

1 **DRAFT**

2 **AMERICAN BAR ASSOCIATION**

3 **JUDICIAL DIVISION**

4 **RESOLUTION**

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9 RESOLVED, That the American Bar Association urges states to adopt the following
10 Model Rule of Civil Procedure:

11 Appointment and Use of Court-Appointed Neutrals:

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13 ABA Judicial Division Lawyers Conference Court-Appointed Neutrals Committee

14 **DRAFT MODEL STATE RULE OF CIVIL PROCEDURE**

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17
18 (a) Definition of Court-Appointed Neutral

19 A Court-Appointed Neutral is a disinterested professional appointed as an adjunct – a
20 special officer appointment – to assist a court in its case-management, adjudicative or
21 post-resolution responsibilities in accordance with the provisions of this Rule and any
22 standards established by this Court for qualification to hold such an appointment.
23

24 (b) Use of Court-Appointed Neutrals

25
26 (1) Unless prohibited by law, at the outset of complex litigation and in other cases that
27 create particular needs that a neutral might satisfy, the court and the parties are
28 encouraged to consider and discuss whether use of a neutral would assist with the
29 disposition of issues in the case. A court may also consider on its own, or upon the
30 motion of one or more of the parties, whether to appoint a neutral later in the
31 litigation.

32 (2) In determining whether to appoint a neutral and the scope of the appointment, the
33 court should consider:

- 34 (A) whether a neutral likely could address any matter within the scope of the
35 appointment more expeditiously than is practicable without the neutral,
36 considering the court's case load and the issues and needs of the case;
37 (B) whether a neutral's involvement may assist by insulating the court from allegedly
38 privileged or confidential information that would otherwise not be necessary for
39 the court's consideration;
40 (C) whether the appointment is proportionate to the issues and needs of the case;
41 (D) whether the benefit of appointing a neutral outweighs the expense;
42 (E) whether the appointment can be made without imposing an unreasonable
43 financial burden on any party or unreasonable delay;
44 (F) whether the appointment will be otherwise unfair to any party; and
45 (G) whether the particular appointee has the knowledge, skills, ability, and training to
46 perform the needed tasks.

47
48 (c) Services of the Court-Appointed Neutral
49

50 Unless law or the court provides otherwise, and subject to any court rules, procedures
51 (including the provisions of any court-based alternative dispute resolution program) and
52 principles of ethics applicable to the services being performed, in appropriate cases a
53 neutral may, without the parties' consent, perform the following services:

- 54 (1) conduct pre-trial case management;
55 (2) coordinate cases in different jurisdictions;
56 (3) provide advice or information to the court on complex or specialized subjects;
57 (4) manage discovery;
58 (5) conduct privilege reviews;
59 (6) investigate and report on factual matters identified by the court;
60 (7) perform accountings, and calculate damages, attorneys' fees and costs;
61 (8) facilitate resolution of disputes between or among otherwise aligned parties and/or
62 their counsel;
63 (9) monitor implementation of and compliance with court orders;
64 (10) conduct and/or oversee claims administration, including the allocation of funds
65 among claimants;
66 (11) oversee settlement administration;
67 (12) facilitate the parties' efforts to resolve differences;
68 (13) allocate responsibility for payment of the neutral's compensation; and
69 (14) perform other services ordered by the court.
70

71 (d) Powers of the Court-Appointed Neutral
72

73 Subject to the provisions of Rule (h) below, in providing the services in accordance with
74 Rule (c) above, a neutral may exercise
75

- 76 (1) the following powers without the parties' consent:
77 (A) issue procedural orders;
78 (B) conduct evidentiary proceedings and make findings of fact and conclusions of law
79 relevant to motions or orders that do not involve trial of an entire action;
80 (C) make evidentiary rulings;
81 (D) compel, take and record evidence;
82 (E) conduct hearings on specified issues; and
83 (F) sanction parties (other than for contempt); and
84 (2) the following powers only with the parties' consent and court approval:
85 (A) conduct non-jury trials of entire actions; and
86 (B) make findings of fact and conclusions of law; and
87 (C) such other powers to which the parties consent and the court approves.
88

