

# **Academy of Court-Appointed Neutrals**

## **Curricula Programs and Materials Introduction**

This ACAN resource contains three CLE programs, each complete with a course outline and accompanying materials. They are designed to be used by any experienced court-appointed neutral to conduct relevant CLE presentations. ACAN welcomes and encourages neutrals to join the Academy at [www.courtappointedneutrals.org](http://www.courtappointedneutrals.org).

The first set describes the various roles neutrals serve. The second set contains materials to draft an appropriate Rule 53 court order appointing a neutral. The third set contains ethical guidelines and issues involving judicial neutrals. Each syllabus and accompanying text may be adapted for use in a 60 or 90 plus minute program. Collectively, they may be used in a half day or longer program.

The materials may be edited or adapted without seeking permission from ACAN for their use, including using power point or other digital image presentations. Additional resources that may be used appear in the ACAN Benchbook at [www.courtappointedneutrals.org/benchbook](http://www.courtappointedneutrals.org/benchbook). ACAN releases its copyright interests on the condition that the following notice is prominently included in the program announcements and repeated in the materials used during the program:

*Materials included in this program have been prepared by the Academy of Court-Appointed Neutrals for use in CLE and law related programs. ACAN is a national organization of neutrals who have been appointed by judges or selected by parties and their lawyers to facilitate the resolution of disputes and to promote social justice. [www.courtappointedneutrals.org](http://www.courtappointedneutrals.org).*

ACAN also invites users of these materials to submit to the Academy corrections, additions, revisions, and suggested materials that can be added to the ACAN Benchbook. To submit supplementary materials or to obtain further information regarding the use of these materials, emails may be sent to Merril Hirsh, ACAN's Executive Director, at: [ExecDir@courtappointedneutrals.org](mailto:ExecDir@courtappointedneutrals.org).

## **Contents**

A Word the Name "Court-Appointed Neutrals".....	Page 2
Roles of Neutrals.....	Page 4
Appointment Orders .....	Page 8
Ethical Issues.....	Page 29

# Academy of Court Appointed Neutrals

## A Word About the Name “Court-Appointed Neutrals”

In July 2022, what had been the “Academy of Court-Appointed Masters” and the American Bar Association Judicial Division Lawyers Conference “Special Masters Committee” changed their names to use “Court-Appointed Neutral” instead of “Master.” Both organizations explained the change in some detail on their websites when they concluded that “Court-Appointed Neutrals” both better describes this flexible tool and better serves the hard work of many to diversify this profession and to think creatively about the work these professionals provide. See [ACAN](#) and [Court-Appointed Neutrals Committee](#).

It is not easy to rebrand a profession that includes such a broad array of roles and difficult to define what it essentially a multi-faceted Swiss army knife with tools limited only by our creativity. Historically, the most common term for the professionals who serve these roles is “master” or “special master,” but legislatures and courts have used dozens of other terms, ranging from the nondescriptive, if accurate, “adjunct,” through many function-specific terms that can be confusingly limited when used to refer to an array of roles. Terms like “special magistrate,” “hearing examiner,” and “referee,” for example, suggest that the role is quasi-adjudicative, and not that it can be facilitative or advisory. “Special facilitator” and “appointed mediator,” suggest that the role is facilitative, and not a way that courts can benefit from specialized judgment or expertise. “Monitor,” “court advisor,” “investigator,” “claims administrator,” and “forensic analyst,” connote specialized or different roles that may or may not be accurate in particular cases. Other terms like “mediator,” “arbitrator,” “case evaluator,” or “ombuds,” potentially create confusion with those who serve these roles in other settings.

*As used in this Benchbook, “Court-Appointed Neutral” refers to “a disinterested professional appointed as an adjunct – a special officer – in a case to assist a court in its case management, adjudicative or post-resolution responsibilities.”* “Court-appointed neutral” is a generic term that includes any role in which the court may wish to use an adjunct, including for example, making reports and recommendations, facilitating agreements between the parties, assisting in fact-finding, advising, monitoring, serving as an intermediary or otherwise facilitating dispute resolution. But it is ACAN’s goal also to turn it into a term-of-art. A court might wish to appoint a neutral as an adjunct to conduct evidentiary hearings in the way an arbitrator might. But the term is not intended to encompass all arbitrators. A court might wish to have a neutral assist the parties in coming to their own resolution of disputes (over procedure, merits or both) in the way a mediator might. But the term is not intended to encompass all mediators. The limiting factor is that the neutral is being appointed, in this instance, by a court, as a special officer to a proceeding for which the court remains the ultimate arbiter.

As courts are not the only ones who appoint neutrals, in other settings there can be similar names. For example, the 9/11 Fund is an example of a Congressionally-appointed neutral. BP's gulf oil explosion and General Motors' ignition switch led to "privately-appointed neutrals." And neutrals have been used as adjuncts to administrative proceedings and arbitrations. But stressing the appointment and the neutrality allows us a means to discuss how to use this multi-faceted tool.

ACAN hopes that, as the profession becomes better-accepted and understood, and rules are amended, "Court-Appointed Neutral" becomes the accepted term to refer to it.

