

# Academy of Court-Appointed Neutrals

## Section 4 Appointment Orders

### 4.1 Order of Appointment

The appointment order is the fundamental document that establishes the court-appointed neutral's powers, limits, and responsibilities. This order is often referred to as an "order of reference." Section 2 of this book provides a checklist of the items that should be included in an appointment order (specifying which items are mandatory under the federal rules) and explains each item in detail. This form may also be used in state court cases, modified as necessary to conform to the applicable state provisions.

In almost all jurisdictions, courts have the authority to appoint a neutral, pursuant to a rule or provision or by inherent authority. In some jurisdictions or in some cases, the court may appoint a neutral (or allow a neutral to perform certain duties) only if all the parties consent. The issue of whether consent is necessary depends on the applicable law and what services the neutral will provide.

At least at the federal level, and often at state level, courts have inherent authority to appoint neutrals and do so, for example, in criminal cases where there is no rule discussing this authority. Federal Rule of Civil Procedure 53, however, does discuss some requirements for making the appointment in civil cases. Federal Rule 53 permits a judge to appoint a neutral to perform duties as needed. Rule 53(a) & (b) allows for an appointment of a neutral (which the rule refers to as a master) if certain circumstances are met, which circumstances are quite broad. Rule 53(a)(1)(A) authorizes the court to appoint a neutral to perform duties consented to by the parties. Rule 53(a)(1)(B) permits a court-appointed neutral to conduct appropriate trial proceedings or to recommend findings of fact if an exceptional condition exists or there is a need to perform an accounting to resolve a difficult damage computation. And Rule 53(a)(1)(C) permits a neutral appointment to address pretrial and post-trial matters in specific circumstances. This provision does not require the consent of the parties, although a court may seek their agreement to an appointment, and many judges prefer to do so.

In state court cases, the applicable law may or may not require consent, or an appellate decision may have decided whether consent is needed. A judge usually has the power inherently or by applicable rule, statute, or judicial decision to appoint a neutral. If a party does object, the duties of the neutral can be limited to those that are appropriate under the circumstances. If all parties object, the court may reconsider the appointment.

Federal Rule 53(b)(1) requires the judge to give notice to the parties and an opportunity to be

heard about the appointment of a neutral. This subsection implies that the court may appoint a neutral even if the parties object as long as the appointment does not conflict with the provisions of Rule 53(a) explained above. Appellate court decisions reviewing the propriety of appointment orders generally approve appointments that serve the interests of the court and the parties, that do not deny a party rights, and that do not cost an unreasonable amount. In cases involving a government party, sovereign immunity may prevent a court from requiring the government to pay a neutral’s fee.

## 4.2 Checklist of Provisions

Rule 53 of the Federal Rules of Civil Procedure and the ABA Model Rule on Court-Appointed Neutrals set forth a number of specific items an appointment order must include and suggests others that should be included. A copy of Rule 53 appears at Appendix D, along with the relevant Advisory Committee Notes published with the 2003 Amendments. A copy of the Model Rule appears at Appendix E, along with the accompanying Report discussing its history. The Notes and Report deserve attention because they elaborate on many of the issues addressed in the rule.

The following checklist summarizes the information provided in this Chapter. Some of the optional provisions appear in state court neutral appointment orders.

**Table 2. Checklist of Items to Include in Appointment Orders**

✓	Step	Provision for Appointment Order	Section of Federal Rule 53	Subpart of ABA Model Rule	Mandatory to Include in Appointment Order According to the Rules?
<input type="checkbox"/>	1	Direct neutral to “proceed with all reasonable diligence”	Rule 53(b)(2)	See Subpart (g)(1)	Yes in Rule 53. The Model Rule directs the neutral to act with diligence regardless of whether the appointment order so specifies.
<input type="checkbox"/>	2	Identify the neutral’s duties	Rule 53(b)(2)(A)	Subpart (f)(1)(A), (C)	Yes in both.
<input type="checkbox"/>	3	Identify when <i>ex parte</i> communication may occur	Rule 53(b)(2)(B)	Subpart (f)(1)(D)	Yes in both
<input type="checkbox"/>	4	Identify what records the neutral must maintain	Rule 53(b)(2)(C)	Subpart (f)(4)(E)	Yes in Rule 53. Discretionary in Model Rule.
<input type="checkbox"/>	5	Describe how the neutral’s rulings will be received and reviewed	Rule 53(b)(2)(D)	Subpart (f)(4)(E), (F). See also Subpart (h).	Yes, although the Rule itself sets forth standards of review.

