

DRAFT

AMERICAN BAR ASSOCIATION

**JUDICIAL DIVISION
SECTION OF DISPUTE RESOLUTION**

RESOLUTION

1
2 RESOLVED, that the American Bar Association amends the *ABA Guidelines for the*
3 *Appointment and Use of Special Masters in Federal and State Civil Litigation*
4 (“Guidelines”), adopted January 2019 (Resolution 100, 19M100), by retitling the
5 Guidelines, “*ABA Guidelines for the Appointment and Use of Court-Appointed Neutrals in*
6 *Federal and State Civil Litigation*” and replacing the terms “Special Master” and “Master”
7 with “Court-Appointed Neutral,” as follows:
8

9 ABA Guidelines for the Appointment and Use of Court-Appointed Neutrals
10 in Federal and State Civil Litigation

11 Consistent with the Federal Rules of Civil Procedure or applicable state court rules:

- 12 (1) It should be an accepted part of judicial administration in complex litigation (and
13 in other cases that create particular needs that a court-appointed neutral might
14 satisfy), for courts and the parties to consider using a court-appointed neutral
15 and to consider using court-appointed neutrals not only after particular issues
16 have developed, but at the outset of litigation.
- 17 (2) In considering the possible use of a court-appointed neutral, courts, counsel
18 and parties should be cognizant of the range of functions that a court-appointed
19 neutral might be called on to perform and roles that a court-appointed neutral
20 might serve.
- 21 (3) In determining whether a case merits appointment of a court-appointed neutral,
22 courts should weigh the expected benefit of using the court-appointed neutral,
23 including reduction of the litigants’ costs, against the anticipated cost of the
24 court-appointed neutral’s services, in order to make the court-appointed
25 neutral’s work efficient and cost effective.
- 26 (4) Participants in judicial proceedings should be made aware that court-appointed
27 neutrals can perform a broad array of functions that do not usurp judicial
28 functions, but assist them. Among the functions court-appointed neutrals have
29 performed are:
30 a. discovery oversight and management, and coordination of cases in multiple
31 jurisdictions;
32 b. facilitating resolution of disputes between or among co-parties;
33 c. **pretrial case management**;
34 d. advice and assistance requiring technical expertise;
35 e. conducting or reviewing auditing or accounting;

- 36 f. conducting privilege reviews and protecting the court from exposure to
37 privileged material and settlement issues; monitoring; class administration;
38 g. conducting trials or mini-trials upon the consent of the parties;
39 h. settlement administration;
40 i. claims administration; and
41 j. receivership and real property inspection.

42 In these capacities court-appointed neutrals can serve numerous roles,
43 including management, adjudicative, facilitative, advisory, information
44 gathering, or as a liaison.

- 45 (5) Courts should develop local rules and practices for selecting, training, and
46 evaluating court-appointed neutrals, including rules designed to facilitate the
47 selection of court-appointed neutrals from a diverse pool of potential
48 candidates.
- 49 (6) Courts should choose court-appointed neutrals with due regard for the court's
50 needs and the parties' preferences and in a manner that promotes confidence
51 in the selection process by helping to ensure that qualified and appropriately
52 skilled and experienced candidates are identified and chosen.
- 53 (7) The referral order appointing the court-appointed neutral should describe the
54 scope of the engagement, including, but not limited to, the court-appointed
55 neutral's duties and powers, the roles the court-appointed neutral may serve,
56 the rates and manner in which the court-appointed neutral will be compensated,
57 power to conduct hearings or to facilitate settlement, requirements for issuing
58 decisions and reporting to the court, and the extent of permissible ex parte
59 contact with the court and the parties. Any changes to the scope of the referral
60 should be made by a modification to the referral order.
- 61 (8) Courts and the bar should develop educational programs to increase
62 awareness of the role of court-appointed neutrals and to promote the
63 acquisition and dissemination of information concerning the effectiveness of
64 court-appointed neutrals.
- 65 (9) Courts and, where applicable, legislatures should make whatever modifications
66 to laws, rules, or practices that are necessary to effectuate these ends.