# **Academy of Court Appointed Neutrals**

## **Roles of Neutrals**

Court-appointed neutrals serve many types of vital and productive roles. These services performed by neutrals provide courts, parties, and lawyers with essential and invaluable services in all kinds of cases, including common cases, complex and multi-party lawsuits, class actions, and multi-district litigation (MDLs). Rule 53 of the Federal Rules of Civil Procedure currently refers to court-appointed neutrals as “masters.” The various states refer to these neutrals with a variety of titles, including adjunct, commissioner, referee, monitor, facilitator, or neutral. A court-appointed neutral may play multiple roles throughout the lifetime of a case, including facilitative, adjudicative, informative, advisory, and as a liaison. Experienced neutrals may also be appointed to assist with non-litigation cases, involving community, social, or governmental disputes. Most commonly, court-appointed neutrals serve in one or more of the following roles.

### **1.1 Settlement Neutral**

The use of settlement neutrals to reach global resolutions in large-scale tort litigation dates back at least to the Dalkon Shield cases and Agent Orange litigation beginning in the late 1980s. Courts have come to realize that the appointment of a neutral third-party who is granted quasi-judicial authority to act as a facilitator between the court and the parties can provide a useful approach to reaching a settlement. This is especially true in complex litigation involving numerous parties, or when the dispute has matured and individual settlements become recurring and time-consuming.

### **1.2 Discovery Neutral**

The use of discovery neutrals to manage and supervise ordinary and complex cases is relatively commonplace. The neutral can manage a discovery plan, issue orders resolving discovery disputes, make recommendations to the judge, and monitor ongoing discovery. Sometimes a discovery neutral will sit in on depositions that are contentious. Because the authority of the neutral focuses on managing discovery, the role is viewed as less judicial and more managerial in nature.

### **1.3 Privilege Review Neutral**

A related type of discovery neutral specializes in reviewing documents and data that contain or likely contain privileged information. These neutrals review the potentially relevant discovery in camera and provide the court with findings or recommendations regarding the legal status and factual nature of the information.

### **1.4 Electronic Discovery Neutral**

Modern cases typically deal with electronically stored information (ESI) issues. Recent amendments to the discovery rules contain provisions regarding how best judges and lawyers can

resolve problems that arise from accessible or recoverable information, native formats, and meta data disclosures. A neutral experienced in both discovery procedures and computer systems and software can be an invaluable help to a court, the parties, and the lawyers. Substantial time and money can be saved by the use of a neutral to help resolve ESI disputes.

### **1.5 Coordinating Neutral**

The term ‘coordinating neutral’ includes those whose work requires the coordination of activities in a variety of ways. For example, they may meet and confer with lawyers to develop proposed orders to submit to the judge; they may chair a liaison committee of lawyers; or they may work on associated aspects of complex cases and class actions. They may also coordinate events in related cases that are filed in different jurisdictions in state and federal courts to provide uniform and efficient procedures.

### **1.6 Trial Neutral**

Neutrals may be assigned trial and hearing duties. Parties may agree to have their dispute heard by a neutral, either for final decision or for findings and recommendations subject to review by the court. Trial neutrals may also compile and interpret technical or complex evidence or voluminous data. In trade secret litigation, the need for a trial neutral may arise to deal with confidentiality matters. In patent suits, an experienced patent expert may assist with or conduct a *Markman* hearing, and prepare findings and recommendations on disputed claim terms.

### **1.7 Expert Advisor**

It has long been considered within a court’s inherent authority to engage the help of an expert advisor. An expert consultant can act as a judicial tutor, providing guidance on complex or specialized subjects. Foreign law cases often create a need for such an expert. When an advisor is utilized, the judge conducts the trial with appropriate assistance from the advisor.

### **1.8 Technology Neutral**

In cases intertwined with technological, scientific, or complex issues, neutrals with technical expertise can be very helpful. Neutrals who are experts in civil procedure as well as experts in a technical field can provide the courts and parties with the expertise necessary to understand and resolve problems. Parties who retain their own experts also benefit from the contributions made by these independent court-appointed professionals.

### **1.9 Monitor**

Neutrals can be helpful after a case is resolved to ensure that a court’s order or settlement agreement is implemented properly and complied with over time. In civil cases, neutrals are often appointed to monitor compliance with structural injunctions, especially those involving employment or other organizational change, those involving accommodation facilities, or those

requiring reform in government agencies. By surveying the defendant's remedial efforts, the neutral can facilitate judicial evaluation of compliance with appropriate equitable relief.

### **1.10 Class Action Neutral**

Neutrals assisting in a class action may perform a variety of tasks specific to this context, including identifying potential class members, drafting or implementing a notice to the class, managing procedural issues, and supervising settlement fairness hearings under Fed. R. Civ. P. 23.

### **1.11 Claims Evaluation and Oversight**

Neutrals can be used to evaluate oversee administration of settlement of class action claims or to distribute money damages to a class of eligible recipients. These neutrals can help select, work with, and monitor the organization that administers and manages the details of the settlement. This function has become more commonplace as litigation comprises federal and state cases requiring this work.

### **1.12 Auditor/Accountant**

A neutral can assist the court by providing an accounting of complex financial information or the assessment and payment of recurring litigation expenses. For example, a court might ask a neutral to sort out a plaintiff's claim of damages or a defendant's ability to pay according to a settlement or judgment.