✓	Step	Provision for Appointment Order	Section of Rule 53	Subpart of ABA Model Rule	Mandatory to Include in Appointment Order According to Rules?
<input type="checkbox"/>	6	Describe clearly how the neutral will be compensated	Rule 53(b)(2)(E)	Subpart (f)(3)	Yes
<input type="checkbox"/>	7	Statement that appointment of a neutral is appropriate	Rule 53(a)(l)	Subpart (f)(1)(B)	Not in the Federal Rule, but it is a good practice. The Model Rule requires a specific statement of the reasons for appointment.
<input type="checkbox"/>	8	Identify source of authority for appointment			No, but good practice
<input type="checkbox"/>	9	Modify neutral's authority to impose sanctions for failure to cooperate	See Rule 53(c)	Subpart (f)(3)	Not in Rule 53, but default standard set out in Rule 53(c) will apply unless modified. Model Rule sets forth the way the authority operates.
<input type="checkbox"/>	10	List hearing procedures and location, including a possible initial meeting with the neutral	Optional	Optional	Optional
<input type="checkbox"/>	11	Describe how documents submitted by parties/ lawyers may be provided to neutral	Optional	Optional	Optional
<input type="checkbox"/>	12	Describe scope of discretion and authority of neutral not previously covered in Step 2	Optional	Subpart (f)(1)(C)	Optional in Rule 53. Mandatory in Model Rule.
<input type="checkbox"/>	13	Certification, Oath, or Bond may need to be included under state law	Optional	Subpart (e)(2)(B)	Optional for Rule 53. Model Rule requires oath concerning service at the time of possible appointment.
<input type="checkbox"/>	14	Include any stipulations agreed to by parties and approved by court relating to the neutral	Optional	Subpart (f)(1)(E), (F)	Under Rule 53, may be included in separate Order Model Rule requires order reference stipulations on standard of review.
<input type="checkbox"/>	15	Include disclosure affidavit	Rule 53(b)(3)	Subpart (e)(2)(A), (B)	No, but the rules require that an affidavit be filed. It is good practice to either attach or reference the affidavit in the appointment order.

### 4.3 Contents of Order

This section explains the major contents of an appointment order.

❑ **1. An appointment order must include the “magic words” directing the neutral to proceed with all reasonable diligence.**

Under Rule 53, an appointment order must specifically “direct the neutral to proceed with all reasonable diligence.” Fed. R. Civ. P. 53(b)(2). Some states require the neutral to proceed with due diligence and with the least practicable delay. The ABA Model Rule requires that neutrals act with diligence, but does not specify that this obligation also be stated in the appointment order.

❑ **2. An appointment order must identify the neutral’s duties**

Rule 53 provides that the order appointing a neutral must state “the neutral’s duties, including any investigation or enforcement duties, and any limits on the neutral’s authority under Rule 53(c).” Fed. R. Civ. P. 53(b)(2)(A). The rule adds that the court also appoint a neutral to “perform duties consented to by the parties.” Fed. R. Civ. P. 53(a)(1)(A).

An appointment order could simply contain a broad clause stating that the neutral may “perform any and all duties assigned to the neutral by the court (as well as any ancillary acts required to fully carry out those duties) as permitted by both the Federal Rules of Civil Procedure and Article III of the Constitution.” But a more specific order would help ensure that the court, the neutral, and the parties have a common understanding of the neutral’s role. Where appropriate, the order language may also establish timetables and deadlines for performance of the neutral’s duties.

The ABA Model Rule contains more specific requirements concerning how the neutral’s duties are to be identified. *See* Model Rule subparts c and d (describing roles neutral may play and authority); subpart (f)(1)(A) and (C) (requiring that the appointing order address the roles); subpart (f)(2) limiting powers to those articulated in the order subject to provisions permitting the effectuation of the authority granted).

A neutral’s specific duties and responsibilities might include, among other things:

**a. Case-management duties**

- Assisting with preparation for attorney conferences (including formulating agendas), court scheduling, and negotiating changes to case management orders.
- Establishing discovery and other schedules; reviewing and attempting to resolve

informally any discovery conflicts (including issues such as privilege, confidentiality, and access to documents and records); and supervising discovery.

- Overseeing the management of docketing, including the identification and processing of matters requiring court rulings.
- Compiling data and assisting with the interpretation of scientific and technical evidence or making findings and recommendations with regard to such evidence.
- Helping to coordinate federal, state, and international litigation.
- Chairing committees of lawyers regarding issues of common interest.
- Working with lawyers to draft and submit proposed orders to the judge.