67
68 FURTHER RESOLVED, that the American Bar Association further amends ABA
69 Resolution 100, 19M100, to urge that Bankruptcy Rule 9031 and other provisions of rules
70 or law related to Bankruptcy be amended to permit courts responsible for cases under
71 the Bankruptcy Code to use court-appointed neutrals (whether identified as "masters" or
72 otherwise) in the same way as they are used in other federal cases; and

73
74 FURTHER RESOLVED that the American Bar Association supports rule and legislative
75 changes designed to replace the term "master" or "special master" with "court-appointed
76 neutral"

REPORT TO THE HOUSE OF DELEGATES

JUDICIAL DIVISION

Introduction

At its midyear meeting in January 2019, the American Bar Association (“ABA”) House of Delegates adopted Resolution 100.¹ This resolution approved the ABA Guidelines on the Appointment and Use of Special Masters in Federal and State Civil Litigation (the “Guidelines”) and urged that Bankruptcy Rule 9031 be amended 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.

The Guidelines and the conclusion that courts responsible for cases under the Bankruptcy Code should be permitted to use neutrals 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 House of Delegates adopted Resolution 19M100, what is now the ABA Judicial Division Lawyers Conference Court-Appointed Neutrals Committee (the “Committee”) has worked on implementing the Guidelines’ precepts and changing the applicable Bankruptcy Rule. 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, and to report back and comment on, the Committee’s work.

This Committee is working to implement Resolution 19M100 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

¹ “Guidelines.” Available at 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”).

² Guideline 1, *supra* n.1.

urging that Bankruptcy Rule 9031 be amended to permit courts responsible for cases under the Bankruptcy Code to use court-appointed neutrals in the same way federal courts responsible for other proceedings do.

One of the lessons learned from the efforts to implement the Resolution has been that it would much better serve both ABA goals generally and the goals of the Guidelines to promote the use of the term “court-appointed neutral,” instead of “special master” or “master,” to describe both the appointment and the people who serve in this role. As explained below, there are many reasons why the term “court-appointed neutrals” both better serves and better describes the assistance the Guidelines contemplate these appointees providing. Another lesson is that, implementing the related principle of the Resolution—that courts responsible for Bankruptcy matters should be permitted to use neutrals in the same way as they are used in other federal proceedings—may require other rule or legislative changes in addition to changes to Bankruptcy Rule 9031, itself.

This Resolution amends Resolution 19M100 based on these lessons. It does not change the substance of any of the Guidelines or the goal the ABA endorsed of affording courts the ability to use neutrals in Bankruptcy proceedings. Rather, it renames and amends the 2019 Guidelines and the Resolution that adopted it (19M100) to use the term “Court-Appointed Neutrals,” rather than “Master” or “Special Master.” The current resolution also supports efforts to use the new term to rebrand the profession of those who serve courts in this role in a far more positive way that better serves the purposes of the Guidelines and ABA Policy. This Resolution also seeks to amend Resolution 19M100 to specify that Bankruptcy Rule 9031 *and other provisions of rules or law related to Bankruptcy* should be amended to permit courts responsible for cases under the Bankruptcy Code to use *court-appointed neutrals (whether identified as “masters” or otherwise)* in the same way as they are used in other federal cases.

This Resolution is the result of hundreds of additional hours of discussion involving dozens of people both inside and outside the ABA both about whether to use a new term for the profession and which term best serves the administration of justice. It is intended to be considered in conjunction with the Resolution to adopt a Model State Rule to implement the 2019 Guidelines. The Model Rule uses the term “Court-Appointed Neutrals,” to have a term that both accounts for the many jurisdictions that have never or do not now use the term “master,” and fairly reflects the principles of the Guidelines the Rule was drafted to implement.

Taken together, these two Resolutions further the ABA’s efforts to rethink the appointment and use of court-appointed neutrals in a way that makes decisions on whether to appoint neutrals more open, selections on who to appoint come from a more diverse range of applicants, and the use of those selectees more flexible and helpful to the administration of justice.

Discussion and Rationale for the Resolution

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.”³ 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.”⁴

The United States Supreme Court appointed a committee of neutrals to assist in deciding the very first case filed on its docket.⁵ 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. . . .”⁶

Historically, court-appointed neutrals have performed a wide variety of functions. Indeed, “[i]t is not possible to identify all the ways in which special masters could be used, however, the functions that special masters have performed include:

- Discovery oversight and management.
- Coordinating cases in multiple jurisdictions or between state and federal courts.
- Facilitating resolution of disputes between co-parties and/or their counsel in multi-plaintiff and/or multi-defendant settings.
- Providing technical advice and assistance for example in managing patent claim construction disputes in patent infringement litigation.
- Auditing/Accounting.
- Serving as a firewall that allows the benefit of neutral involvement while avoiding exchanges of information or ex parte contacts between the judge and stakeholders in a way that might otherwise be perceived as unfair.
- Addressing class action administration and related issues.
- Real property inspections.
- Mediating or facilitating settlement.
- Trial administration.
- Monitoring and claims administration.
- Receivership.”⁷

Moreover, depending upon the function(s) the court-appointed neutral master is performing, the neutral “may serve in different types of roles, including:

- Adjudicative.