### **1.13 Receiver**

A neutral can be asked by the court to function as a receiver. In this role, the neutral would hold, manage, or preserve property until a dispute is resolved. Receivers can be given quite extensive responsibilities. In some cases, they have been appointed to run governmental or business entities.

### **1.14 Criminal Case Neutral**

In criminal cases, neutrals can assist the court in administering the resolution of cases. They can assist the prosecution and the defense in negotiating plea bargains while preserving and protecting the interest of the public and the constitutional rights of the defendant. Neutrals may also help in administering or monitoring non-jail sentencing terms and conditions. A neutral may accompany a peace officer who is conducting a search for documents and, afterwards, review and secure the materials until a court determines if the items are discoverable or privileged.

### **1.15 Conference Neutral**

A settlement neutral in a criminal case is sometimes referred to as a conference neutral. These neutrals help to settle disputes, often employing a community approach that involves the prosecutor, defendant, victim, and their families. Witnesses such as police officers sometimes participate. Conference neutrals are often able to obtain results that are more creative and more beneficial to the victims and their families than typical plea bargains.

### **1.16 Ethics Neutral**

A state court may appoint a neutral to review evidence in connection with ethics complaints against attorneys. These neutrals can recommend whether disciplinary action against an attorney is appropriate, and if so, what sort. This process may supplement the work done by an ethics board.

### **1.17 Supreme Court Neutral**

The United States Supreme Court and state Supreme Courts have original jurisdiction over certain types of cases—for example, boundary disputes between states or election controversies. Because these cases are typically beyond normal appellate functions, courts will often appoint a judicial neutral to develop and review an evidentiary record, manage discovery and motion practice, and recommend a final disposition.

### **1.18 Appellate Neutral**

Neutrals may be appointed to assist appellate parties, lawyers, and courts regarding appropriate matters that need resolution, including motions, procedural issues, final settlement, and attorneys fees.

### **1.19 Specialized Neutrals**

An expert neutral may also be appointed in situations other than litigation. The skills neutrals employ in judicial cases also apply to non-litigation matters. Neutrals have been appointed by governors, mayors, governmental officials, non-profit organizations, and private entities to solve problems. Congress and legislatures have also referred significant social problems to experienced neutrals. These experts can: work with groups and individuals to resolve disputes; distribute funds contributed in response to tragedies, and use neutral expertise in other types of controversies. Often, neutrals provide pro bono services in these situations.

## Discussion Questions

1. What other roles have you served as a court-appointed neutral?
2. What other roles have you served when selected by parties and their lawyers in a case?
3. Do you perceive any of the listed roles as being inappropriate to be served by a judicial neutral?
4. What influences a judge to appoint a neutral in a case?
5. What factors inhibit a judge to appoint a neutral?
6. Why would parties and their lawyers prefer to have a neutral serve in a case?
7. What factors inhibit parties and their lawyers from having a neutral serve in a case?
8. What applicable state rules, statutes, or other provisions support the use of a neutral in a state case in your jurisdiction?
9. What applicable state rules, statutes, or other provisions inhibit the use of a neutral in a state case in your jurisdiction?
10. How may court-appointed or party/lawyer-selected neutrals best advance social justice?



# **Academy of Court-Appointed Neutrals**

## **Appointment Orders**

### **2.1 Order of Appointment**

The appointment order is the fundamental document that establishes the powers, limits, and responsibilities of a court-appointed neutral. This order is often referred to as an “order of reference.” This Section provides a checklist of the items that should be included in an appointment order, explains each item in detail, and contains a form order. These materials apply to both federal court and state court neutral appointments, and may be modified as necessary to conform to applicable 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 permits a court to

appoint a neutral even if the parties object as long as the appointment does not conflict with the provisions of Rule 53(a). Court decisions that review the propriety of appointment orders 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.

## 2.2 Checklist of Provisions

Rule 53 of the Federal Rules of Civil Procedure prescribes a number of specific items an appointment order must include and suggests others that should be included. These comments deserve attention because they elaborate on many of the issues addressed in the rule.

The following checklist summarizes the information provided in this Section. Some of the provisions will be applicable to state court neutral appointment orders.

**Table 1. Checklist of Items to Include in Appointment Orders**

✓	Step	Provision for Appointment Order	Section of Rule 53	Mandatory to Include in Appointment Order According to Federal Rules?
<input type="checkbox"/>	1	Direct neutral to “proceed with all reasonable diligence”	Rule 53(b)(2)	Yes
<input type="checkbox"/>	2	Identify the neutral’s duties	Rule 53(b)(2)(A)	Yes
<input type="checkbox"/>	3	Identify when <i>ex parte</i> communication may occur	Rule 53(b)(2)(B)	Yes
<input type="checkbox"/>	4	Identify what records the neutral must maintain	Rule 53(b)(2)(C)	Yes
<input type="checkbox"/>	5	Describe how the neutral’s rulings will be received and reviewed	Rule 53(b)(2)(D)	Yes
<input type="checkbox"/>	6	Describe clearly how the neutral will be compensated	Rule 53(b)(2)(E)	Yes