**b. Discovery-Related Responsibilities**

- Coordinating disclosure and discovery schedules with the lawyers.
- Resolving motions and disputes related to discovery and disclosures.
- Assisting with the formulation of a discovery plan to be submitted to the court.
- Establishing discovery schedules as needed and resolving time, method, and other conflicts.
- Assisting with issues raised by electronically stored information, native formats, meta data, and related matters.
- Monitoring depositions.

**c. Settlement-related duties**

- Serving as arbitrator, mediator, or neutral in the context of a settlement.
- Proposing structures and strategies for settlement negotiations on the merits and on any subsidiary issues, and evaluating class and individual claims.
- Administering alternative dispute procedures such as summary jury trials, mini-trials, and settlement conferences.

**d. Decision-making duties**

- Assisting with legal analysis of motions or other submissions, whether made before, during, or after trials, and making recommended findings of fact and conclusions of law and proposed orders.
- Resolving non-dispositive motions, including motions related to discovery and disclosures.
- Interpreting any agreements reached by the parties.
- Issuing reports and recommendations.
- Holding trial proceedings and making or recommending findings of fact on issues to be decided by the court without a jury, if warranted by the conditions set out

in Rule 53(a)(1)(B) & (C).

- Pursuing investigative or quasi-prosecutorial roles.
- Recommending that sanctions be imposed on a party or lawyer for wrongdoing.

**e. Post-trial duties**

- Proposing structures and strategies for attorney’s fee issues and fee settlement negotiations, reviewing fee applications, and evaluating individual claims for fees (*see also* Fed. R. Civ. P. 23(h)(4); 54(d)(2)(D)).
- Administering, allocating, and distributing funds and other relief.
- Adjudicating eligibility and entitlement to funds and other relief.
- Monitoring or enforcing compliance with structural injunctions.
- Directing, supervising, monitoring, and reporting on implementation and compliance with the court’s orders, and making findings and recommendations on remedial action if required.

**f. Duties that might arise in any role**

- Assisting with responses to media and legislative inquiries.
- Making formal or informal recommendations and reports to the parties, and making recommendations and reports to the court, regarding any matter pertinent to the proceedings.
- Communicating with parties and attorneys as necessary in order to permit the full and efficient performance of the neutral’s duties.

**□ 3. An appointment order must identify when *ex parte* communication may occur.**

Rule 53 directs the court to set forth “the circumstances—if any—in which the neutral may communicate *ex parte* with the court or a party.” Fed. R. Civ. P. 53(b)(2)(B). *See also* Model Rule (f)(1)(D). The propriety of a neutral’s *ex parte* communication with the court or a party depends on the duties the neutral is assigned and on the language in a court order governing *ex parte* communications. For example, if the neutral’s duties include settlement negotiations, *ex parte* communication with a party will be necessary and appropriate. *Ex parte* communication with the court may be necessary and appropriate if the neutral’s duties include assisting the court with legal analysis or providing the court with technical expertise. Where a neutral performs multiple roles, *ex parte* communication with the court might be appropriate concerning some topics but not others. The order might permit *ex parte* communication with the court about one type of matter but not another type. Where a neutral plays a settlement role, the appointment order should spell out clearly the extent to which the neutral may report to the court on the progress of settlement discussions. The formula adopted should accommodate the

court's need to know the progress of the mediation, and the parties' need to negotiate in confidence. One court adopted the following approach:

The Mediator shall periodically report to the Court the status of the Mediation process, but those reports should be limited to matters general to the Mediation and its progress and not to specifics or to the merits of the Mediation or to the respective parties' positions or statements made during the course of the proceedings. The Mediator shall not, without the prior written consent of both parties, disclose to the Court any matters which are disclosed to him by either of the parties or any matters which otherwise relate to the Mediation.

*In re Propulsid Prods. Liab. Litig.*, MDL No. 1355, 2002 WL 32156066 (E.D. La. Aug. 28, 2002).

The court should modify any restrictions on *ex parte* communications as needed if the neutral's duties change over time. *See, e.g., id.* (after the neutral received additional mediation duties, the scope of *ex parte* communications with the parties and the court changed).

*Ex parte* communication may be appropriate in the following circumstances:

**a. With the court**

- To assist the court with legal analysis of the parties' submissions;
- To assist the court with procedural matters, such as apprising the court regarding logistics, the nature of the neutral's activities, and management of the litigation;
- To assist the court's understanding of highly specialized matters;
- To inform the court of matters that may affect the progress of the case or the court's docket.