89 (e) Appointment of Neutral
90

- 91 (1) Selection

92 (A) Before appointing a neutral, a court must provide notice to the parties and permit
93 them to identify any objection they may have to the appointment, to suggest
94 candidates for appointment and to propose any provisions they may wish to have
95 or not to have included in an appointment order. If the court deems appropriate, it
96 may afford the parties an opportunity for oral argument on these issues.

97 (B) The court may consider suggested candidates and other candidates on any rosters
98 or other listings of pre-screened individuals from a diverse pool of potential
99 candidates, but the court is not required to select from among such candidates.

100 (C) The court should select a neutral with due regard for the court's needs, the parties'
101 preferences, and any requirements relating to a roster in a manner that ensures
102 qualified and appropriately skilled and experienced candidates are identified and
103 chosen.

104 (2) Qualification Procedure

105 (A) Upon receiving notice of a prospective appointment, and before accepting the
106 appointment, a prospective appointee shall file an affidavit disclosing whether the
107 prospective appointee (and, if applicable, the individual's firm) has any
108 information, including but not limited to information regarding any relationship to
109 the parties, their attorneys or the action, that is likely to give rise to justifiable
110 doubt about the impartial and fair administration of justice.

111 (B) The affidavit shall also include an oath that if appointed, the neutral will
112 administer justice without favor to or prejudice against any party and will
113 faithfully and impartially discharge and perform all duties in accordance with the
114 law, this rule, and the court's instructions.

115 (C) Within five days, or such other period as the court may order, any party who
116 objects to the prospective appointment may file an objection stating the grounds
117 therefor.

118 (D) If no objection is filed on or before the deadline for making one, or if the parties
119 consent to the appointment notwithstanding the disclosure, the court may proceed
120 with the appointment.

121 (E) The court should not select a proposed candidate if a party files a timely objection
122 and the court sustains the objection, or the court decides on its own that the
123 proposed candidate is not suitable for the particular matter.

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

126 (G) A neutral, the parties, and their counsel have a continuing obligation throughout
127 the course of the appointment to correct errors in and to supplement information
128 concerning the disclosures described above. Upon good cause shown, a party
129 may be permitted to submit this information to the neutral and the court in
130 confidence.

131
132 (f) Appointing Order

133
134 (1) The appointing order should:

135 (A) identify the particular function(s) the neutral is expected to serve and the services
136 the neutral is expected to provide;

