Expanding Use of Court-Appointed Neutrals in New York State Courts

By Norman Feit

Few would dispute that the growing backlog oppressing the New York court system warrants new and enlightened tools to achieve more efficient judicial administration. Certainly, the New York courts have taken some meaningful steps. For example, system-wide, courts are increasingly turning to presumptive mediation–often early in a case–as an expedient to reduce caseloads.[1] Many judges have also continued to embrace the efficiencies flowing from remote proceedings occasioned by the pandemic, particularly for status conferences and ancillary matters. But one widely used tool that has largely eluded the New York State court system is the use of court-appointed private neutrals–often referred to as "special masters" or "referees"–to assist in overseeing discrete aspects in order to streamline case administration as well as provide specialized expertise.[2]

The Expanding Use of Court-Appointed Neutrals

The designation of private neutrals as judicial adjuncts has become widespread across the country.[3] In the federal court system, Federal Rule of Civil Procedure 53 contemplates the appointment of "masters" for broad ranging functions.[4] These may as a baseline encompass any duties consented to by the parties. But even without the parties' consent, federal courts have broad latitude outside the province of fact determination to appoint private neutrals to oversee "pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district."[5] A neutral may be even appointed by federal courts to hold evidentiary hearings and make recommendations of factual issues in non-jury contexts if warranted by "exceptional circumstances" or if confronted with an accounting or difficult computation of damages.[6] Several dozen states have adopted provisions emulating the federal rule.

Among the most high-profile recent uses of a "special master" under Rule 53, a Florida federal judge appointed a longtime New York federal judge, Raymond Dearie, to oversee the cataloguing of documents identified at former President Trump's Mar-a-Lago estate,[7] and former New York federal judge Barbara Jones was separately designated as a "special master" to conduct a privilege review of documents recovered from the former President's ex-counsel Michael Cohen.

Indeed, neutrals are sometimes directly retained outside of the judicial arena by private parties themselves to play quasi-judicial roles because of their capacity to administer and oversee complex procedures and solutions in a fair and impartial manner. Among the most prominent privately retained neutrals is Kenneth Feinberg, who was appointed by Congress to administer the 9/11 Victims' Fund, and by the parties themselves in many mass claims private arrangements, including to administer the Deep Horizon Fund for businesses and individuals impacted by a British Petroleum oil spill in the Gulf of Mexico.[8]

The Potential Functions of Court-Appointed Neutrals

Neutrals provide a valuable resource precisely because many judges are simply too busy to dive into the weeds and sift through inordinate documents and information, and the subject matter including complex technology sometimes entails specialized expertise for which court personnel may not be best suited. Just as special masters are used for diverse functions under Rule 53 and in other states, neutrals could vastly assist the New York state courts as to broad-ranging functions, including:

- *Case Administration*. Making recommendations on substantive matters such as claim construction and class certification, or offering guidance on complex technical matters beyond the court's normal expertise;
- *Discovery Coordination*. Oversight and management of all aspects of discovery, including as to electronically stored information (ESI) and ESI protocols, particularly in light of the 2015 amendments to the federal rules requiring that discovery be "proportionate to the needs of the case" and to preempt disputes;
- *Privilege & Confidentiality Reviews*. Reviewing privilege logs and confidentiality designations (including conducting in camera reviews of designated documents) thereby insulating the court from exposure to privileged and confidential material;
- *Co-Party Disputes*. Helping to resolve disputes among co-parties that otherwise threaten to disrupt proceedings and create multiple warring factions;
- *Accountings and Calculations*: Performing difficult accountings or damages calculations, including disgorgement and penalties;

- *Settlement Exploration*. Conducting settlement and ADR processes, also insulating the court from settlement discussions;
- *Settlement and Class Implementation*. Assisting with implementation of settlements, including distribution processes in class actions to coordinate claim protocols, eligibility, and allocation procedures;
- *Monitoring*. Monitoring compliance with orders and judgments, particularly with long-term consent decrees or injunctions;
- *Receivership*. Overseeing the operation and/or dissolution of businesses that are placed into receivership; and
- *Fee Applications*. Reviewing fee applications authorized by statute or court order, including to determine whether work was within the scope of any authorized recovery and/or duplicative and efficient.

These are merely examples of roles court-appointed neutrals have played, but there is no limit so long as the assistance is within the scope of the authorizing statute or role and contributes to a fair and speedy resolution of the dispute.

Guidance for Educating Court-Appointed Neutrals

With the expanding use of private neutrals across the nation over the past several decades, a wealth of guidance has emerged to support and foster their function. Several professional associations have been organized dedicated to the expansion and development of these judicial adjuncts.