✓	Step	Provision for Appointment Order	Section of Rule 53	Mandatory to Include in Appointment Order According to Federal Rules?
<input type="checkbox"/>	7	Statement that appointment of a neutral is appropriate	Rule 53(a)(1)	No, but good practice
<input type="checkbox"/>	8	Identify source of authority for appointment (Rule 53, or other source)		No, but good practice
<input type="checkbox"/>	9	Modify neutral's authority to impose sanctions for failure to cooperate	See Rule 53(c)	No, but default standard set out in Rule 53(c) will apply unless modified.
<input type="checkbox"/>	10	List hearing procedures and location, including a possible initial meeting with the neutral	Optional	Optional
<input type="checkbox"/>	11	Describe how documents submitted by parties/ lawyers may be provided to neutral	Optional	Optional
<input type="checkbox"/>	12	Describe scope of discretion and authority of neutral not previously covered in Step 2	Optional	Optional
<input type="checkbox"/>	13	Certification, Oath, or Bond may need to be included under state law	Optional	Optional
<input type="checkbox"/>	14	Include any stipulations agreed to by parties and approved by court relating to the neutral	Optional	May be included in separate Order
<input type="checkbox"/>	15	Reference duties, powers, and responsibilities necessary to the neutral's work	Optional	May be wise to include in the order to specify the work and to notify all about the scope of the powers.
<input type="checkbox"/>	16	Include disclosure affidavit	Rule 53(b)(3)	No, but the rule requires that an affidavit be filed. It is good practice to either attach the affidavit to the appointment order or reference its filing in the appointment order.

## 2.3 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.

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.

### ❑ 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 may 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, neutral, and 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.

A duties and responsibilities of a neutral may 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 the evidence.
- Helping to coordinate federal, state, and international litigation.

- Chairing committees of lawyers regarding issues of common interest.
- Working with attorneys 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 related issues.
- Assisting with matters raised by electronically stored information, native formats, meta data, and related issues.
- 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, or making recommended findings of fact and conclusions of law and proposed orders.
- Resolving non-dispositive motions, including motions related to discovery and procedures.
- Interpreting and implementing 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 fee issues and fee settlement negotiations, reviewing fee applications, and evaluating individual claims for fees (*see also* Fed. R. Civ. P. 54(d)(2)(D)).

- Administering, allocating, and distributing funds and other relief.
- Adjudicating eligibility and entitlement to funds and other remedies.
- 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. Additional Duties**

- 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). The propriety of a neutral’s *ex parte* communication with the judge 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 may be necessary and appropriate. *Ex parte* communication with the judge 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 the mediator 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.).

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 an analysis of the parties' submissions;
- To assist the judge with procedural matters, such as apprising the court regarding logistics, the neutral's activities, and management of the litigation; and
- To assist the judge's understanding of highly specialized matters.
- To inform the judge 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 opposing counsel involved;
- To work with subcommittees consisting of a subset of the attorneys in a case;
- To obtain information from lawyers regarding scheduling and hearing agendas; and
- To discuss other matters with the permission of the lead or liaison 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). 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).

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 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). 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.

**❑ 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>)
- List 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.
- Determine 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.

- Identify 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 include that statement and specify why it is appropriate. Fed. R. Civ. P. 53(a)(1) provides that, unless a statute specifies otherwise, a court may appoint a neutral to:

- Perform duties consented to by the parties
- 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
  - Some exceptional condition, or
  - The need to perform an accounting or resolve a difficult computation of damages; or
- Address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge.

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, the 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 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 matters 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 some issues require specialized or technical knowledge, or a detailed understanding of foreign law.
- The court needs the help of expert advisors or consultants to fully understand and oversee the dispute.
- Timely or expedited decisions on numerous individual claims cannot be made without additional resources.
- The case entails complicated or detailed computations or accountings.
- The case requires 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.

**❑ 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; or

- Consent of the parties.

Although current 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). A neutral may also be able to impose appropriate sanctions on attorneys when required. It is good practice to state the 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. This meeting often led to a productive start to working with the neutral, and the court may consider requiring or suggesting such a meeting in the appointment order.

**❑ 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 may include statements regarding the work of a neutral that describe necessary powers, duties, or responsibilities**

These inclusions may be helpful or essential to assist the neutral in performing the needed work and to explain to the parties and the lawyers what the court expects the neutral to do.

**❑ 16. 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).

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 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.

## 2.4 Neutral Appointment Form Order

The following form provides an example of a model appointment order. It includes language to fit most cases. It will need to be tailored to meet the specific needs of a 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 arising out 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) 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 \_\_\_\_\_

**2.5 Affidavit of Neutral**

**AFFIDAVIT OF [NAME]**

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

**Alternative Form A**

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

AFFIDAVIT

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

I have thoroughly familiarized myself with the issues involved in the Multi-District Litigation 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

**Alternative Form B**

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

AFFIDAVIT

[Name] declares and states under the penalty of perjury the following:

I have thoroughly familiarized myself with all parties and matters involved in the above captioned case. 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 the captioned matter.

