

Academy of Court-Appointed Neutrals

Section 2

Establishing a Roster of Neutrals

Although relatively few courts have established rosters of neutrals in advance of individual selection, some have, and a number of courts are currently considering establishing rosters. Rosters can promote fairness, quality, diversity and stakeholder engagement and confidence in the selection and use of neutrals.

2.1 Advantages of Establishing a Roster

Guidelines 6 and 7 of the [American Bar Association January 2019 Guidelines on the Appointment and Use of Special Masters \[Court-Appointed Neutrals\] in Federal and State Litigation](#) state that:

6. Courts should develop local rules and practices for selecting, training, and evaluating [neutrals], including rules designed to facilitate the selection of [neutrals] from a diverse pool of potential candidates.
7. Courts should choose [neutrals] with due regard for the court's needs and the parties' preferences and in a manner that promotes confidence in the selection process by helping to ensure that qualified and appropriately skilled and experienced candidates are identified and chosen.

Establishing a roster serves these goals in numerous ways. For example, establishing a roster:

- Helps to increase general awareness of the possibility of using neutrals in advance of an actual controversy;
- Helps to regularize the process and provide more time for consideration of potential appointees and their qualifications;
- Provides a means for recruiting potential neutrals from diverse sources;
- Allows for more significant stakeholder involvement in the court's efforts thereby increasing the quality of the selections and the acceptance of neutrals who are selected;
- Allows for independent assessment of potential neutrals by respected committees who would not ordinarily be involved in individual litigation;
- Facilitates efforts to establish training and systems of evaluation and data collection and analysis that can improve the quality of services provided by neutrals; and
- Allows for more structure and transparency in how courts use neutrals and options for establishing a pro bono commitment that would expand the court's resources.

This last point – about a pro bono commitment – warrants special emphasis. Coupling a pro bono commitment with participation on a fee-paying roster can be a particularly effective means of calling forth resources to help courts.

A pro bono commitment could create a pool of neutrals available in cases where parties would otherwise be unable to afford them or allow for the use of neutrals in roles that are non-case specific. For example, pro bono neutrals could be used to review dockets to flag cases that are ripe for diversion or alternative dispute resolution, or identify pending motions that are ripe for ruling or most likely to assist the resolution of the action. Or neutrals could be used in a role to help courts many cases involving unrepresented litigants.

A pro bono commitment can also help to ensure that those who seek to serve as neutrals are committed to helping the court and will be perceived to be so committed by stakeholders in the process.

Asking for a pro bono commitment for participation in a fee-paying roster is not only fairer for the neutrals involved, it is also more successful than a program that seeks to be based entirely on pro bono or low bono assistance. Unlike court-based mediation rosters, which often involve a large number of people called upon each to contribute a relatively small number of hours, a court-appointed neutral program generally works best with a relatively small number of trained participants each making a larger time commitment. This larger time commitment makes it much more difficult to recruit qualified applicants on a purely pro bono or low bono basis, and particularly biases the selection against lawyers who are not at large law firms and are less able to afford to make this time commitment for free. Even lawyers who are able to commit a large number of hours in one year may be unable to do that every year (leading to turnover) and whatever pro bono or low bono hours they are able to provide comes at the cost of using pro bono resources that would otherwise be available for other important needs. Combining paid work with a pro bono commitment helps to solve many of these problems.

2.2 A Roster Checklist

A roster should be selected in a way that facilitates these advantages. Depending on the local court's circumstances, local custom and history, and the collective and individual preferences of individual judges, courts may wish to consider and adapt the following processes:

