code of Conduct for Judicial Employees.

Introduction

This Code of Conduct applies to all employees of the Judicial Branch except Justices; judges; and employees of the United States Supreme Court, the Administrative Office of the United States Courts, the Federal Judicial Center, the Sentencing Commission, and Federal Public Defender offices.[1] As used in this code in canons 3F(2)(b), 3F(5), 4B(2), 4C(l), and 5B, a member of a judge's personal staff means a judge's secretary, a judge's law clerk, and a courtroom deputy clerk or court reporter whose assignment with a particular judge is reasonably perceived as being comparable to a member of the judge's personal staff.[2]

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.

The Judicial Conference has authorized its Committee on Codes of Conduct to render advisory opinions concerning the application and interpretation of this code. Employees should consult with their supervisor and/or appointing authority for guidance on questions concerning this code and its applicability before a request for an advisory opinion is made to the Committee on Codes of Conduct. In assessing the propriety of one's proposed conduct, a judicial employee should take care to consider all relevant canons in this code, the Ethics Reform Act, and other applicable statutes and regulations[3] (e.g., receipt of a gift may implicate canon 2 as well as canon 4C(2) and the Ethics Reform Act gift regulations). Should a question remain after this consultation, the affected judicial employee, or the chief judge, supervisor, or appointing authority of such employee, may request an advisory opinion from the Committee. Requests for advisory opinions may be addressed to the Chairman of the Committee on Codes of Conduct in care of the General Counsel, Administrative Office of the United States Courts, One Columbus Circle, N.E., Washington, D.C. 20544.

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* U.S. Courts, http://www.uscourts.gov/guide/vol2/ch2a.html.

1 Justices and employees of the Supreme Court are subject to standards established by the Justices of that Court. Judges are subject to the Code of Conduct for United States Judges. Employees of the AO and the FJC are subject to their respective agency codes. Employees of the Sentencing Commission are subject to standards established by the Commission. Federal public defender employees are subject to the Code of Conduct for Federal Public Defender Employees. When Actually Employed (WAE) employees are subject to canons 1, 2, and 3 and such other provisions of this code as may be determined by the appointing authority.

2 Employees who occupy positions with functions and responsibilities similar to those for a particular position identified in this code should be guided by the standards applicable to that position, even if the position title differs. When in doubt, employees may seek an advisory opinion as to the applicability of specific code provisions.

3 *See Guide to Judiciary Policies and Procedures,* Volume II, Chapter VI, Statutory and Regulatory Provisions Relating to the Conduct of Judges and Judicial Employees.

Adopted September 19, 1995
by the Judicial Conference of the United States
Effective January 1, 1996[4]

## CANON 1 A JUDICIAL EMPLOYEE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY AND OF THE JUDICIAL EMPLOYEE'S OFFICE

An independent and honorable Judiciary is indispensable to justice in our society. A judicial employee should personally observe high standards of conduct so that the integrity and independence of the Judiciary are preserved and the judicial employee's office reflects a devotion to serving the public. Judicial employees should require adherence to such standards by personnel subject to their direction and control. The provisions of this code should be construed and applied to further these objectives. The standards of this code shall not affect or preclude other more stringent standards required by law, by court order, or by the appointing authority.

## CANON 2: A JUDICIAL EMPLOYEE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES

A judicial employee should not engage in any activities that would put into question the propriety of the judicial employee's conduct in carrying out the duties of the office. A judicial employee should not allow family, social, or other relationships to influence official conduct or judgment. A judicial employee should not lend the prestige of the office to advance or to appear to advance the private interests of others. A judicial employee should not use public office for private gain.

## CANON 3: A JUDICIAL EMPLOYEE SHOULD ADHERE TO APPROPRIATE STANDARDS IN PERFORMING THE DUTIES OF THE OFFICE

In performing the duties prescribed by law, by resolution of the Judicial Conference of the United States, by court order, or by the judicial employee's appointing authority, the following standards apply:

A. A judicial employee should respect and comply with the law and these canons. A judicial employee should report to the appropriate supervising authority any attempt to induce the judicial employee to violate these canons.

Note: A number of criminal statutes of general applicability govern federal employees' performance of official duties. These include:

18 U.S.C. § 201 (bribery of public officials and witnesses);
18 U.S.C. § 211 (acceptance or solicitation to obtain appointive public office);
18 U.S.C. § 285 (taking or using papers relating to government claims);
18 U.S.C. § 287 (false, fictitious, or fraudulent claims against the government);
18 U.S.C. § 508 (counterfeiting or forging transportation requests);
18 U.S.C. § 641 (embezzlement or conversion of government money, property, or records);
18 U.S.C. § 643 (failing to account for public money);
18 U.S.C. § 798 and 50 U.S.C. § 783 (disclosure of classified information);
18 U.S.C. § 1001 (fraud or false statements in a government matter);
18 U.S.C. § 1719 (misuse of franking privilege);

[4] Canon 3F(4) was revised at the March 2001 Judicial Conference.