As electronic discovery has proliferated, the Electronic Discovery Reference Model (EDRM) has, among its overall practical global resources designed to improve e-discovery, privacy, security, and information governance, focused specifically on using private neutrals as part of the equation. Indeed, since 2005, the EDRM has published and updated (most recently in 2022) a "benchbook" to guide neutrals specifically overseeing electronic discovery.[9] The 2022 edition of the EDRM Benchbook contains a thorough discussion of the dynamic aspects of discovery that invite consideration of a special master or discovery mediator, their costs and benefits (including faster resolutions of disputes, confidentiality and cost savings), educational and developmental considerations, and practice forms.

At about the same time as EDRM gained traction, the Academy of Court-Appointed Neutrals (ACAN, formerly Academy of Court-Appointed Masters) was formed to be a leader and advance the court-appointed neutrals profession. In addition to providing training and mentorship as well as maintaining professional standards, ACAN has published on its website a Benchbook for Judges and Lawyers containing a soup-to-nuts resource for developing and implementing a court-appointed neutrals program. The materials detail, among other things, the range of potential uses of such neutrals, means to establish a roster of neutrals, guidelines for selecting neutrals for particular cases, samples of appointment orders, and ethical considerations, as well as references to articles, books and websites on the topic.

Moreover, the American Bar Association (ABA) in 2016 formed a Court-Appointed Neutrals Committee (formerly denominated "Court Appointed Special Masters Committee")–consisting of current and former federal and state judges, Alternate Dispute Resolution (ADR) professionals and other practitioners–to explore "how court-appointed neutrals might be used to decrease litigation cost, diminish the drain on court resources, and reduce the length of court proceedings." The committee's work resulted in the ABA House of Delegates in 2019 approving Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation,[10] which assist courts and stakeholders in judicial proceedings with the latest thinking on how private neutrals can be a more useful tool for their judicial administration.

The ABA Guidelines at their core rethink the special neutral function not simply as an expedient to address some discrete issue that happens to arise during the course of litigation, but at the very outset of complex and other suitable litigation in fashioning a case administration plan. At the same time the ABA delegates adopted the Guidelines, they also approved a resolution recommending the amendment of Bankruptcy Rule 9031 to facilitate the use of court-appointed neutrals in bankruptcy proceedings, just as Federal Rule 53 authorizes their use otherwise in the federal court system.

Implementing a Court-Appointed Neutrals Program in New York

What is lacking in New York, however, is authorization. While the CPLR provides for appointment in some circumstance of court-employed referees,[11] New York State courts may generally under CPLR 3104 designate *private* "referees" only upon stipulation by the parties, and in that event only in connection with "supervision of disclosure."[12] (In one notable case, prominent litigator Mark Zauderer was reportedly designated by the parties in a high-stakes dissolution litigation to resolve the issues "with all the powers of the court," but the CPLR provisions underlying the designation, Sections 4301 and 4317, appear to contemplate judicially employed referees absent consent).[13]

Otherwise, the sole protocol for appointment of "special masters" in the New York State trial courts has been a pilot program founded in 1976 and relaunched by a New York County Lawyers Association program in 2021 involving volunteers (with a focus on attorneys of color and other underrepresented communities) who work with judges essentially as interns, including to handle discovery and settlement conferences, conducting research, drafting memos of law advising the court on pretrial and trial issues, and preparing recommendations on motions.[14] The New York Appellate Division, First and Second Departments, also use private and unpaid (albeit highly qualified) special masters for their mandatory mediation programs.[15]

By comparison, the Delaware Court of Chancery, a leading business and commercial state court, often designates paid private neutrals to oversee discrete aspects of litigation. The court's rules devote a full chapter to such "masters," expressly authorizing appointment of private individuals to assist the court (as well as designating several full time "Masters in Chancery"). These neutrals often oversee discovery matters. For example, in the battle between Twitter and Elon Musk, the Court of Chancery appointed a Special Discovery Master to review discovery motions and facilitate resolution or otherwise make recommendations as to resolution.[16] Neutrals have also been appointed in Delaware to sift through logs of privilege designations.[17]

Indeed, the potential range of private neutral functions in Delaware are endless. In connection with a proposed settlement of the *AMC Entertainment Holdings, Inc. Stockholder Litigation*, for example, the court appointed a special master to review any stockholder motions to intervene to express views on the settlement.[18] Special masters have even appointed in Delaware to oversee disputed corporate elections.[19]

New York has considered a broader use of court-appointed private neutrals in the past.[20] As recounted by former Appellate Division, First Department Justice David Saxe in a 2017 article,[21] a 2014 pilot program entailing a 18-month test using uncompensated special masters gained conceptual support but then failed to be implemented. And the New York State Bar Association's Commercial and Federal Litigation Section revisited the issue through a CLE program in 2021, recommending establishment of another task force to pursue the concept of paid "private judges" (albeit seemingly within the context of managing discovery matters).[22] Fundamentally, however, a compensated program utilizing court-appointed neutrals requires enabling legislation and amendments to the CPLR.[23]

Beyond authorization, New York would need to consider the support and training private neutrals. Many jurisdictions (including the federal courts) require no special training to qualify as court-appointed neutrals, and instead turn to individuals who have distinguished themselves as former judges or in private practice. While the integrity of such distinguished jurists and highly respected lawyers is beyond reproach, some practitioners may be concerned that a broader roster will invite appointment of less qualified individuals, and possibly even appointments on a personal basis without regard to qualification or expertise. Certainly, adopting standards and protocols for appointments can easily assuage such concerns.