- 137 (B) identify the court's reasons for making the appointment including the court's
138 consideration of the factors described in Rule (b)(2);
- 139 (C) describe in writing and with reasonable specificity the scope of the neutral's
140 appointment, including, if appropriate, the duration and/or tasks to be completed;
- 141 (D) state the circumstances, if any, in which the neutral may communicate ex parte
142 with the court or a party;
- 143 (E) state the circumstances, if any, in which the standards of review will differ from
144 those set forth in Rule (h)(4);
- 145 (F) state whether the parties have stipulated to waive review by the trial court as set
146 forth in Rule (h)(5); and
- 147 (G) set forth the basis and terms of the neutral's compensation, with the court:
- 148 (i) at the outset of the appointment, setting the rate of compensation, addressing
149 reimbursement for expenses, identifying the source of funds, stating whether and
150 how the parties will share responsibility for the neutral's compensation, and
151 directing how and to whom invoices are to be submitted for payment.
- 152 (ii) The neutral's compensation may be modified through an amendment of the
153 appointing order at any time subsequent to the appointment, by the court's
154 adjusting the rate of compensation and the source of funds, and by the court-
155 appointed neutral or the court revising the allocation of responsibility for
156 payment, as the circumstances warrant, including altering responsibility for costs
157 incurred because party has engaged in unreasonable conduct necessitating the
158 expense.
- 159 (2) The appointing order may also state any of the following:
- 160 (A) whether the neutral is prohibited from providing any of the services described
161 in Rule (c);
- 162 (B) whether the neutral is prohibited from exercising any of the powers described
163 in Rule (d)(1);
- 164 (C) whether the neutral is permitted to exercise any of the powers described in Rule
165 (d)(2);
- 166 (D) whether and the extent to which the neutral is required to inform the court as
167 to the status of the matters within the scope of the appointment;
- 168 (E) the nature of the materials to be preserved and filed as the record of the
169 neutral's activities; provided, however, that unless otherwise stipulated, where a
170 neutral is appointed to conduct a non-jury trial of an entire matter or to make
171 findings of fact or conclusions of law, a transcript of any testimony taken and
172 copies of any exhibits shall accompany the neutral's report;
- 173 (F) procedures that will take effect if the neutral is unable to fulfill the duties
174 specified in the appointing order.
- 175 (3) The appointing order may be amended by the court on its own or upon motion of a
176 party.
- 177
- 178 (g) Neutral's Responsibilities
- 179
- 180 (1) After appointment, the neutral should proceed with diligence to ensure the just,
181 speedy, and inexpensive performance of the neutral's responsibilities.
- 182 (2) Neutral's Orders, Reports and Recommendations
- 183 (A) A neutral who issues a written order shall file it with the court and ensure prompt
184 service of a copy on each party.

- 185 (B) A neutral who prepares a written report or recommendation shall file it, along
186 with any testimony or exhibits required pursuant to Rule (f)(2)(E), with the court
187 and ensure prompt service of a copy on each party.
- 188 (C) A neutral appointed to conduct a non-jury trial of an entire matter or to make
189 findings of fact or conclusions of law shall comply with the requirements
190 applicable to a trial court rendering an appealable decision.
- 191 (D) A neutral may share drafts, designated as such, of an order, report or
192 recommendation with all parties before filing the final version.
- 193 (E) A neutral shall provide any additional reports to the court as the appointing order
194 may require.
- 195
- 196 (h) Action on Neutral's Order, Report or Recommendations
- 197 (1) Unless an order, report or recommendation is marked as a draft, the time for the
198 parties to respond or file objections shall run from the later of the filing or service of
199 the order, report or recommendation.
- 200 (2) Action by the Parties
- 201 (A) A party may file with the court and simultaneously must serve, on all other
202 parties, written objections to – or a motion to adopt or modify – the neutral's
203 order, report or recommendations in no later than 14 days, unless the court sets
204 a different time. Any objection to or motion must show that the argument being
205 asserted was presented to the neutral for consideration, and, if seeking to
206 challenge a proposed finding of fact must specifically identify the finding to
207 which the party objects and identify the evidence of record that contradicts that
208 finding or the reasons why evidence supporting the finding should have been
209 excluded or evidence contradicting the finding should have been admitted.
- 210 (B) The court's rules governing motion practice apply to responses and replies,
211 unless the court orders otherwise.
- 212 (3) Action by the Court
- 213 (A) In reviewing a neutral's order, report or recommendations, the court may adopt
214 or affirm, modify, wholly or partly, reject or reverse, or resubmit to the neutral
215 with instructions.
- 216 (B) The court, on its own or by motion of a party, may conduct a hearing (i) if a
217 party has filed an objection or a motion to modify the neutral's order, report or
218 recommendations; (ii) if the court intends to receive evidence before acting
219 upon the neutral's order, report or recommendations; or (iii) if the court intends
220 to modify, wholly or partly, reject or reverse the neutral's order, report or
221 recommendations.
- 222 (4) Standards for Review by the Court in the Absence of a Stipulation to Waive Review
223 In the absence of a stipulation to waive review under Rule (f)(1)(F) above and subject to
224 applicable law:
- 225 (A) The court may vary the standards of review in the appointing order of any
226 objections to, or issues raised by a motion to amend or modify, an order, report or
227 recommendations of a neutral, as permitted by Rule (f)(1)(E) above.
- 228 (B) Subject to the court's approval, the parties may stipulate to applicable standards
229 of review of any objections to, or issues raised by motion to amend or modify, an
230 order, report or recommendations of a neutral;