**b. With the parties**

- To arrange scheduling matters;
- To ensure the efficient administration and management of the litigation;
- To resolve privilege or similar questions, and in connection with *in camera* inspections;
- To discuss the merits of a particular dispute, for the purpose of resolving that dispute, but only with the prior permission of the opposing counsel involved;
- To work with subcommittees consisting of a subset of the lawyers in a case;
- To obtain information from lawyers regarding scheduling and hearing agendas; and
- To discuss other matters with the permission of the lead lawyers.

❑ **4. An appointment order must identify what records the neutral should maintain.**

Rule 53 states that the court must define “the nature of the materials to be preserved and filed as the record of the neutral’s activities.” Fed. R. Civ. P. 53(b)(2)(C). *See also* Model Rule subparts (f)(1)(G), (f)(4)(E). The court may not want to obligate the neutral to maintain certain records and can specify in an appointment order that certain records need *not* be maintained. The court may amend the record requirements if the neutral’s role changes. *See, e.g., In re: Propulsid Prods. Liab. Litig.*, MDL No. 1355, 2004 WL 1541922 (E.D. La. June 25, 2004) (setting out additional record-keeping requirements after the neutral was charged with new duties of administering a settlement program). Rule 53 also specifies that the order must state the “method of filing the record.” Fed. R. Civ. P. 53(b)(2)(D). *See also* Model Rule (f)(4)(E).

The following are examples of records that a neutral might be ordered to maintain or file with the court, under seal or by regular filing:

- Normal billing records of time spent on the matter, with reasonably detailed descriptions of activities and matters worked on.
- Formal written reports or recommendations regarding any matter.
- Informal notes regarding any matter.
- Documents created by the neutral that are docketed in any court.
- Documents received by the neutral from counsel or parties.
- A complete record of the evidence considered by the neutral in making or recommending findings of fact.

The Advisory Committee Notes to the 2003 Amendments recommend that appointment orders “routinely” require neutrals to maintain a record of evidence considered unless there is no prospect that the neutral will make or recommend evidence-based findings of fact.

**□ 5. An appointment order must describe how the neutral’s rulings will be received and reviewed.**

Rule 53 directs the court to state “the time limits, method of filing the record, other procedures, and standards for reviewing the neutral’s orders, findings, and recommendations.” Fed. R. Civ. P. 53(b)(2)(D). Rule 53 also provides for how and when parties may object to the neutral’s rulings, and prescribes the default standard of review. Fed. R. Civ. P. 53(f). Specifically, the order should include:

- The mechanism the neutral should use to file and serve any formal order, finding, report, or recommendation (*e.g.*, whether the neutral will receive assistance from the clerk of court).
- A reference to Rule 53(f)(2), explaining that a party may file an objection to a neutral’s order, finding, report, or recommendation no later than 21 days after a copy is served (under the Federal Rule). The order may set out a different time period.
- The consequences of failure to timely object to a neutral’s ruling (*e.g.*, permanent waiver of any objection to the neutral’s orders, findings, reports, or recommendations, such that they are deemed approved, accepted, and ordered by the court).
- The standard of review the court will employ if a party objects to a neutral’s finding or conclusion, as set out in Rule 53(f) (3, 4, 5). The default standard under the rule is *de novo* for findings of fact and conclusions of law, and abuse of discretion for procedural matters. The parties may consent otherwise regarding the standard of review for findings of fact or procedural matters; however, the *de novo* standard of review for conclusions of law may not be changed by agreement of the parties.
- Whether and under what circumstances the parties consent to a different standard of review or waive the right to object to the neutral’s findings or conclusions.

The Model Rule subpart (h) largely tracks the standards of review of Fed. R. Civ. P. 53, but differs in some respects. It contemplates a procedure that generally requires parties to make their record before the neutral (both to present evidence and to preserve objections), so that while, absent stipulation otherwise, the court’s review of facts is *de novo*, that review is expected to be based on the record adduced before the neutral and that parties must identify bases for factual objections when they seek review.

**□ 6. An appointment order must clearly describe how the neutral will be compensated.**

Rule 53 states that the court must set forth “the basis, terms, and procedure for fixing the neutral’s compensation.” Fed. R. Civ. P. 53(b)(2)(E). Rule 53(g)(3) also refers to related issues, such as how payment obligations will be allocated between the parties.