Table 1. Checklist of Items to Consider in Establishing a Roster

✓	Step	Description
<input type="checkbox"/>	1	<p>Establish a committee charged with developing a program and creating a means of selecting neutrals in a way that is fair and perceived to be fair.</p> <p>Possible approaches are:</p> <p>(a) Use a respected existing body serving some related function (e.g., the committee that oversees a commercial court, or a judicial nominating commission).</p> <p>(b) Constitute a committee with a membership that would be respected (e.g., sitting judges who will work with the neutrals; court staff; representatives of both general and affinity bars with formal responsibilities; retired judges or lawyers who will be and will be perceived to be neutral in the selection; and the ADR and academic communities).</p>
<input type="checkbox"/>	2	<p>Have the Committee assess the court’s needs and potential ways in which neutrals might be used to serve those needs.</p>
<input type="checkbox"/>	3	<p>Use that assessment of needs and uses to develop a program that is flexible but self-sustaining, perhaps beginning with a pilot.</p>
<input type="checkbox"/>	4	<p>Develop a list of the tasks neutrals will be expected to perform and the roles neutrals will be expected to serve.</p>
<input type="checkbox"/>	5	<p>Identify the expected responsibilities of roster members, any particular terms or commitments neutrals would be expected to follow and the process by which their work will be evaluated.</p>
<input type="checkbox"/>	6	<p>Determine the size of the roster and the criteria and process for selection.</p>
<input type="checkbox"/>	7	<p>Develop or use an application that identifies the types of talent, experience, personality and methods that will be needed and asks applicants to address what they would bring to the work. Include questions about areas of subject matter expertise wanted for the panel. Ask questions probing the neutral’s ability to be fair and civil. (ACAN can assist with application language).</p>
<input type="checkbox"/>	8	<p>Identify how the roster will be used in selecting neutrals for particular cases. (<i>See discussion below</i>)</p>
<input type="checkbox"/>	9	<p>Establish a process and timeline for making the selections to the roster.</p>
<input type="checkbox"/>	10	<p>Develop a plan for publicity and recruitment that will encourage a diverse pool of roster applicants. Create a website or webpages on an existing site to explain and publicize the program and facilitate application.</p>

<input type="checkbox"/>	11	Designate a contact available to answer questions.
<input type="checkbox"/>	12	Institute an evaluation system for assessing the work of neutrals. (The ABA Judicial Division Court-Appointed Neutrals Committee has a draft survey instrument developed by Dr. Barbara Meierhoefer that can be provided on request).
<input type="checkbox"/>	13	Establish a procedure for filling vacancies and/or expanding the size of the roster or areas of expertise represented.
<input type="checkbox"/>	14	Provide an orientation and training program for new roster members.
<input type="checkbox"/>	15	Publicize and vet the proposed approach with stakeholders, including the general and affinity bars, organizations involved in judicial and court administration, and other interested parties. Conduct programs both in advance of implementing a proposed approach and afterwards to evaluate and improve the program.
<input type="checkbox"/>	16	To the maximum extent possible, do these tasks without taxing the resources of either judges or court staff. ACAN and the ABA Judicial Division Court-Appointed Neutrals Committee are available to work with courts to provide sample documents (such as applications and evaluation instruments), to locate resources that could assist in the process and to provide training. In addition, courts should consider taking advantage of bar and other resources. For example, law students or professors involved in dispute resolution could help assess the court's needs and design the program.

2.3 Use of the Roster

In establishing a roster, a court can also determine the way in which it will be used. Because the potential uses of neutrals are broad and, in some cases, can be specialized, rosters cannot be the exclusive source of appointment. There may be situations in which no one, or too few, people on the roster are appropriate for a particular appointment. Accordingly, the Court must have at least some discretion to choose neutrals located from other sources. *See* Section 3, below.

When choosing neutrals from among those on a roster, a number of methods are possible depending upon the culture of the court and bar. Pure random selection (a wheel) is not likely to be workable. It prevents the parties and the court from weighing in on the appropriateness of the selection or considering the relative rates neutrals would charge. More appropriate is a system in which parties are directed to identify options off the list and, perhaps, to recommend additional non-roster options.

As explained in Section 3, below, whatever approach the court uses for selection, the court and the parties should ensure that appointments of neutrals are made from a broad list that accounts for a wide range of background and skills.