18 U.S.C. § 2071 (concealing, removing, or mutilating a public record);
31 U.S.C.§ 1344 (misuse of government vehicle);
31 U.S.C. § 3729 (false claims against the government).

In addition, provisions of specific applicability to court officers include:
18 U.S.C. §§ 153, 154 (court officers embezzling or purchasing property from bankruptcy estate);

18 U.S.C. § 645 (embezzlement and theft by court officers);
18 U.S.C. § 646 (court officers failing to deposit registry moneys);
18 U.S.C. § 647 (receiving loans from registry moneys from court officer).

This is not a comprehensive listing but sets forth some of the more significant provisions with which judicial employees should be familiar.

B. A judicial employee should be faithful to professional standards and maintain competence in the judicial employee's profession.

C. A judicial employee should be patient, dignified, respectful, and courteous to all persons with whom the judicial employee deals in an official capacity, including the general public, and should require similar conduct of personnel subject to the judicial employee's direction and control. A judicial employee should diligently discharge the responsibilities of the office in a prompt, efficient, nondiscriminatory, fair, and professional manner. A judicial employee should never influence or attempt to influence the assignment of cases, or perform any discretionary or ministerial function of the court in a manner that improperly favors any litigant or attorney, nor should a judicial employee imply that he or she is in a position to do so.

D. A judicial employee should avoid making public comment on the merits of a pending or impending action and should require similar restraint by personnel subject to the judicial employee's direction and control. This proscription does not extend to public statements made in the course of official duties or to the explanation of court procedures. A judicial employee should never disclose any confidential information received in the course of official duties except as required in the performance of such duties, nor should a judicial employee employ such information for personal gain. A former judicial employee should observe the same restrictions on disclosure of confidential information that apply to a current judicial employee, except as modified by the appointing authority.

E. A judicial employee should not engage in nepotism prohibited by law.

Note: See also 5 U.S.C. § 3110 (employment of relatives); 28 U.S.C. § 458 (employment of judges' relatives).

F. Conflicts of Interest.

(1) A judicial employee should avoid conflicts of interest in the performance of official duties. A conflict of interest arises when a judicial employee knows that he or she (or the spouse, minor child residing in the judicial employee's household, or other close relative of the judicial employee) might be so personally or financially affected by a matter that a reasonable person with knowledge of the relevant facts would question the judicial employee's ability properly to perform official duties in an impartial manner.

(2) Certain judicial employees, because of their relationship to a judge or the nature of their duties, are subject to the following additional restrictions:

(a) A staff attorney or law clerk should not perform any official duties in any matter with respect to which such staff attorney or law clerk knows that:

(i) he or she has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(ii) he or she served as lawyer in the matter in controversy, or a lawyer with whom he or she previously practiced law had served (during such association) as a lawyer concerning the matter, or he, she, or such lawyer has been a material witness;

(iii) he or she, individually or as a fiduciary, or the spouse or minor child residing in his or her household, has a financial interest in the subject matter in controversy or in a party to the proceeding;

(iv) he or she, a spouse, or a person related to either within the third degree of relationship,[5] or the spouse of such person (A) is a party to the proceeding, or an officer, director, or trustee of a party; (B) is acting as a lawyer in the proceeding; (C) has an interest that could be substantially affected by the outcome of the proceeding; or (D) is likely to be a material witness in the proceeding;

(v) he or she has served in governmental employment and in such capacity participated as counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

(b) A secretary to a judge, or a courtroom deputy or court reporter whose assignment with a particular judge is reasonably perceived as being comparable to a member of the judge's personal staff, should not perform any official duties in any matter with respect to which such secretary, courtroom deputy, or court reporter knows that he or she, a spouse, or a person related to either within the third degree of relationship, or the spouse of such person (i) is a party to the proceeding, or an officer, director, or trustee of a party; (ii) is acting as a lawyer in the proceeding; (iii) has an interest that could be substantially affected by the outcome of the proceeding; or (iv) is likely to be a material witness in the proceeding; provided, however, that when the foregoing restriction presents undue hardship, the judge may authorize the secretary, courtroom deputy, or court reporter to participate in the matter if no reasonable alternative exists and adequate safeguards are in place to ensure that official duties are properly performed. In the event the secretary, courtroom deputy, or court reporter possesses any of the foregoing characteristics and so advises the judge, the judge should also consider whether the Code of Conduct for United States Judges may require the judge to recuse.