In setting forth the basis, terms, and procedures for compensation, the order should address some or all of the following:

- Include an explicit statement that the court has “consider[ed] the fairness of imposing the likely expenses on the parties” and has taken steps to “protect against unreasonable expense or delay.” Fed. R. Civ. P. 53(a)(3).
- Identify the neutral’s hourly rate or an index that will be used to determine it (e.g., the Laffey Index, available at the Department of Justice web site, <http://www.laffeymatrix.com/see.html>)
- Identify the sorts of expenses the neutral may and may not charge to the parties (e.g., travel, overhead).
- Describe how the parties will allocate the cost of the neutral, and whether this allocation will change (e.g., whether a re-allocation will be made after a verdict or settlement is reached).
- Specify whether the neutral’s appointment is for a term certain (e.g., a given number of hours, or until a certain task is completed), and how and whether that term may be renewed.
- Address whether the neutral will receive a one-time or continuing retainer.
- Address when and to whom the neutral must submit an itemized statement of fees and expenses.
- Address whether the neutral should provide only summary fee statements to the parties and provide complete statements to the court under seal (because itemized statements might reveal proper confidential communications).
- Establish deadlines for the payment to the neutral by the parties of their share of any amounts owed.
- Establish the payment mechanism (e.g., whether payments are made directly to the neutral or deposited into the court registry for later disbursement).
- Address whether the neutral may hire, and obtain reimbursement or compensation for, support personnel (e.g., assistants, accountants, IT consultants, attorneys).

**□ 7. An appointment order should include a section establishing that appointment of a neutral is appropriate.**

Rule 53 does not require that the appointment order state that appointment of a neutral is appropriate—but it is good practice to make that statement and specify why it is appropriate. Rule 53 provides that neutrals are appropriate only in limited circumstances. Unless a statute provides otherwise, a court may appoint a neutral to:

- a. Perform duties consented to by the parties;

- b. Hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by
  - (1) Some exceptional condition, or
  - (2) The need to perform an accounting or resolve a difficult computation of damages; or
- c. Address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.

Fed. R. Civ. P. 53(a)(1).

In the context of pretrial conferences, Rule 16 further states that “the court may take appropriate action, with respect to ... the advisability of referring matters to a magistrate judge or neutral” and with respect to “the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems.” Fed. R. Civ. P. 16(c)(2) (H, L). In summary, if the court needs help because a case presents difficult, complex, or labor-intensive issues, appointment of a neutral is appropriate. *See also* Fed. R. Civ. P. 54(d)(2)(D) (regarding the use of neutrals to determine attorney fees); Fed. R. Civ. P. 23(h)(4) (regarding award of cost and fees in class actions).

In various appointment orders, judges have used the language set out below to establish that appointment of a neutral is appropriate in a specific case.

- The presence of multiple parties requires extra administrative work.
- The legal or factual issues will be complicated or protracted.
- There will be discovery or evidentiary problems requiring continued oversight.
- There will be management and communication issues necessitating supervision.
- Matters between and among the parties and lawyers need to be coordinated.
- A mediator is needed to assist with the potential settlement of some or all issues.
- There will be hearings that need to be conducted.
- Proposed findings of fact and conclusions of law need to be recommended.
- Resolution of issues will require specialized or technical knowledge, or a detailed understanding of foreign law.
- To fully understand and oversee the dispute, the court will need the help of expert advisors or consultants.
- Timely or expedited decisions on masses of individual claims cannot be made without additional resources.

- The case entails complicated or detailed computations or accountings.
- The case will require a high degree of coordination with other lawsuits or courts.
- The case will involve lengthy oversight and administration of settlement funds.
- The case will require the monitoring of complex injunctive relief.
- A neutral can ensure a search warrant is properly and fairly executed
- A neutral can ensure that the Government makes property Brady disclosures or other prosecutorial conduct are conducted fairly.
- A neutral can help ensure that plea negotiations are conducted fairly.
- The needs of the parties and lawyers require the services of a neutral, including ex parte communications with the neutral.
- The services of a neutral are necessary to work on matters away from the courthouse or at times when the court is not available.
- A neutral is necessary to provide a just, speedy, and inexpensive determination of the case.
- The administration of justice requires the appointment of a neutral in this case.

Model Rule subpart (f)(1)(B) would require courts to identify the Court's reasons for making the appointment. Subpart (b)(2) says that factors the Court should consider are:

- whether the appointment, with its attendant expense, is proportionate to the issues and needs of the case;
- the ability of the parties to pay for the services being provided by the neutral; whether the appointment can be made without imposing an unreasonable delay;
- whether a neutral likely could address matters within the scope of the appointment more expeditiously than is practicable without the neutral, considering the court's case load and the issues and needs of the case;
- whether the appointment will be otherwise unfair to any party;
- whether the appointee has the knowledge, skills, ability, and training to perform the needed tasks; and
- whether, notwithstanding the possibility that a court may ultimately need to review privileged or confidential material, a neutral's involvement may assist by insulating the court from the need to review claimed privileged or confidential information that may not be necessary for the court's consideration. Model Rule subpart (b)(2).

