

Academy of Court-Appointed Neutrals

Section 3

Selecting a Neutral for a Particular Case

The choice of who will serve as a neutral is ultimately one for the court. However, experience and recent thinking have suggested a number of best practices to involve both the particular parties, and stakeholders in general, to help ensure the quality and fit of the choice and the actual and perceived fairness of the process.

There is no universal model for how courts should develop a pool of prospective neutrals. No criteria apply to all needs. Instead, we hope to facilitate the process by identifying issues courts may want to consider, both in deciding which neutrals will serve particular cases. Courts contemplating the possible use of neutrals may wish to follow this two-step approach:

3.1 Evaluate the Needs to be Filled and the Knowledge, Skills and Abilities the Potential Appointee will Bring to Serve Those Needs.

Neutrals can be used for a wide array of jobs and can serve in different roles depending upon the case. *See* Section 1 above. Choosing the right neutral requires a careful evaluation of what needs the appointee will be serving and what knowledge, skills and abilities the appointee brings to serve those needs.

This requires evaluating the talents, experience, personality and methodology that the prospective neutral brings to the particular case. Just as there is no one role neutrals perform, there is no one rule for determining what talents will make a person an appropriate neutral in a case. Someone may have a talent or personality that the court judges to be especially useful, even if the candidate has little experience as an adjunct or on the subject matter. Sometimes, a wealth of experience generally in case management is more relevant than knowledge of the subject matter; sometimes the reverse is true and the need for subject matter expertise is predominant.

In some cases, courts have used a team approach. Courts have appointed a group of neutrals to perform one role, or utilized an early-stage neutral for mediation and a remedial-stage neutral for monitoring. Another approach can be to appoint a single neutral with the expectation that the neutral will use a team (for example to provide technical or computer expertise to the decision-making). The goal should be to search for a neutral who has the talents, experience, personality and methodology that best track the tasks the court wishes to have performed and the role the neutral will play.

Courts and parties must also evaluate the subject matter expertise that would be useful in the particular case. In some cases, what a court needs from a neutral is subject matter expertise, either in the applicable law or the “real world” issues. This may be particularly true, for example, in areas such as patent law, environmental and natural resource disputes, construction

cases, pharmaceutical litigation, human services, government agency or corporate restructuring. Sometimes, the nature of legal issues to be addressed can affect the choice of a neutral, for example, questions raised on summary judgment, on privilege, civil rights, or on foreign law.

Courts and parties should evaluate the ability of the prospective neutral to be (and to be perceived to be) fair and impartial, and to engage the parties and others with courtesy and civility.

3.2 Ensure the Use of Methods Likely to Locate a Broad Pool of Potential Applicants.

Justice and judicial administration will be served well by courts selecting potential neutrals from a broad pool of potential applicants. A candidate who has not previously been a neutral may be a better match for a particular case than a candidate with longstanding neutral experience. Candidates should reflect the diversity of background, experience and perspectives that reflect the richness of our community and wide variety of useful skills in dispute resolution.

Social science research reflects that diversifying selections from an applicant pool requires rethinking how we create lists of potential candidates. Relying on a system in which individuals limit their recommendations to those who, either they already know, or that a colleague already knows, reinforces historic limitations in the pool of potential candidates. Research reflects that reaching more broadly to create lists that include a critical mass of representation from a wider range of applicants (30% rather than just one to choose from) turns the likelihood of selection of a previously underrepresented candidate into the equivalent of a blind audition. *See, e.g., [Homer C. La Rue and Alan Symonette, The Ray Corollary Initiative: How to Achieve Diversity and Inclusion in Arbitrator Selection, 63 Howard L. J. 215 \(2020\)](#)* (referring to this approach as the “Ray Corollary” to the original “Rooney Rule” requiring at least one minority candidate to be interviewed for NFL coaching positions).

It is, accordingly, a best practice that, in general, before a court appoints a neutral, the court itself use or directs the parties to create a Ray Corollary compliant list of potential options and to explain and justify the search that was done to locate potential appointees. If, for some reason, the court or the parties believe the circumstances require an exception to this approach, the reasons that justify the exception should be explained. This makes the process fairer and more transparent, and so increases confidence in the selection.

Obviously, ACAN’s membership is not the only source of potential neutrals or of Ray Corollary compliant lists. However, ACAN has created a resource that can assist in broadening the search for neutrals. ACAN has actively recruited new qualified people into the profession and encourages its membership to create [profiles that can be searched by those interested in retaining neutrals](#). It also affords courts and parties who might be interested in having a neutral appointed to post [requests for proposals](#) that are then forwarded to all of ACAN’s membership for possible response.

Regardless, however, of whether the approach used is to review ACAN’s profiles, or some other approach, the selection process should be broad and informed.