³ 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)).

⁴ *Id.*

⁵ *Vanstophorst v. Md.*, 2 U.S. 401 (1791).

⁶ *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).

⁷ Report, submitted in support of Resolution 19M100 and seeking adoption of the Guidelines (“Report”), at 9-10.

- Facilitative.
- Advisory.
- Informatory.
- Liaison.”⁸

The history of the name for court-appointed neutrals. Despite the long history of courts appointing neutrals, courts and rule-makers have never completely settled on a single term to refer to a neutral appointed by a court to perform one or more of these functions or to serve in one or more of these roles. Since 2003, Federal Rule of Civil Procedure 53, and state rules that adopt the federal language, have used the term “master.” But legislatures and courts have used dozens of other terms that often have their own meanings in other contexts. These terms include “adjunct,” “special magistrate,” “hearing examiner,” “special facilitator,” “discovery facilitator,” “appointed mediator,” “monitor,” “court advisor,” “investigator,” “claims administrator,” “claims evaluator,” “ombuds,” “court mediator,” “case evaluator,” “referee,” “receiver,” “judicial ombuds,” “commissioner,” and others.

Court-appointed neutrals have these different titles because they serve roles so diverse that they are limited only by our creativity. Where the term “master” suggests someone brought in to adjudicate, these many types of court-appointed neutrals are more like a Swiss Army Knife: a multipurpose tool that could be used for quasi-adjudicative work, but could also be used for facilitative, investigative, intermediary, informatory, administrative, monitoring, implementing or many other purposes.

Moreover, in recent years, at least two states—Maryland and Pennsylvania—have changed relevant provisions to substitute a different term for “masters.” In Pennsylvania’s case, the move followed a resolution of the Philadelphia Bar Association that raised a number of concerns about appointing someone called a “master.”⁹ That resolution noted that the term “creates a sense of separation, anxiety, and confusion” because it suggests that some people are subject to others.¹⁰

Last year, the Judicial Division Lawyers Conference Committee that has been leading the effort to implement the Guidelines cited these efforts and changed its name from the “Special Masters Committee” to the “Court-Appointed Neutrals Committee.”¹¹ The primary organization of these professionals also changed its name last year from the “Academy of Court-Appointed Masters” to the “Academy of Court-Appointed Neutrals.”¹² And in October 2022, the National Association of Women Judges adopted

⁸ *Id.* at 10.

⁹ See https://philadelphiabar.org/?pg=ResNov20_1

¹⁰ *Id.*

¹¹ https://www.americanbar.org/groups/judicial/conferences/lawyers_conference/committees/court-appointed-neutrals/committee-name-change/

¹² See

www.courtappointedneutrals.org/acam/assets/file/public/namechange/on%20becoming%20the%20academy%20of%20court-appointed%20neutrals.pdf

a “Resolution in Support of Ceasing to Use the Term "Master" or "Special Master" and the Use of "Court-Appointed Neutrals.”¹³

In recent years, other professions have questioned whether the term “master” continues to be appropriate in their context. “Master” has a number of positive connotations. It can refer to admirable qualities, like expertise, proficiency, accomplishment, scholarship or leadership. However, “master” also has obvious negative connotations that have led many professions in many contexts to consider using different terms. For example, electrical and software engineers are discussing whether they should continue (as they have for decades) to use master and slave to refer to situations in which one device exercises asymmetric control over others. Colleges, including Harvard, Yale and Rice, have stopped using “master” as an academic title or the name for the head of a residential college. Real estate professionals are debating whether “master” bedroom is the best name.

No one associated with using the term “master” in the context of court-appointed neutrals intended the term to connote negative or restrictive images. But that does not mean that it makes sense to continue using the term. Indeed, it is only reasonable that the ABA consider whether there is a better term.