**❑ 8. An appointment order should identify the source of authority for the appointment.**

Rule 53 does not require that the appointment order specify the nature of the authority for the appointment, but specifying the source is good practice. Relevant provisions addressing the appointment can come from a variety of sources, including:

- Federal Rule of Civil Procedure 53, or analogous state rule;
- A statute, or legislative or governmental enactment;
- The inherent authority of the court;
- The Model Rule (as an illustration of what the Court may wish to consider); or
- Consent of the parties.

Although Rule 53 specifies terms concerning the appointment of neutrals, federal courts recognized that they have inherent power to appoint neutrals. “Beyond the provisions of [Rule 53] for appointing and making references to Masters, a Federal District Court has the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential.” *Schwimmer v. United States*, 232 F.2d 855, 865 (8th Cir. 1956) (quoting *In re Peterson*, 253 U.S. 300, 312 (1920)); see *Ruiz v. Estelle*, 679 F.2d 1115, 116 n.240 (5th Cir. 1982) (same), *amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983) (same); *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 746 (6th Cir. 1979) (noting that the authority to appoint “expert advisors or consultants” derives from either Rule 53 or the court’s inherent power).

**❑ 9. An appointment order should include a provision restating or modifying the neutral’s authority to impose sanctions for failure to cooperate.**

It is expected that parties and lawyers will cooperate with a neutral, nevertheless, they may engage in inappropriate behavior. Rule 53 addresses this possibility: if appropriate, a neutral may “impose upon a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.” Fed. R. Civ. P. 53(c). See Model Rule subpart (f)(3)(A) (contemplating that the appointment order may authorize the neutral to recommend sanctions). It is good practice to state this authority explicitly in the appointment order and provide that the neutral shall have the full cooperation of the parties and their counsel, including making available appropriate agents, employees, and personnel and access to facilities, files, databases, or documents the neutral requires to fulfill all functions.

**❑ 10. An appointment order may include information relating to hearings the neutral may conduct.**

There are a variety of hearings a neutral may preside over. Some will be informal, while others will resemble trial proceedings. It may be advisable to include in the order rules and procedures that govern these hearings or that may be established by the neutral, the location of a hearing if it is to occur in a place different than the court location, and related matters.

The prior Rule 53 required an initial meeting with the neutral. Many found such a meeting to be a productive start to working with the neutral and the court may consider requiring or suggesting such a meeting in the appointment order. However, not having this as explicit requirement affords the court and the parties flexibility to determine how

to adapt the process to a particular case.

❑ **11. An appointment order may specify how parties and lawyers may submit documents and information to a neutral.**

A neutral may obtain a copy of documents filed with the clerk or administrator of the court; or it may be more efficient for a neutral to receive submissions from the parties without those documents having to be formally filed. The nature and purpose of the materials may determine the method of submission. Neutrals can readily receive information and documents by email or other form of electronic messaging, and these methods can be listed in the order.

❑ **12. An appointment order may include provisions regarding the discretion and authority of a neutral.**

The scope of a neutral's discretion and authority may be included in the previous portion of the order detailing the duties of a neutral. Or it may be advisable or necessary to add additional and further descriptions regarding the general or specific responsibilities of the neutral. Some state court orders provide that: The Neutral shall have the discretion to determine the appropriate procedures for the completion of the Neutral's duties and shall have the authority to take all appropriate measures to perform the assigned duties.

❑ **13. An appointment order may include references to a certification, oath or bond.**

State statutes or rules may require a neutral to provide a certification or oath which states, in summary, that the neutral is familiar with the applicable standards and grounds for conflicts of interest and disqualification, and that nothing known to the neutral disqualifies the neutral. Or a neutral may need to procure a surety bond for the benefit of the parties, especially if the neutral is performing receivership or accounting duties.

❑ **14. An appointment order may include any stipulations regarding the neutral.**

The parties may have agreed to provisions and procedures regarding the role of the neutral which the court has approved. It may be wise to include these stipulations in the appointment order to avoid any later confusion caused by parties and lawyers entering the case after the appointment order takes effect.