The advent of national organizations supporting the training and mentoring of court-appointed neutrals may well be sufficient to address any concerns regarding qualifications and competence. To the extent an individual belongs to a professional organization meeting New York's standards, New York could elect to waive any further local training or education requirements.

Otherwise, New York can easily emulate the strict qualifications and appointment standards it has implemented in connection with court-sponsored mediation and evaluation programs. The Office of Court Administration has promulgated minimum standards for mediators under Part 146, including 40 hours of training by approved platforms, and maintains rosters of neutrals available as mediators, which could provide an ample starting place for identifying potential special masters. (The author was selected as a discovery master in one proceeding precisely from that court's mediation roster.) Neutrals wishing to serve as mediators in specialized contexts or as evaluators require additional training. Also, potential court-appointed neutrals should, like arbitrators and mediators, be subject to strict threshold disclosure and non-disqualification protocols to avoid any actual or perceived bias absent the parties' consent and court approval following disclosure.

The Office of Court Administration administers the Part 146 mediation training standards, resulting in rosters of qualified individuals maintained by the various counties. Assign-

ments are typically made by the county ADR office, not the presiding judge, ensuring independence and neutrality. The same approach could be used for selection of court-appointed neutrals, although parties could also be offered the opportunity to confer and mutually select an individual from either the roster or otherwise from the private sector based on their familiarity with qualified individuals.

To the extent that local training as a court-appointed neutral is deemed warranted, Part 146 sets a perfect paradigm and can be easily replicated to provide for minimum training standards for approval, as well as approving training modules. As with Part 146 mediators, neutrals could also be required to satisfy continuing education requirements to maintain their eligibility, although again, the requirement could be waived for neutrals who secure that education through membership in a qualified national organization. Finally, just as Part 146 mediators must perform a minimum amount of preparation and mediation time on each assignment without charge, neutrals could be required to commit to some modest level of "pro bono" service in cases that might otherwise not be conducive to appointments as a condition to be maintained on the roster.

Optimizing Use of Court-Appointed Neutrals

To be sure, court-appointed neutrals are not suitable for every case. As with Federal Rule 53, any provision authorizing the retention of paid private neutrals in the New York state court system should consider the "fairness of imposing the likely expenses on the parties" and "protect against unreasonable expense or delay." The ABA Guidelines similarly focus on "the expected benefit of using the special master, including reduction of the litigants' costs, against the anticipated costs of the special master's services, in order to make the special master's work efficient and cost effective."

Certainly, in smaller matters, imposing a paid private neutral may be an unreasonable burden. But the added expense of a compensated judicial adjunct in a larger, particularly commercial dispute, or where specialized subject matter is involved, arguably will reduce overall costs for the parties by more efficiently managing proceedings and thereby obviating wasted counsel time and motion practice. Many cases in the New York Commercial Part are especially ideal for such private neutrals, which the added cost pales in comparison to litigation budgets and the potential of wasteful fees arising from skirmishes that could be obviated.

There is also little risk of a court-appointed neutral running out of control, either in terms of extreme rulings or expenses. Orders appointing private neutrals precisely circumscribe their function, duties, and compensation, including at a minimum as recommended under the ABA Guideline 7:

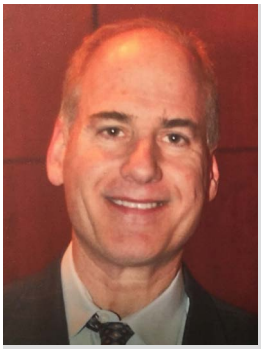
> the scope of the engagement, the special master's duties and powers, the roles the special master may serve, the rates and manner in which the special master will be compensated, power to conduct hearings, requirements for issuing decisions and reporting to the court, and the extent of permissible ex parte contact with the court and the parties.

The rules governing appointment of neutrals, such as Federal Rule 53, typically provide for *de novo* review of rulings involving findings of fact and conclusions of law (absent a stipulation by the parties otherwise, e.g., to a clearly erroneous standard). Procedural rulings are also typically reviewable under an abuse of discretion standard. Moreover, protocols are typically included in appointment orders to address itemization and scrutiny of fees.