- 231 (C) Absent order of the court, or stipulation by the parties, the following standards of
232 review shall apply to an order, report or recommendation by a neutral if a party
233 objects or files a motion to amend or modify such order, report or
234 recommendation in accordance with Rule (h)(2)(A):
235 (i) the court shall review conclusions of law de novo;
236 (ii) with regard to findings of fact, the court shall review the objection or motion
237 first to determine whether the objecting or moving party has raised sufficient
238 contradicting evidence under Rule (h)(2)(A) or grounds for evidentiary objection
239 to warrant review and review only those findings to which this evidence has been
240 adduced or to which the grounds apply. When reviewing findings of fact, the
241 court does not owe deference to the neutral's findings. Absent order of the court
242 based upon a showing of good cause, however, the court will conduct its review
243 based on the record adduced before the neutral; and
244 (iii) procedural rulings shall be reviewed for abuse of discretion.
- 245 (5) Stipulations that Waive Review by the Court
246 Subject to the Court's approval, applicable law and Rule (g)(2)(C), above
247 (A) If the parties stipulate that the neutral may conduct trials of entire non-jury
248 actions; or
249 (B) if the parties stipulate that the neutral may make findings of fact and
250 conclusions of law; then
251 (C) the parties waive review by the trial court and an appeal from the neutral's
252 determination may be taken to a higher court as would any other appeal from a
253 trial court's determination.

REPORT TO THE HOUSE OF DELEGATES

JUDICIAL DIVISION

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 urging that Bankruptcy Rule 9031 be amended to permit courts responsible for cases

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 is presenting a separate Resolution to revise the in the Guidelines to use the term “Court-Appointed Neutral.”

² Guideline 1, *supra* n.1.

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 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 Council of Juvenile and Family Court Judges, 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 urges the House of Delegates to endorse this Model Rule and thus encourage

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.

state-level jurisdictions to adapt this proposed rule to their local needs and then adopt the Model Rule for the Appointment and Use of Court-Appointed Neutrals.⁴

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

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 efaidnbmnnnibpcjpcglclefindmkaj/https://tile.loc.gov/storage-services/service/ll/usrep/usrep461/usrep461amendments/usrep461amendments.pdf at 1104 (Former Rule 53(c)). 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,

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. Instead of saying, as the 1983 Rule had, that the court “may appoint a special master” for a very limited trial purpose, the first line of the 2003 version of Rule 53 (which is the current version) presumed that courts had the authority to appoint special masters for an unspecified array of potential needs and described the limits on how that broad authority should be exercised.¹⁴

The version of Federal Rule of Civil Procedure 53 in effect since 2003 has contemplated appointing not only trial masters but also masters to “perform duties consented to by the parties,” and to “address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.”¹⁵

This language did more than just acknowledge that court-appointed neutrals could be used for “pretrial and posttrial” matters that the pre-2003 “trial master” version of the Rule did not address. It established a much more flexible standard for the appointment of neutrals to perform pretrial and posttrial matters than applied when

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 Fed. R. Civ. P. 53(a)(1) (current version) (“Unless a statute provides otherwise, a court may appoint a master only to:...”)