Date \_\_\_\_\_ Signature \_\_\_\_\_

## Appointment Order Discussion Questions

1. What other provisions have been included in your appointment orders in other cases?
2. How should or must a potentially appointed or selected neutral respond to the inclusion of a provision that the neutral believes is inappropriate or inapplicable?
3. How should or must a potentially appointed or selected neutral respond to the exclusion of a provision that the neutral believes is inappropriate or inapplicable?
4. If the neutral believes *ex parte* communications with a judge will be necessary, should the neutral urge the inclusion of such a provision?
5. If the neutral believes *ex parte* communications with a party/lawyer will be necessary, should the neutral urge the inclusion of such a provision?
6. Without the inclusion of a specific clause regarding *ex parte* communications with the judge or a party/lawyer, is it appropriate for the neutral to have such communication if afterwards all the participants are notified of the communication?
7. Are there other aspects of neutral fee arrangements that should be included in the order?
8. How involved should be the neutral in setting the fee to be paid the neutral?
9. Are there some provisions that the court or the parties/lawyers may prefer to include that a neutral should insist not be included?
10. Would it be wise for some provisions to be drafted ambiguously because of potentially unanticipated issues that may arise?
11. Should there be a clause included that empowers the neutral to interpret the meaning and application of the appointment order?
12. If so, should a clause be included that allows a party to seek review of that decision by the judge?

# ACADEMY OF COURT-APPOINTED NEUTRALS

## Ethical Issues

### Discussion Questions Included in the Text

This Section specifies the sources of ethical rules for court-appointed neutrals, posits a set of basic ethics rules that apply to neutrals, and provides a checklist of difficult situations the neutral may face in the course of the appointment.

What are the rules that should govern the neutral's behavior? The first rule, of course, is that the neutral should follow the mandate of the order appointing the neutral and, if necessary, seek appropriate guidance to understand how the judge would like particular situations handled. Beyond that, what codes govern a neutral's conduct? What impact do ethical rules and norms have a neutral's work?

Regardless of restrictions on *ex parte* conversations between the judge and the neutral, the parties may believe that the neutral is informed by the judge's thinking. Parties read volumes into what the neutral says, does, and even hints at. In high-profile litigation, even the neutral's political, social, and religious activity might come under scrutiny. The press, legislative entities, and regulatory entities that cannot contact the judge about the case may try to contact the neutral to ask questions about the case.

#### 3.1 Sources of Ethical Rules for Court-Appointed Neutrals

Several different types of rules and codes of professional responsibility apply or can be construed to apply to a court-appointed neutral's conduct, including:

- a. **Applicable State Rules of Professional Conduct.** If the court-appointed neutral is a lawyer, the neutral is governed directly by these rules. The state equivalent of Rule 1.12 of the Model Rules of Professional Conduct may be particularly relevant to a lawyer serving as a court-appointed neutral. (Rule 1.12 of the Model Rules of Professional Conduct can be found at Appendix 6 or at: [http://www.abanet.org/cpr/mrpc/mrpc\\_toc.html](http://www.abanet.org/cpr/mrpc/mrpc_toc.html).)
- b. **Code of Conduct for United States Judges ("CCUSJ"), 28 U.S.C.S. app. (2005).** The Compliance section of this Code makes it binding on federal masters, except for the limitations on: certain financial dealings; certain fiduciary activities; the practice of law; participation in political, civic, charitable, and legal organizations; and limitations on the receipt of gifts. (CCUSJ can be found at Appendix 7 or at: <http://www.uscourts.gov/library/conduct.html>.)

- c. **Code of Conduct for Judicial Employees (“CCJE”).** Court-appointed neutrals ordinarily are not judicial “employees.” However, the CCJE states that:

Contractors and other nonemployees who serve the Judiciary are not covered by this code, but appointing authorities may impose these or similar ethical standards on such nonemployees, as appropriate.

A judge may choose to impose portions of this code on a court-appointed neutral. *See* CCJE, Introduction If 2. (CCJE can be found at Appendix 8 or at:

<https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>)

- d. **28 U.S.C. § 455.** This statute governs the disqualification of federal judges. In addition, Federal Rule of Civil Procedure 53(b)(3) states that a court may appoint a neutral “only after the neutral has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455.” (Section 455 can be found at Appendix 5 or at: <http://codes.lp.findlaw.com/uscode/28/I/21/455>.)
- e. **Federal Rules of Civil Procedure.** Rule 53 directly governs neutrals. (Rule 53, along with the Advisory Committee Notes, can be found at Appendix 4 and at: <http://www.uscourts.gov/rules/>.)
- f. **Codes of Conduct for ADR organizations such as FORUM, JAMS, and AAA.** Several alternative dispute resolution (ADR) organizations have their own ethical guidelines for their neutrals. *See, e.g.:*

ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes, particularly Canons I-VII, available at Appendix 9 and at:

[https://www.americanbar.org/content/dam/aba/events/dispute\\_resolution/committees/arbitration/code\\_annotated\\_updated\\_feb\\_2013.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/events/dispute_resolution/committees/arbitration/code_annotated_updated_feb_2013.authcheckdam.pdf)

Forum’s Code of Conduct for Arbitrators, available at Appendix 10 and at:

<https://www.adrforum.com>

Forum’s Code of Procedure, particularly Part IV “Arbitrators,” Rules 20-24, available at: <https://www.adrforum.com/assets/resources>

JAMS Arbitrators Ethics Guidelines, particularly Guidelines I-IX, available at Appendix 11 and at: <http://www.jamsadr.com/arbitrators-ethics/>

JAMS Comprehensive Arbitration Rules and Procedures, particularly Rule 30, available at: <http://www.jamsadr.com/rules-comprehensive-arbitration/#Rule%2030>

- g. **Applicable state court statutes and regulations.** There may be additional statutes or regulations in a given state that could serve as a source for ethical guidelines.