❑ **15. An appointment order should include or reference a disclosure affidavit.**

Rule 53(b)(3) provides that the court may enter an appointment order "only after the neutral has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455." *See also* Rule 53(a)(2) (discussing grounds for disqualification); Model Rule subpart (e)(2) (discussing a similar but not identical process). It is good practice to attach the affidavit to the appointment order or make reference in the

appointment order to the affidavit's separate filing. While the court and the neutral should review § 455 very carefully to ensure there are no grounds for disqualification, or that all such grounds have been disclosed to the parties, the key averment in the neutral's affidavit could directly state:

I have thoroughly familiarized myself with the issues involved in this case. As a result of my knowledge of the case, I can attest and affirm that I know of no non-disclosed grounds for disqualification under 28 U.S.C. § 455 that would prevent me from serving as the neutral in the captioned matter.

In addition to thinking carefully about the items to include in the appointment order, the judge and the neutral should give advance consideration to ethical issues and practical concerns that may arise during the course of the appointment. Section 3 explains these considerations and concerns.

## 4.4 Sample Neutral Appointment Order

The following form provides an example of a model appointment form. It includes language to fit most cases. It will need to be tailored to meet the specific needs of each case.

### NEUTRAL APPOINTMENT ORDER

This matter was submitted to the undersigned upon *[choose one: the joint request of the parties / the consent of the parties / the motion of \_\_\_\_\_ / the Court's own initiative]*.

Counsel appearances were:

Based upon the *[recite in some detail the basis of the Court's authority for appointment, such as the consent of the parties, the press of business, the needs of the case, or other demanding circumstances]*, and having given the parties notice and an opportunity to be heard:

IT IS HEREBY ORDERED:

1. Authority for and Scope of the Appointment. [Name of Neutral] of [Address] is appointed pursuant to [insert appropriate Rule citation] as Neutral for the purpose of *[specify scope of roles and duties in detail - options include the following]*:
  - a. Directing, managing, and facilitating settlement negotiations among the parties. *[Settlement Neutral]*
  - b. Managing and supervising discovery and resolving all issues related to or arising out of, discovery disputes or disputes concerning disclosures. *[Discovery Neutral]*
  - c. Coordinating activity on the case as follows \_\_\_\_\_. *[Coordinating Neutral]*
  - d. Hearing evidence on [specify issue(s)] and issuing [choose one: findings and recommendations / a final decision NOTE: *The second option is available only with the consent of the parties.*] *[Trial Neutral]*
  - e. Compiling and interpreting *[specify the technical, voluminous, or complex evidence that is in need of review]* and issuing findings and recommendations for the Court regarding \_\_\_\_\_. *[Hearing Neutral]*
  - f. Advising the Court on the subject of \_\_\_\_\_. *[Expert Neutral]*
  - g. Managing and supervising issues involving electronic information or data. *[Technology Neutral]*
  - h. Serving as Monitor as described in paragraph \_ of *[choose one: The Consent Decree / this Court's Order dated \_\_\_\_\_]*. *[Monitor]*
  - i. *[Drafting / implementing]* a notice to the class. *[Notice Neutral]*
  - j. Supervising a hearing regarding the fairness of the Settlement Agreement to the class and issuing findings and recommendations for the Court. *[Class Action Neutral]*
  - k. Administering the distribution of [settlement / damage] payments to Plaintiffs. *[Claims Administrator]*
  - l. Providing an accounting of *[specific evidence]*. *[Auditor]*

- m. Acting as a receiver for *[identify the subject of the receivership]* pending the resolution of this dispute. *[Receiver]*  
In addition, the Neutral may perform any duties consented to by the parties *[pursuant to Rule 53(a)(1)(a)]*.

*[The following provision is required in federal court:]* The Neutral is directed to proceed with all reasonable diligence to complete the tasks assigned by this order.

2. Neutral's Duties and Authority. *[Neutral's Name]* shall have the sole discretion to determine the appropriate procedures for resolution of all assigned matters and shall have the authority to take all appropriate measures to perform the assigned duties. The Neutral shall have all of the authority provided to neutrals set forth in *[Federal Rule 53 (c)]*. The Neutral may by order impose upon a party any sanction other than contempt and may recommend a contempt sanction against a party and contempt or any other sanction against a non-party.