¹⁵ Fed. R. Civ. P. 53(a)(1)(A), (B), (C) (current version).

appointing a “trial master.” The current version of Rule 53 makes clear that use of court-appointed neutrals to conduct a trial required that there be some “exceptional condition,” or “need to perform an accounting or resolve a difficult computation.”¹⁶ The Advisory Notes on the 2003 Amendment make clear that these limitations on the use of court-appointed neutrals to conduct trials were intended to track limitations in the prior version of Rule 53 and to “embrace[] for this setting” the philosophy—explicit in the prior rule—that appointments of *trial* masters “shall be the exception and not the rule.”¹⁷

The pretrial and posttrial master provisions of the current Federal Rule 53 (and the Advisory Committee Notes that discuss it) do not limit the appointment to some “exceptional condition” or make the use of masters “the exception and not the rule.” To the contrary, the current rule broadly recognizes the authority of trial courts to appoint a “master” to address pretrial and post-trial matters without any limitation concerning what work the “master” may perform so long as the master is appointed to “address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.”¹⁸

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 53.¹⁹ Some, however, have versions that continue to track language from the pre-2003 “trial master” version of Federal Rule 53.²⁰ Others use different language to discuss the appointment and use of court-appointed neutrals (and often different titles for the position).²¹

The Guidelines. The Guidelines articulate best practices for using court-appointed neutrals. The Guidelines recognized that, since Federal Rule of Civil Procedure

¹⁶ Fed. R. Civ. P. 53(a)(1)(B)(i), (ii).

¹⁷ Advisory Committee Notes to the “Trial Masters” portion of the 2003 Amendments to Fed. R. Civ. P. 53.

¹⁸ Fed. R. Civ. P. 53(a)(1)(C) (current version).

¹⁹ See, e.g., Ariz. R. Civ. P. 53; Colo. 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.

²⁰ 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. § 1A-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.

²¹ 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. 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.

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.²²
- 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.²³
- 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.²⁴
- Courts can use neutrals creatively and in myriad ways to help increase efficiency and decrease the time needed to resolution.²⁵
- 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.²⁶

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,²⁷ 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).²⁸

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

²² Report Accompanying ABA Resolution 19M100 (adopting the Guidelines) (“Report”) at 2-3 & n.4.

²³ *Id.* at 3 & nn.5-6.

²⁴ *Id.* at 3-4 & nn.8-9.

²⁵ *Id.* at 5-6 & nn.15-17.

²⁶ *Id.* at 6-7 & n.18.

²⁷ See Fed. R. Civ. P. 16(c)(2)(H).

²⁸ Report, *supra* n.20, at 7 & n.18.

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 the 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 courts or, where applicable, state 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), Use of 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 regular, 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 should consider in making an appointment, and directs the court to consider whether the benefit outweighs the cost and whether the appointment can be made without imposing an unreasonable financial burden on any party or delay and whether the appointment is otherwise fair or unfair. It also directs the court’s focus to the potential appointee’s knowledge, skills, ability and training.

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 judge's authority or to impair 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."²⁹ 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."³⁰

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 litigation. 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.³¹ 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 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 (Model Rule subdivisions (b)(2)(C),(D) and (E)), 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.

²⁹ Report, *supra* n.20 at 7 & n.12.

³⁰ *Id.* at 8.

³¹ See, e.g., Merrill 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

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."³² This standard affords courts broad discretion 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 broad discretion for the court. 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 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 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 when the benefit outweighs the cost and the many 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

³² See Advisory Committee Notes to 2003 Amendments to Fed. R. Civ. P. 53 ("Trial Masters").

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 of the Court-Appointed Neutral, 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.³³

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), Powers of the Court-Appointed Neutral, identifies powers that may be afforded 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

³³ 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), available at www.courtappointedneutrals.org/acam/assets/file/public/handbook/acan%20benchbook%202023%20edition%20-%20section%203.pdf

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.”³⁴ 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.³⁵

The 2003 amendments relegated the use of “trial masters” to a single provision of the Rule,³⁶ “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,”³⁷ 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.”³⁸

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.”³⁹ As the Advisory Committee Notes explain, the accounting was to be “essentially ministerial,” and the “exceptional condition” language for otherwise appointing 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.”⁴⁰

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.”⁴¹ Neither the Rule itself, nor the Advisory Committee Notes, suggest that a court upon finding that a neutral was able to perform pretrial or posttrial matters that the court could not address in an effective or timely fashion, needed to find some additional “extraordinary” circumstance to justify the appointment.