Coming to the Term “Court-Appointed Neutral.” As work progressed on efforts to implement the Guidelines, it became apparent that one of the most significant steps the ABA could take to advance this effort would be to change and standardize the name used to refer to professionals who serve this function. The Guidelines recognized that, properly used, court-appointed neutrals were a significant potential resource for courts, but that the lack of a methodical and consistent approach to considering the use of court-appointed neutrals has left this potential resource poorly understood, rarely used and less effective.¹⁴

The Report that accompanied Resolution 19M100 identified several advantages to making it an accepted part of judicial administration to consider using court-appointed neutrals in cases that might warrant their use. Among other things, a regular process for considering appointment of these professionals in appropriate cases would be expected:

- To make people more familiar with what these professionals do, ensuring that courts can use them effectively and creatively to improve the administration of justice.
- To help diversify and improve the quality of those selected by, for example, facilitating the use of rosters and systems for vetting potential neutrals in advance of appointment.
- To afford litigants a clearer idea of why neutrals are being appointed; what they will be doing (or not doing); how they will be paid; and how they are going to proceed.

¹³ Available at www.nawj.org/uploads/files/resolutions/resolutionsupportingcourtappointedneutrals10-22-2022.pdf

¹⁴ See Report supra n.7 at 6-7.

- To increase accountability by fostering training and evaluation systems and scholarly study of litigants' and lawyers' experience with neutrals.

Standardizing the name “Court-Appointed Neutrals,” and using it to replace “master” or “special master” helps to attain these advantages:

Familiarity/Effective Use. The Report accompanying Resolution 19M100 noted that “the use of (or even consideration of using) “special masters” is so rare that the very idea is alien to many judges and lawyers.”¹⁵ It is not possible to know the reasons why the idea is so alien. The Report suggests some possible reasons, but the use or even discussion of using a neutral is so rare that there are no statistics on how the role is currently perceived.¹⁶

Having a name that does not describe the tool, however, cannot possibly help. Calling someone “Master” suggests that they are being brought in to make decisions for others. That misdescribes someone who is used to facilitate or otherwise assist the parties in reaching their own resolution of differences; or to offer expertise about science, or particular industries like construction, or forensic accounting; or to serve numerous other roles. Indeed, even when the role is ostensibly quasi-adjudicative, a significant benefit from appointing a neutral can come from helping the parties work out differences without the need for motions in the first place.

“Court-Appointed Neutral” better describes a disinterested professional brought in as a special officer appointment to help, rather than to take over specific functions in a litigation. It makes it easier for parties to appreciate that this is a multi-faceted tool and to focus the consideration on whether and which facet might be useful in a particular case and whether the benefit from using the tool in a particular case outweighs the costs.

“Court-Appointed Neutral” also better captures the wide variety of names that jurisdictions use for this tool. In effect, using the term “master” or “special master” picks a term—albeit the most common, but not even close to the only one—that many states do not use and at least two have specifically abandoned. Having a term that broadly encompasses the many terms jurisdictions use facilitates the process of encouraging states to adopt the Model Rule that is the subject of a companion resolution and focuses the discussion more effectively on the broad uses the tool can offer.

Standardizing this term also helps to clarify the scope of our rules and ensures that the change does not impede existing alternative dispute resolution programs, including those implemented in accordance with the ADR Act of 1998. Historically, jurisdictions have used many function-specific terms that can be confusingly limited

¹⁵ *Id.* at 7.

¹⁶ In connection with what became the 2003 Amendments to Federal Rule of Civil Procedure 53, a Subcommittee of the Judicial Conference Advisory Committee on Civil Rules asked the Federal Judicial Center for information on how “masters” were being used. The Center concluded that courts considered using “masters” in only .3% of federal cases and actually appointed “masters” in .2% of federal cases. Thomas Willging, et. al., “Special Masters’ Incidence and Activity,” Federal Judicial Center at 3 (2000). Even that data is now 23 years old.

when used to refer to an array of roles. Terms like “master” “special master,” “special magistrate,” “hearing examiner,” and “referee,” for example, suggest that the role is quasi-adjudicative, and do not clearly delineate that a facilitative or advisory role may be appropriate. Terms like “special facilitator” and “discovery facilitator,” suggest that the role is facilitative, and arguably limit a court’s ability to benefit from specialized judgment or expertise that is appropriate for a given case.. “Monitor,” “court advisor,” “investigator,” “claims administrator,” and “forensic analyst,” connote specialized roles that may or may not be applicable to a given case. Other terms like “mediator,” “arbitrator,” “case evaluator,” or “ombuds,” potentially create confusion with those who serve these roles in other settings. Accordingly, the use of one or another of these terms could confuse the role of an individual a judge is empowered to designate for a given case.

The use of these terms also may leave unclear when provisions of rules apply at all. 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.” But 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. Standardizing and defining the term “court-appointed neutral” to encompass the broad roles the Guidelines envision clarifies these rules.