Which ethical code(s) govern a court-appointed neutral’s conduct depends on the nature of the appointment and on the rules that the judge has chosen to impose. To some extent, this is uncharted territory, and overlapping rules from several different codes may apply to some situations. For example, Rule 53 of the Federal Rules of Civil Procedure governs certain special masters, but may not govern monitors or other adjuncts not appointed explicitly under Rule 53. Moreover, depending on the situation, a judge may choose to impose certain provisions of the Federal Code of Conduct for Judicial Employees on a neutral in one case but not in another case.

Table 2 summarizes the potentially applicable codes.

**Table 2: Codes that Govern the Conduct of Court-Appointed Neutrals**

<b>Code</b>	<b>Acronym</b>	<b>Applicability</b>	<b>Notes</b>
State Rules of Professional Conduct		All attorneys	Generally, an attorney is subject to the rules of all bars in which the attorney is admitted and a court can reasonably expect its own rules to apply to a neutral it appoints
Code of Conduct for United States Judges	CCUSJ	See Compliance Section—except for a few specified exceptions, this code applies to neutrals appointed in federal court	
Code of Conduct for Judicial Employees	CCJE	Federal judges may impose these or similar standards on non-employee neutrals	
28 U.S.C. § 455	Disqualification Statute	Fed. R. Civ. P. 53(b)(3) makes this binding on neutrals appointed in federal court	

<b>Code</b>	<b>Acronym</b>	<b>Applicability</b>	<b>Notes</b>
Rule 53 of the Federal Rules of Civil Procedure	Rule 53	Binding on neutrals appointed in federal court	
Rules of specific organizations like the American Bar Association, American Arbitration Association, JAMS, and Forum	ABA, AAA, JAMS, FORUM	Applies to neutrals governed by the particular organization's rules or who work under those organizations	
State rules			There may be specific state rules that govern the conduct of court-appointed neutrals in that state

### **3.2 Ethical Rules for Court-Appointed Neutrals**

The basic ethical rules listed below draw on all of the sources of authority explained above. This list is intended to serve as a common-sense guide for the appointing judge and the court-appointed neutral to review together when the adjunct's appointment begins and refer to later as necessary.

The basic rules for court-appointed neutrals are summarized in the following table.

**Table 3: Basic Rules for Court-Appointed Neutrals**

	<b>Rule</b>	<b>Sources of Authority</b>
Rule 1	Preserve Dignity and Integrity of the Court	CCUSJ, Canon 1; CCJE, Canon 1
Rule 2	Competence and Diligence	Fed. R. Civ. P. 53(b)(2); CCUSJ, Canon 3.A (1)-(5); CCJE, Canons 3.B and C; JAMS Guidelines, II; ABA/AAA Code, Canons I.B and IV.
Rule 3	Propriety	CCUSJ, Canon 2; CCJE, Canons 2, 3 and 4; ABA/AAA Code, Canon I.A.

Rule 4	Neutrality/Absence of Conflict or Appearance of Conflict	Fed. R. Civ. P. 53(a)(2) and (b)(3); CCUSJ, Canon 3.C; CCJE, Canon 3.F; ABA/AAA Code, Canons I and II; JAMS Guidelines, V.
Rule 5	Disqualification	28 U.S.C. § 455; CCUSJ, Canon 3.C; ABA/AAA Code, Canons I.H and I; JAMS Guidelines, VII.

**Rule 1: Dignity and Integrity of the Court**

Court-appointed neutrals should observe high standards of conduct to preserve the integrity, dignity, and independence of the appointing court and judicial system.

Sources: CCUSJ, Canon 1; CCJE, Canon 1.

**Rule 2: Competence and Diligence**

- 2A. A court-appointed neutral should accept only assignments: (1) for which the adjunct is suited by education, training, and experience; (2) that the adjunct is able to undertake and complete in a competent, professional, and timely fashion; and (3) as to which the adjunct is physically and mentally able to meet the reasonable expectations of the parties and the appointing court.
- 2B. A court-appointed neutral must maintain professional competence and diligently discharge assigned responsibilities in a prompt, fair, nondiscriminatory, and professional manner.
- 2C. A court-appointed neutral must be patient, dignified, respectful, and courteous; apply an even-handed and unbiased process; and treat all parties with respect.
- 2D. A court-appointed neutral must maintain order and decorum in conducting proceedings.

Sources: Fed. R. Civ. P. 53(b)(2); CCUSJ, Canon 3.A(1)-(5); CCJE, Canons 3.B and C; ABA/AAA Code, Canons I.B and IV.

**Rule 3: Propriety**

- 3A. A court-appointed neutral should respect and comply with the law and should at all times act in a manner that promotes public confidence in the integrity and impartiality of the adjunct and the judiciary.
- 3B. A court-appointed neutral should not engage in any activities that would call into question the propriety of the neutral’s conduct in carrying out the responsibilities assigned by the appointing court.
- 3C. A court-appointed neutral should not allow family, social, or other relationships to influence official conduct or judgment. Nor should a neutral use the prestige of the office for private gain or to advance or appear to advance the private interests of others.



3D. A court-appointed neutral should not hold membership in any organization that practices discrimination on the basis of race, religion, sex, sexual orientation, or national origin.