The Model Rule continues the approach of recognizing that, in trial courts, the

³⁴ See Advisory Committee Notes to 2003 Amendments to Fed. R. Civ. P. 53 (“Trial Masters”).

³⁵ See Former Rule 53(b) (1983).

³⁶ See Fed. R. Civ. P. 53(a)(1)(B).

³⁷ See Advisory Committee Notes to 2003 Amendments to Fed. R. Civ. P. 53 (“Trial Masters”).

³⁸ Fed. R. Civ. P. 53(a)(1)(C).

³⁹ Fed. R. Civ. P. 53(a)(1)(B)(i), (ii).

⁴⁰ See Advisory Committee Notes to 2003 Amendments to Fed. R. Civ. P. 53 (“Trial Masters”).

⁴¹ See Advisory Committee Notes to 2003 Amendments to Fed. R. Civ. P. 53 (“Trial Masters”).

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 "likely to give rise to legitimate doubt," is one used in many arbitration proceedings. 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. Absent some particular reason, it does not contemplate that law firms will survey lawyers who are not involved in the appointment. The experience of others at a firm, who will not be involved in the appointment, is not usually "likely to give rise to legitimate doubt" about a prospective appointee's impartiality or fairness. A prospective appointee would be expected to disclose, for example, 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 likely to be relevant.

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 power 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 alter the standards. 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; 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
May 2023

General Information Form

1. Summary of Resolution.

This Resolution adopts a Model State Rule of Civil Procedure for the Appointment and Use of Court-Appointed Neutrals. It is designed to implement the Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation (19M100) and to help standardize the use of the name “Court-Appointed Neutrals” rather than “Masters” or “Special Masters” to refer to the those who serve in this role.

2. Indicate which of the ABA’s Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

This Resolution seeks to advance all four of the ABA’s goals. It both serves ABA’s Members and Improves our Profession (Goals 1 and 2) by helping to clarify, regularize, improve and broaden the thinking about use of court-appointed neutrals in civil litigation; to facilitate easier entry of skills professionals into work of court-appointed neutrals; and to establish principles that help ensure the legitimacy, quality and effectiveness of selections o court-appointed neutrals.

It will help eliminate bias and enhances diversity in several ways. It urges courts to put in place regular (rather than *ad hoc*) processes for considering and appointing neutrals. It encourages the use of rosters and the development of best practices to draw the selection of neutrals from a wider pool. By assisting in diversifying the court-appointed neutrals profession, it will also assist in diversifying both the array of professionals that serve litigants in the court-system, and the pipeline of experiences that lead to judicial selection.

It will help advances the rule of law by facilitating the assistance of courts in providing the just, fair and inexpensive resolution of every action and in promoting a regularized process that can be recognized as legitimate and informed by stakeholder in the process.

3. Approval by Submitting Entity.

The Judicial Division (JD) Council voted to sponsor this Resolution on April 25, 2023. Pursuant to the JD Bylaws, a majority of the voting members of the JD Council participated, making this a binding action.

4. Has this or a similar Resolution been submitted to the House or Board previously?

No.

5. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The ABA has long advanced the use of dispute resolution tools to promote efficiency in the administration of justice in state and federal courts. This resolution would enhance the ABA's current policy, summarized below:

- Support in principle the proposed Dispute Resolution Act, which would provide federal funds to states to create or improve small claims courts and other means of dispute resolution such as mediation and arbitration. (enacted in 1980 but not funded). Also support the increased use of alternative means of dispute resolution by federal administrative agencies consistent with several specified principles. 88A103A
- Support continued use of and experimentation with certain alternative dispute resolution techniques, both before and after suit is filed, as necessary and welcome components of the justice system in the United States. All alternative dispute resolution techniques should assure that every disputant's constitutional and other legal rights and remedies are protected. 89A114
- Recommend that the Council of the Commission for Environmental Cooperation consider the Model Rules of Procedure for Dispute Resolution under the North American Agreement on Environmental Cooperation dated February 1995, with a view to their adoption. 95M117C
- Support legislation and programs that authorize any federal, state, territorial or tribal court, including Courts of Indian Offenses, in its discretion, to utilize systems of alternative dispute resolution such as early neutral evaluation, mediation, settlement conferences and voluntary, but not mandatory, arbitration. 97M112
- Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship. 97M101.
- Urges the Supreme Court of the United States to consider racial, ethnic, disability, sexual orientation, gender identity, and gender diversity in the selection process for appointment of amicus curiae, special masters, and other counsel. 17M10A
- Adopts Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation and urges the amendment of 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. 19M100.

6. If this is a late Report, what urgency exists which requires action at this meeting of the House?

N/A.

7. Status of Legislation (if applicable).

N/A.

8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The Judicial Division, through the Lawyers Conference Court-Appointed Neutral Committee will commence specific outreach efforts with states and organizations associated with the judiciary to disseminate and explain the draft Model Rule and promote its use. These efforts will include:

- (1) Conducting outreach through programs and publications to educate organizations involved in the administration of justice (including the National Center for State Courts, the National Judicial College, the National Association for Court Management, and others), state and local bars, courts, staff and stakeholders about the Model Rule;
- (2) Continuing to develop and refine model criteria that courts could use to select a diverse group of qualified candidates to rosters of court-appointed neutrals, and a survey instrument that courts could use on a consistent basis to evaluate the work of court-appointed neutrals, to improve their performance in future cases, and to create data that would be available to researchers to evaluate the effectiveness of court-appointed neutrals and the differing approaches and methods they employ;
- (3) Continuing to work with the appropriate ABA Standing Committees, Commissions, Sections, Divisions and forums to develop a principles of Ethics for Court-Appointed Neutrals; and
- (4) Urging consideration of the principles and potentially language in the draft Model State Rule as part of possible amendments to federal rules, including Federal Rule of Civil Procedure 53 and of Bankruptcy Rule of Civil Procedure 9031.

9. Cost to the Association (both indirect and direct costs).

None.

10. Disclosure of Interest.

In September 2021, after Committee work on this draft Model Rule had begun, Merrill Hirsh, the Chair of what is now the Judicial Division Lawyers Conference Court-Appointed Neutrals Committee and one of the contacts in connection with the resolution also became the Executive Director of what is now the Academy of Court-Appointed Neutrals—a professional organization of individuals who provide or are interested in providing court-appointed neutral services or are otherwise interested in advancing the assistance that appointed neutrals provide courts. The Court-Appointed Neutrals Committee responsible for drafting the Model Rule also includes some court-appointed neutrals along with sitting and retired federal and state judges, outside and in-house lawyers, other ADR professionals, academics and formal and informal liaisons from several of sections, divisions and forums to which drafts were referred and discussed. See Item 11.

11. Referrals.

Appellate Judges Conference

Business Law Section
Forum on Construction Law
Lawyers Conference
National Conference of the Administrative Law Judiciary
National Conference of Federal Trial Judges
National Conference of Specialized Court Judges
National Conference of State Trial Judges
Tribal Courts Council
Lawyers Conference
Standing Committee on the American Judicial System
Section of Antitrust Law
Section of Dispute Resolution
Section of Intellectual Property Law
Section of Litigation
Solo, Small Firm and General Practice Division
Tort Trial and Insurance Practice Section

12. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address.)

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13. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

Same, subject to Mr. Hirsh being granted speaker privileges.