Diversifying and improving the quality of the selection. Using “Court-Appointed Neutral” rather than “master” reinforces the effort to recruit appointees from a diverse and non-traditional pool. The Report accompanying Resolution 19M100 noted that because courts have not regularly considered using neutrals, a practice has developed to consider these appointments *ad hoc* (often when a particular judge favors the approach).¹⁷ Guideline 5 specifically calls for courts to change this system in to one that approaches selection more broadly—“to develop local rules and practices for selecting, training, and evaluating [court-appointed neutrals], including rules designed to facilitate the selection of [court-appointed neutrals] from a diverse pool of potential candidates.” It is sensible to rename of the profession in a way that captures its breadth and does not have the negative connotations of “master.” Renaming also facilitates the development of a “best practice” to improve the quality of the selection by searching more widely before making appointment to develop lists of candidates that are broader not only demographically but also in skill sets.

Affording litigants a clearer idea of why the appointees are chosen. Having a term that does not describe what “court-appointed neutrals” do engenders confusion. Standardizing the term helps serve the goal of familiarizing litigants with the “broad array of functions” neutrals can provide, as contemplated by Guideline 4 and focuses the inquiry on what services might be useful in a particular case.

Increasing accountability. The patchwork of multiple names for this role makes more difficult the process of developing generalized training, evaluation and methods of

¹⁷ Report, *supra*.n.7, at 7 & n.18.

improving the work of court-appointed neutrals. A common term, with a common definition, helps to solve that problem.

Resolution 19M100’s mandate supporting affording courts responsible for cases under the Bankruptcy Code the ability to appoint neutrals should be amended to support using the term “court-appointed neutral,” and to contemplate the amendment or adoption of supporting changes to achieve that end.

As the 2019 Report explained, “there is no justification today for a rule that assumes that bankruptcy judges can never make effective use of special masters.”¹⁸ Bankruptcy Rule 9031 purports to do that, by stating that Federal Rule of Civil Procedure 53 “does not apply in cases under the [Bankruptcy] Code.” Resolution 19M100 called for amending 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.” In seeking to amend the Guidelines to use “court-appointed neutral” instead of “master” or “special master,” the current Resolution also seeks to amend the reference in the discussion of amending Bankruptcy Rule 9031.

The current Resolution makes a clarifying amendment to the 2019 language. Resolution 19M100 discussed achieving the goal of permitting the use of neutrals in Bankruptcy proceedings by amending Bankruptcy Rule 9031. In pursuing efforts to implement this change, it has become apparent that fulfilling this objective may require, or benefit from, other changes. For example, Part VII of the Federal Rules of Bankruptcy Procedure govern adversary proceedings.¹⁹ “The content and numbering of these Part VII rules correlates to the content and numbering of the F.R.Civ.P. Most, but not all, of the F.R.Civ.P. have a comparable Part VII rule. When there is no Part VII rule with a number corresponding to a particular F.R.Civ.P., Parts V and IX of these rules must be consulted to determine if one of the rules in those parts deals with the subject.”²⁰ Accordingly, it may be appropriate to urge that a new Bankruptcy Rule 7053 be adopted to incorporate Federal Rule of Civil Procedure 53 by reference.

Also, while there is existing statutory authority to treat the payment of some appointed neutrals (a trustee or examiner), as an administrative claim under a bankruptcy,²¹ it may not be clear that this language would apply to the appointment of neutrals for other purposes. Accordingly, it may be appropriate to urge this clarification.

¹⁸ Report, *supra* n.7, at 15. See also Merrill Hirsh and Sylvia Mayer, “Time To Stop Hamstringing Bankruptcy Judges: Amending Bankruptcy Rule 9031 To Recognize and Permit the Use of Court-Appointed ‘Masters,’” ABA Judicial Division JUDGES JOURNAL, v. 61, no. 4 (Fall 2022) 4 (examining the history of Bank. R. 9031 and explaining the reasons for changing the rule); Paulette J. Delk, “Special Masters in Bankruptcy: The Case Against Bankruptcy Rule 9031,” 67 MO. L. REV. 29, 30-31 (Winter 2002); R. Spencer Clift, III, “Should the Federal Rules of Bankruptcy Procedure Be Amended to Expressly Authorize United States District and Bankruptcy Courts to Appoint a Special Master in an Appropriate and Rare Bankruptcy Case or Proceeding?,” 31 U. MEM. L. REV. 353 (2001).