Conclusion

Many judges who have appointed private neutrals attest to their benefits in expediting case administration and reducing costs and judicial burden. Those sentiments will inevitably expand throughout the judiciary and legal profession as litigants provide meaningful input regarding their experiences with such neutrals (just as they often do following presumptive mediation referrals), helping to refine and enhance the program.

In the end, there is simply no downside for New York to join dozens of other jurisdictions in expanding the potential scope and function of court-appointed neutrals to buttress the case management arsenal of overburdened state court judges. As with amended Federal Rule 53, whether called special masters, referees, or simply neutrals, these privately appointed adjuncts should be a critical tool for the New York State courts rather than the exception.



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Endnotes

1. *See* https://ww2.nycourts.gov/presumptive-adr.
2. While Federal Rule of Civil Procedure 53 refers to "special masters" and the CPLR refers to "referees," there is a growing use of the term "court-appointed neutrals" to capture the full scope of what these judicial adjuncts offer. The American Bar Association resolutions discussed in this article advocate use of the term "court-appointed neutral" rather than "master." This article generally uses the "court-appointed neutral" term but is intended to encompass all private individuals appointed by courts to facilitate the judicial function.
3. Scheindlin, *We Need Help: The Increasing Use of Special Masters in Federal Court*, DePaul Law Review, Vol. 58, Issue 2 (Winter 2009); Jokela & Herr, *Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool,* William Mitchell Law Review, Vol. 31, Issue 3, Article 16 (Jan. 2005); Corder and Galant, *What Is a Special Master? The Use of Special Masters in New York Courts*, The New York Law Journal (Nov. 14, 2022).
4. Although masters have been appointed by courts for several centuries, the U.S. Supreme Court held in 1957 that appointment of a special master in an antitrust case amounted to an "abdication of the judicial function" that was not warranted by docket congestion, the case's complexities, or the time commitment it demanded. *See La Buy v. Howes Leather*, 352 U.S. 249 (1957). Rule 53 was amended most recently in 2003 to facilitate the expanded use of masters, recognizing the tremendous benefits they can bring to the judicial process.
5. Fed. R. Civ. P. 53(a)(1)(C).
6. Fed. R. Civ. P. 53(a)(1)(B)(i) & (ii).
7. The U.S. Court of Appeals for the Eleventh Circuit later vacated the appointment, finding that the district court lacked equitable jurisdiction to hear the matter. *See Donald Trump v. United States*, 54 F.4th 689 (11th Cir. 2022).
8. Mr. Feinberg has also reportedly served as a privately retained special master in connection with Agent Orange, asbestos personal injury, Dalkon shield, Hurricane Katrina insurance, and DES (pregnancy medication) matters.
9. *Using Special Masters and Discovery Mediators to Avoid and Resolve Discovery Disputes: A Bench Book for Judges and Attorneys* (EDRM 2022).
10. *See* Hirsh, *A Revolution That Doesn't Offend Anyone: The ABA Guidelines for Appointment and Use of Special Masters in Civil Litigation*, The Judges Journal, Vol. 58, No. 4 (Fall 2019).
11. *See, e.g.*, CPLR 3104, 4200, 4201, 4212, and 4301-4321.
12. *Ploski v. Riverwood Owners*, 255 A.D.2d 24 (2d Dep't 1999).
13. *See Napoli Bern Business Divorce Will Create Two Separate Firms*, The New York Law Journal (Aug. 17, 2015 at 1 col. 3).
14. Pursuant to 22 N.Y.C.R.R. 202.14, the chief administrator of the courts "may authorize the creation of a program for the appointment of attorneys as special masters in designated courts to preside over conferences and hear and report on applications to the court. Special masters shall serve without compensation."
15. *See* 22 N.Y.C.R.R. §§600.3 and 670.3(d).
16. *See Twitter, Inc. v. Elon R. Musk, et al.,* C.A. No. 2022-0613-KSJM (Order Sept. 30, 2022).
17. *See Buttonwood Tree Value Partners, L.P. v. R.L. Polk & Co., Inc., et al.,* C.A. No. 9250-VCG (Del. Ch. Jul. 30, 2021).
18. *In re AMC Entertainment Holdings, Inc. Stockholder Litigation*, Consol. C.A. No. 2023-0215-MTZ (Orders dated Apr. 25, 2023 & July 19, 2023).
19. *Portnoy v. Cryo-Cell International, Inc.*, et al., C.A. No. 3142-VCS (Stipulation and Order).
20. Saxe and Lesser, *Broader Use of Special Masters: A Proposal*, The New York Law Journal (Aug. 4, 2017).
21. New York Law Journal (Aug. 4, 2017).
22. *See NYSBA Commercial and Federal Litigation Section Newsletter*, Vol. 27 No. 2 at 20-22 (2021).
23. As noted in note 9, *supra*, 22 N.Y.C.R.R. 202.14 current provides for promulgation of special master programs only involving unpaid masters.