Comment: Whether an organization practices discrimination is often a complex question to which court-appointed neutrals should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather depends on factors such as how the organization selects members; whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members; and whether it is in fact an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. [CCUSJ, comment to Canon 2C]

Sources: CCUSJ, Canon 2; CCJE, Canons 2, 3 and 4; ABA/AAA Code, Canon LA.

#### **Rule 4: Neutrality/Absence of Conflict or Appearance of Conflict**

4A. A court-appointed neutral should avoid conflicts of interest in the performance of official duties. A conflict of interest arises when a neutral knows that the neutral or a member of the neutral's family or a relative of the neutral might be so personally or financially affected by a matter that a reasonable person with knowledge of the relevant facts would question the neutral's ability to properly perform the assigned responsibilities.

4A. Before an appointment, a court-appointed neutral should disclose to the appointing court and the parties all matters required by applicable law, any actual or potential conflict of interest or relationship, or other information of which the neutral is aware that reasonably could lead a person to question the neutral's impartiality. This duty of disclosure continues throughout the assignment and must be supplemented when warranted.

Sources: Fed. R. Civ. P. 53(a)(2) and (b)(3); CCUSJ, Canon 3.C; CCJE, Canon IF; ABA/AAA Code, Canons I and II

#### **Rule 5: Disqualification**

5A. Federal: A neutral may not have a relationship with the parties, counsel, action, or appointing court that would require disqualification of a judge under 28 U.S.C. § 455, unless waived by the parties and with the court's approval after full disclosure of any potential grounds for disqualification.

5B. State: A court-appointed neutral shall comply with the applicable state statutes and court rules governing disclosures, conflicts of interest, and disqualification.

5C. Financial interest: A court-appointed neutral may not own a legal or equitable interest, however small, in a party, nor have a relationship with a party such as serving as its director or advisor.

Note: Some exceptions to this rule include: *de minimis* ownership of mutual funds that hold a party's securities, unless the court-appointed neutral participates in management; holding office in an educational, religious, or similar organization that owns securities; and similar exceptions for government securities, mutual insurance companies, depositors in mutual savings associations, or similar associations, unless the outcome of a proceeding could substantially affect the value of the securities.

Sources: 28 U.S.C. Section 455; CCUSJ, Canon 3.C; ABAIAAA Code, Canons I.H and I

#### **Rule 6: Confidentiality**

- 6A. A court-appointed neutral should avoid making public comment on the merits of a pending action, except as appropriate in the course of official duties.
- 6B. A court-appointed neutral should never disclose confidential information received in the course of official duties, except as required in the performance of those duties.
- 6C. These restrictions on disclosure continue to apply after the conclusion of the court-appointed neutral's service, unless modified by the appointing judge.

Sources: CCUSJ, Canon 3.A(6); CCJE, Canon 3.D; ABAIAAA Code, Canon VI.B

#### **Rule 7: Compensation/Time-keeping/Gifts and Favors**

- 7A. A court-appointed neutral's compensation for official duties shall be determined by the appointing court.
- 7B. Reimbursement for expenses incurred in the course of service as a court-appointed neutral or for outside activities shall be clearly disclosed and shall be limited to the actual costs and overhead the judicial neutral reasonably incurs.
- 7C. A court-appointed neutral should not solicit or accept anything of greater than *de minimis* value from anyone doing business with the neutral or with the appointing court, or from anyone whose interest may be substantially affected by the performance of the neutral's official duties. Upon completion of an assignment, a court-appointed neutral may not accept gifts of any kind from a party encountered during the assignment until a period of time has elapsed sufficient to negate any appearance of a conflict of interest. The passage of one-year is presumptively sufficient to negate any appearance of a conflict of interest.

Note: A federal neutral is explicitly exempt from the limitations on receipt of gifts that apply to judges. The Compliance section of the CCUSJ makes Canon 5.C.4 relating to gifts inapplicable to neutrals. Nonetheless, good practice in dealing with proffered gifts, meals, trips, and favors is to decline them.

Sources: Rule 53(h); CCUSJ, Compliance Section (B); CCJE, 4.E; ABAIAAA Code, Canon VII

### 3.3 Checklist: Ethical Rules to Consider for Specific Neutral Roles

The general ethics rules discussed above have very different practical applications in different types of neutral appointments. In some cases, a judge may have strong concerns about the neutral’s outside political activity or interactions with the press, while in other cases these concerns may be minimal or non-existent.

The judge and court-appointed neutral should meet at the beginning of the appointment to consider the items on the following checklist. Each item on this list may require a particularized interpretation of the general ethical rules, depending on the circumstances of the case. This list is based on practical problems that have arisen in actual neutrals’ work.

**Table 4. Checklist of Ethical Considerations and Practical Concerns**

✓	Step	Issue
<input type="checkbox"/>	1	Conflicts of Interest
<input type="checkbox"/>	2	Relationship With the Judge
<input type="checkbox"/>	3	Relationship With the Parties
<input type="checkbox"/>	4	Relationships Among Neutrals
<input type="checkbox"/>	5	Gifts and Favors
<input type="checkbox"/>	6	Interactions With Media
<input type="checkbox"/>	7	Interactions With Legislative and Investigative Bodies
<input type="checkbox"/>	8	Political Activity
<input type="checkbox"/>	9	Timekeeping and Compensation
<input type="checkbox"/>	10	Outside Work

The following section lists questions that the judge and the neutral should discuss about each of the items listed above. The judge and neutral should consider these issues as they apply not only to the neutral, but also the neutral’s staff.