(c) A probation or pretrial services officer should not perform any official duties in any matter with respect to which the probation or pretrial services officer knows that:

(i) he or she has a personal bias or prejudice concerning a party;

(ii) he or she is related within the third degree of relationship to a party to the proceeding, or to an officer, director, or trustee of a party, or to a lawyer in the proceeding;

(iii) he or she, or a relative within the third degree of relationship, has an interest that could be substantially affected by the outcome of the proceeding.

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[5] As used in this code, the third degree of relationship is calculated according to the civil law system to include the following relatives: parent, child, grandparent, grandchild, great grandparent, great grandchild, brother, sister, aunt, uncle, niece and nephew.

(3) When a judicial employee knows that a conflict of interest may be presented, the judicial employee should promptly inform his or her appointing authority. The appointing authority, after determining that a conflict or the appearance of a conflict of interest exists, should take appropriate steps to restrict the judicial employee's performance of official duties in such matter so as to avoid a conflict or the appearance of a conflict of interest. A judicial employee should observe any restrictions imposed by his or her appointing authority in this regard.

(4) A judicial employee who is subject to canon 3F(2) should keep informed about his or her personal, financial and fiduciary interests and make a reasonable effort to keep informed about such interests of a spouse or minor child residing in the judicial employee's household. For purposes of this canon, "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the employee participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policy holder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(5) A member of a judge's personal staff should inform the appointing judge of any circumstance or activity of the staff member that might serve as a basis for disqualification of either the staff member or the judge, in a matter pending before the judge.

**CANON 4: IN ENGAGING IN OUTSIDE ACTIVITIES, A JUDICIAL EMPLOYEE SHOULD AVOID THE RISK OF CONFLICT WITH OFFICIAL DUTIES, SHOULD AVOID THE APPEARANCE OF IMPROPRIETY, AND SHOULD COMPLY WITH DISCLOSURE REQUIREMENTS**

A. Outside Activities. A judicial employee's activities outside of official duties should not detract from the dignity of the court, interfere with the performance of official duties, or adversely reflect on the operation and dignity of the court or office the judicial employee serves. Subject to the foregoing standards and the other provisions of this code, a judicial employee may engage in such activities as civic, charitable, religious, professional, educational, cultural, avocational, social, fraternal, and recreational activities, and may speak, write, lecture, and teach. If such outside activities concern the law, the legal system, or the administration of justice, the judicial employee should first consult with the appointing authority to determine whether the proposed activities are consistent with the foregoing standards and the other provisions of this code.

B. Solicitation of Funds. A judicial employee may solicit funds in connection with outside activities, subject to the following limitations:

(1) A judicial employee should not use or permit the use of the prestige of the office in the solicitation of funds.

(2) A judicial employee should not solicit subordinates to contribute funds to any such activity but may provide information to them about a general fund-raising campaign. A member of a judge's personal staff should not solicit any court personnel to contribute funds to any such activity under circumstances where the staff member's close relationship to the judge could reasonably be construed to give undue weight to the solicitation.

(3) A judicial employee should not solicit or accept funds from lawyers or other persons likely to come before the judicial employee or the court or office the judicial employee serves, except as an incident to a general fund-raising activity.

C. Financial Activities.

(1) A judicial employee should refrain from outside financial and business dealings that tend to detract from the dignity of the court, interfere with the proper performance of official duties, exploit the position, or associate the judicial employee in a substantial financial manner with lawyers or other persons likely to come before the judicial employee or the court or office the judicial employee serves, provided, however, that court reporters are not prohibited from providing reporting services for compensation to the extent permitted by statute and by the court. A member of a judge's personal staff should consult with the appointing judge concerning any financial and business activities that might reasonably be interpreted as violating this code and should refrain from any activities that fail to conform to the foregoing standards or that the judge concludes may otherwise give rise to an appearance of impropriety.

(2) A judicial employee should not solicit or accept a gift from anyone seeking official action from or doing business with the court or other entity served by the judicial employee, or from anyone whose interests may be substantially affected by the performance or nonperformance of official duties; except that a judicial employee may accept a gift as permitted by the Ethics Reform Act of 1989 and the Judicial Conference regulations thereunder. A judicial employee should endeavor to prevent a member of a judicial employee's family residing in the household from soliciting or accepting any such gift except to the extent that a judicial employee would be permitted to do so by the Ethics Reform Act of 1989 and the Judicial Conference regulations thereunder.

Note: See 5 U.S.C. § 7353 (gifts to federal employees). See also 5 U.S.C. § 7342 (foreign gifts); 5 U.S.C. § 7351 (gifts to superiors).

(3) A judicial employee should report the value of gifts to the extent a report is required by the Ethics Reform Act, other applicable law, or the Judicial Conference of the United States.