¹⁹ See Bankr. R. 7001 (“[a]n adversary proceeding is governed by the rules of this Part VII.”)

²⁰ Advisory Committee Notes to Bankr. R. 7001.

²¹ See 11 U.S.C. §1104.

The current resolution amends Resolution 19M100 to ensure the flexibility in the approach necessary to achieve the objective of 19M100 of permitting courts responsible for cases under the Bankruptcy Code to use court-appointed neutrals in the same way as they are used in other federal cases.

The Report Accompanying Resolution 19M100 Should Be Interpreted as if It Used the Term “Court-Appointed Neutral” Rather than “Master” or “Special Master.”

Although the Report that accompanies any Resolution is not official ABA Policy, it is useful in helping to understand the background of the Resolution. The Report was a product of 18 months of efforts by numerous representatives across the sections, divisions and forums of the ABA and discusses the thinking behind this important Resolution.

That thinking has not changed. Nothing in this Resolution changes either the substantive provisions of the Guidelines or the guidance provided in the Report. For convenience, the Court-Appointed Neutrals Committee may produce an unofficial “reference” version of the report using the new terminology.

The ABA Should Support Rule and Legislative Changes Designed to Substitute the term “Court-Appointed Neutral” for “Master” or “Special Master.”

Ultimately obtaining the benefits of “court-appointed neutral” as a name for the profession requires standardizing the name. As a practical matter, it is very difficult to expect courts or litigants to use a new name when rules or legislation use an old name. As changing the name to “Court-Appointed Neutrals” is the right thing to do for the Guidelines, it is also the right thing to do for rules and legislation. Like the National Association of Women Judges,²² the ABA should support the effort to make this change.

Conclusion

In Midyear Resolution 19M100, in 2019, the ABA endorsed a broader way of thinking about how courts could make use of neutrals to assist the process of judicial administration. In this Resolution, the ABA gives that broad way of thinking a name—court-appointed neutral.

Respectfully submitted,

Hon. Ernestine S. Gray. (ret.)
Chair, Judicial Division
May 2023

²² See supra n.13 and accompanying text.

General Information Form

1. Summary of Resolution.

This Resolution seeks to amend Resolution 19M100 (which adopted the ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation, and urged amending Bankruptcy Rule 9031 concerning “special masters”) to use (and going forward to urge the use of) the term “Court-Appointed Neutral” rather than “Masters” or “Special Masters.” The Resolution also clarifies the mandate in Resolution 19M100 to specify that Bankruptcy Rule 9031 *and other provisions of rules or law related to Bankruptcy* should be amended to permit courts responsible for cases under the Bankruptcy Code to use court-appointed neutrals (whether identified as “masters” or otherwise) in the same way as they are used in other federal cases.

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 seeking to standardize a term that better describes and better serves the goal of making effective use disinterested professionals as special officer appointment to assist courts.

It helps to eliminate bias and enhances diversity by joining with other organizations, including the National Association of Women Judges and the Philadelphia Bar Association, the states of Pennsylvania and Maryland and other professions, including real estate and electrical engineering, in recognizing that using a new term better serves the goals our profession strives to achieve and the efforts to diversity the profession than does the term “master.”

It advances the rule of law by adopting a name that better describes the profession and promotes a better understanding of the potential assistance court-appointed neutrals can provide to the administration of justice.

3. Approval by Submitting Entity.

The Judicial Division (JD) Council voted to sponsor this Resolution by vote 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.

The Section of Dispute Resolution (DR) Council voted to co-sponsor this Resolution by electronic vote conducted from May 2-8, 2023.

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 promote and standardize the use of “court-appointed neutrals” as a term in rules and references. This will include:

(1) Continuing to work with the appropriate ABA Standing Committees, Commissions, Sections, Divisions and forums to promote discussion and general use of the term “court-appointed neutrals” in rules, orders and publications;

(2) Conducting outreach through programs and publications to educate other organizations involved in the administration of justice (including the National Center for State Courts, the National Judicial College, the National Association for Court Management, the Advisory Committee on Federal Rules, the Federal Judicial Center, the American Judges Association, the National Association of Women Judges, the National Council of Juvenile and Family Court Judges, the Conference of Chief Justices), state and local bars, courts, staff and stakeholders about the Model Rule;

(3) Continuing to urge the amendment of rules and statutes as necessary to permit courts responsible for cases under the Bankruptcy Code to use court-appointed neutrals in the same way as they are used in other federal cases.

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

None.

10. Disclosure of Interest.

In September 2021, 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 the resolution 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.