#### 1. Conflicts of Interest

Are there any potential conflict issues that the neutral should disclose?

- Has the neutral ever been involved in litigation with either party, or with any subsidiary of either party?
- Does the neutral have any ownership interest in either party?
- Does the neutral sit on any boards or advisory committees that might have any jurisdiction over or connection to either party or the matter at issue?
- Is there any reason that the neutral could not be fair and impartial to all parties?

## □ 2. Relationship With the Judge

- a. What are the circumstances under which the judge and the neutral should or should not be allowed to communicate *ex parte*?
  - Regarding scheduling?
  - Regarding the overall progress of any negotiations?
  - Regarding the progress of the neutral’s work?
  - Regarding the parties’ positions in any disputes?
  - Regarding legal matters pending before the judge?
  - Regarding other matters?
- b. What rules will govern the neutral’s relationship with the judge’s law clerk? In a complex case that lasts many years, will the neutral help orient each successive law clerk to the history and posture of the case?
- c. How will these rules about the neutral’s *ex parte* communication with the judge be conveyed to the parties?
- d. Are there any concerns about social relationships between the neutral and the judge?

## □ 3. Relationship With the Parties

- a. What are the circumstances under which the parties and the neutral should or should not be allowed to communicate *ex parte*?
  - Are there negotiating roles in which *ex parte* communications are appropriate?
  - Are there adjudicative roles in which *ex parte* communications should be prohibited?
  - Given the neutral’s multiple roles, how can the neutral properly isolate confidential information received through *ex parte* communications? For example, can the neutral have *ex parte* conversations while wearing one hat, and then effectively function as a neutral fact-finder while wearing a different hat?

- b. Are there any concerns about social relationships between the neutral and a party?

**❑ 4. Relationships Among Neutrals**

- a. To what extent may multiple neutrals assigned to the same case discuss confidential aspects of the case with each other?
- b. Do additional ethical considerations arise where one neutral serves as an “appellate” entity reviewing the work of another neutral?

**❑ 5. Gifts and Favors**

- a. What rule will the judge impose about gifts and favors?
  - Are *de minimis* gifts allowed from the parties to the neutral?
  - If yes, what is the definition of “*de minimis*?”
  - Should the rule be stricter if the government is a party?
- b. Are *de minimis* gifts allowed between neutrals?
- c. Are there any types of potential “favors” that the neutral would need to discuss with the judge before accepting?
- d. If the neutral’s fees are used to pay vendors (such as a class action administration firm), are there restrictions on gifts and favors that the neutral may accept from the vendors?

**❑ 6. Interactions With the Media**

- a. Reactive Media
  - How should the neutral respond to calls from the media about the case?
  - May the neutral comment about the case to the extent that information is in the public domain, or solely to explain procedural issues?
  - Are there any differences between a neutral’s ability and a judge’s ability to speak with the media about a case?
- b. Proactive Media
  - If media reports about the case are inaccurate, may the neutral, for example, write an op-ed piece to try to correct the reporting?
  - May the neutral work through the media to create a better public perception of the case?
  - Would the answer be different if the parties agree to the neutral taking on this work?

## ❑ 7. Interactions With Legislative and Investigative Bodies

- a. May the neutral respond to inquiries about the case from legislators?
  - May the neutral say more to legislators than the appointing judge would say?
- b. May the neutral appear and testify before a legislative committee if asked to do so?
  - If so, are there questions that the neutral may refuse to answer?
  - For each category of refusal, what privilege or other reason will be applicable?
- c. If the Government Accountability Office (GAO), for example, investigates the case, should the neutral cooperate in the investigation?
  - What types of materials should the neutral provide?
  - What materials, if any, are privileged or confidential? And what is the source of the privilege or claim of confidentiality?

## ❑ 8. Restrictions on Political Activity and Other Outside Activities

Unlike a federal judge or judicial employee, a federal court-appointed neutral is not automatically required to refrain from partisan or non-partisan political activity. CCUSJ, Compliance section, B (1). But when a neutral's role will be highly public, the neutral and appointing judge should consider whether it is necessary to limit the neutral's group memberships, political activity, and fiscal relationships to ensure actual and apparent neutrality. As mentioned above, a federal judge may choose to impose such restrictions.

- a. Should the neutral's partisan or non-partisan political activity be restricted?
- b. If yes, should the activity of the neutral's staff be similarly restricted?

## ❑ 9. Timekeeping and Compensation

- a. How should the neutral record his or her time?
  - Should the descriptions include confidential information?
  - Should itemized bills be submitted only to the court and under seal?
  - What time block should be used? (1/10 hour segments?)
- b. To what extent may the neutral charge for staff salaries and expenses? How and when should disclosure be made of such charges?
- c. May the neutral charge an "overhead" rate in addition to actual expenses? How and when should disclosure be made of such charges?

- d. What will the process be for constructing and obtaining court approval of budgets and invoices?

**❑ 10. Other Work**

- a. May the neutral accept other work, or is this appointment considered to be “full-time” work?
- b. May the neutral work on another case with or against an overlapping party? After disclosure and consent?