Note: See 5 U.S.C. App. §§ 101 to 111 (Ethics Reform Act financial disclosure provisions).

(4) During judicial employment, a law clerk or staff attorney may seek and obtain employment to commence after the completion of the judicial employment. However, the law clerk or staff attorney should first consult with the appointing authority and observe any restrictions imposed by the appointing authority. If any law firm, lawyer, or entity with whom a law clerk or staff attorney has been employed or is seeking or has obtained future employment appears in any matter pending before the appointing

authority, the law clerk or staff attorney should promptly bring this fact to the attention of the appointing authority.

D. Practice of Law. A judicial employee should not engage in the practice of law except that a judicial employee may act pro se, may perform routine legal work incident to the management of the personal affairs of the judicial employee or a member of the judicial employee's family, and may provide pro bono legal services in civil matters, so long as such pro se, family, or pro bono legal work does not present an appearance of impropriety, does not take place while on duty or in the judicial employee's workplace, and does not interfere with the judicial employee's primary responsibility to the office in which the judicial employee serves, and further provided that:

(1) in the case of pro se legal work, such work is done without compensation (other than such compensation as may be allowed by statute or court rule in probate proceedings);

(2) in the case of family legal work, such work is done without compensation (other than such compensation as may be allowed by statute or court rule in probate proceedings) and does not involve the entry of an appearance in a federal court;

(3) in the case of pro bono legal services, such work (a) is done without compensation; (b) does not involve the entry of an appearance in any federal, state, or local court or administrative agency; (c) does not involve a matter of public controversy, an issue likely to come before the judicial employee's court, or litigation against federal, state or local government; and (d) is reviewed in advance with the appointing authority to determine whether the proposed services are consistent with the foregoing standards and the other provisions of this code.

Judicial employees may also serve as uncompensated mediators or arbitrators for nonprofit organizations, subject to the standards applicable to pro bono practice of law, as set forth above, and the other provisions of this code.

A judicial employee should ascertain any limitations imposed by the appointing judge or the court on which the appointing judge serves concerning the practice of law by a former judicial employee before the judge or the court and should observe such limitations after leaving such employment.

Note: See also 18 U.S.C. § 203 (representation in matters involving the United States); 18 U.S.C. § 205 (claims against the United States); 28 U.S.C. § 955 (restriction on clerks of court practicing law).

E. Compensation and Reimbursement. A judicial employee may receive compensation and reimbursement of expenses for outside activities provided that receipt of such compensation and reimbursement is not prohibited or restricted by this code, the Ethics Reform Act, and other applicable law, and provided that the source or amount of such payments does not influence or give the appearance of influencing the judicial employee in the performance of official duties or otherwise give the appearance of impropriety. Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by a judicial employee and, where appropriate to the occasion, by the judicial employee's spouse or relative. Any payment in excess of such an amount is compensation.

A judicial employee should make and file reports of compensation and reimbursement for outside activities to the extent prescribed by the Ethics Reform Act, other applicable law, or the Judicial Conference of the United States.

Notwithstanding the above, a judicial employee should not receive any salary, or any supplementation of salary, as compensation for official government services from any source

other than the United States, provided, however, that court reporters are not prohibited from receiving compensation for reporting services to the extent permitted by statute and by the court.

Note: See 5 U.S.C. App. §§ 101 to 111 (Ethics Reform Act financial disclosure provisions); 28 U.S.C. § 753 (court reporter compensation). See also 5 U.S.C. App. §§ 501 to 505 (outside earned income and employment).

**CANON 5: A JUDICIAL EMPLOYEE SHOULD REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY**

A. Partisan Political Activity. A judicial employee should refrain from partisan political activity; should not act as a leader or hold any office in a partisan political organization; should not make speeches for or publicly endorse or oppose a partisan political organization or candidate; should not solicit funds for or contribute to a partisan political organization, candidate, or event; should not become a candidate for partisan political office; and should not otherwise actively engage in partisan political activities.

B. Nonpartisan Political Activity. A member of a judge's personal staff, clerk of court, chief probation officer, chief pretrial services officer, circuit executive, and district court executive should refrain from nonpartisan political activity such as campaigning for or publicly endorsing or opposing a nonpartisan political candidate; soliciting funds for or contributing to a nonpartisan political candidate or event; and becoming a candidate for nonpartisan political office. Other judicial employees may engage in nonpartisan political activity only if such activity does not tend to reflect adversely on the dignity or impartiality of the court or office and does not interfere with the proper performance of official duties. A judicial employee may not engage in such activity while on duty or in the judicial employee's workplace and may not utilize any federal resources in connection with any such activity.

Note: See also 18 U.S.C. Chapter 29 (elections and political activities).


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