3. Ex Parte Communications.

(a) With the Court. The Neutral may have ex parte communications with the Court regarding *[describe]* *[Examples - 1) whether or not a particular dispute or motion is subject to the scope of the Neutral's duties; 2) assisting the Court with procedural matters, such as apprising the Court regarding logistics, the nature of the Neutral's activities, and management of the litigation; 3) any matter upon which the parties or their counsel have consented; 4) the application of Rule 53; and 5) any matter, the subject of which is properly initiated by the Court.]*

(b) With the Parties and Counsel. The Neutral may have ex parte communications with the parties or counsel regarding *[describe]* *[Examples - 1) purely procedural or scheduling matters; 2) resolution of privilege or similar questions, in connection with *in camera* inspections, upon notice to the other parties; and 3) any matter upon which the parties or their counsel have consented.]* *[Example - The Neutral shall be allowed to engage in ex parte conversations with counsel for the parties relating to settlement efforts and/or conferences.]*

4. Materials to be Preserved and Filed as the Record of the Neutral's Activities. *[Example - The parties shall file with the Clerk all papers filed for consideration by the Neutral. The Neutral shall also file with the Clerk all reports or other communications with the undersigned. [Fed. R. Civ. P. 53(b)(2)(C)]. [Example - All orders of the Neutral shall be filed with the Court, unless the parties or their counsel have agreed otherwise. It shall be the duty of the parties and counsel, not the Neutral, to provide for any record of proceedings with the Neutral, as approved by the Neutral. The Neutral shall not be responsible for maintaining any records of the Neutral's activities other than billing records. In the event of any hearing where evidence is taken, it shall be the duty of the parties and counsel to preserve any exhibits tendered or rejected at the hearing.]*

5. Review of Neutral's Reports, Orders or Recommendations. Any party seeking review of any ruling of the Neutral shall *[specify appeal procedure and timing, and in the absence of special considerations, the default procedures of Rule 53(g) may be implemented, either by reference to the rule or incorporation]*:

5a. Alternative 1: comply with the procedures and within the time limits specified in Fed. R. Civ. P. 53(g).

5b. Alternative 2: be deemed to have stipulated that findings of fact made by the Neutral will be final [shall be reviewed for clear error], except for a party who objects to this portion of the Order, in writing and filed with the Court, within 7 days of the date of this Order.

6. Compensation. The Neutral shall be paid \$ \_\_\_\_ per hour for work done pursuant to this Order, and shall be reimbursed for all reasonable expenses incurred. The Neutral shall bill the parties on a monthly basis for fees and disbursements, and those bills shall be promptly paid [50% by the plaintiffs and 50% by the defendants / *or identify an alternative arrangement*]. As to any particular portion of the proceedings necessitated by the conduct of one party or group of parties, the Neutral can assess the costs of that portion of the proceedings to the responsible party or parties. The Court will determine at the conclusion of this litigation whether the amounts paid to the Neutral will be borne on the 50/50 basis or will be reallocated. Upon the failure of a party to timely pay the Neutral's fees, the Court may enter a judgment in favor of the Neutral and against the non-paying party.

7. The Neutral is authorized to hire \_\_\_\_\_ to assist in completion of the matters referred to the Neutral by this Order. The reasonable fees of \_\_\_\_\_ shall be paid by the parties in accord with the procedure set forth in Paragraph 6, above.

8. Neutral's Affidavit. The Neutral's Affidavit required by F.R.C.P. 53(b)(3)(A) has been executed and has been filed. (*See following form affidavit*).

Dated this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_. Judge \_\_\_\_\_

**4.5 Affidavit of Neutral**

**AFFIDAVIT OF [NAME]**

**TENDERED PURSUANT TO FED. R. CIV. P. 53**

STATE OF \_\_\_\_\_ )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

AFFIDAVIT

[Name], being first duly sworn according to law, states the following:

1. I am an attorney at law, duly licensed to practice law in the States of [\_\_\_\_]. My bar admissions are as follows:  
[list]
2. I have thoroughly familiarized myself with the issues involved in the case captioned [\_\_\_\_]. As a result of my knowledge of that case, I can attest and affirm that there are no non-disclosed grounds for disqualification under 28 U.S.C. §455 that would prevent me from serving as the Neutral in the captioned matter.

\_\_\_\_\_

Sworn to before me and subscribed in my presence this day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Notary Public

**AFFIDAVIT DECLARATION OF [NAME]**

STATE OF \_\_\_\_\_ )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

AFFIDAVIT

[Name] declares under penalty of perjury that:

I have thoroughly familiarized myself with the issues involved in the case captioned above. As a result of my knowledge of this case, I can attest and affirm that there are no non-disclosed grounds for disqualification under 28 U.S.C. §455 that would prevent me from serving as the Neutral in this matter.

Date \_\_\_\_\_

Name \_\_\_\_\_