USING COURT-APPOINTED NEUTRALS

A Benchbook for Judges and Lawyers

2023 Edition

ACADEMY OF COURT-APPOINTED NEUTRALS

Benchbook for Judges and Lawyers

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The initial National Conference for Special Masters and Judicial Adjuncts was held in October 2004 at the Mitchell Hamline School of Law, with assistance from the Federal Judicial Center and the Forum ADR. That conference led to the creation of ACAM, renamed ACAN, and subsequently to the development of this book.

This book was originally written by several members of the publications committee of the Academy of Court-Appointed Masters. The authors and editors included: Roger Haydock, David Cohen, Martin Quinn, and Randi Ilyse Roth. Cynthia Gilbertson and Ann Pagel provided editing assistance. Other members of the initial ACAM publications committee included: David Ferleger, Mike Frascogna, Rick Grauer, Greg Miller, Gale "Pete" Peterson, and Clarence Sundram.

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Our Executive Director, Merril Hirsh, provides direction and continuing growth for the Academy, including the availability and distribution of this Benchbook.

www.courtappointedneutrals.org

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.

Using Court Appointed Neutrals

Introduction

This Benchbook provides invaluable information to judges and lawyers regarding the best use of neutrals. Our civil justice system needs the services that court-appointed neutrals can provide courts, parties, and the public. This Benchbook explains how neutrals can be used to fulfill our mission to provide a just, speedy, and inexpensive determination for all disputes.

This reference book is designed to help federal and state court judges and lawyers: (1) decide whether and when to appoint a neutral, (2) draft effective appointment orders, and (3) anticipate and effectively address ethical issues and practical concerns that arise in neutral work. These materials may also be helpful to prospective court-appointed neutrals and to parties considering whether to request the appointment of a neutral.

Sections of this book comprise an invaluable resource regarding neutral practice. These sections include a summary of Federal Rule 53 and the rules or statutes authorizing neutrals, masters, and court-appointed neutrals in every state. Another section includes a description of legal articles and commentaries regarding these roles. These unique resources are periodically updated.

Almost all courts currently have the power to appoint a court-appointed neutral to assist with civil and criminal cases. Rule 53 of the Federal Rules of Civil Procedure governs the appointment of masters in federal court. In state courts, various procedural rules or state statutes empower judges to obtain assistance. State court judicial officers may be designated as neutrals, masters, referees, commissioners, magistrates, or related names.

Many federal and state court judges use neutrals, and more will do so in the future. Because of their substantial caseloads, many trial and magistrate judges do not have sufficient time for the tasks inherent in the administration of complex, multi-party, and class action cases. Judges need to conserve and preserve their time to rule on pretrial matters and to try cases. And, with demanding dockets and limited court budgets, judges are looking for help for all types of cases.

Court-appointed neutrals can provide courts, parties, and lawyers with essential services without tapping into court resources. Neutrals can act as mediators and settle basic and complicated civil and criminal cases away from the courthouse; they can monitor discovery and resolve time-consuming disputes; they can help with the growing burden on courts caused by electronic (ESI) discovery problems; they can be assigned trial duties; they can testify as expert witnesses, especially in cases involving technical and specialized issues; they can help coordinate multi-party, multi-jurisdictional, and multi-district litigation (MDL) cases; they can administer settlement claims; and they can monitor compliance with a court order or settlement agreement; they can serve in criminal cases.

An appointed neutral can markedly reduce the burden on a judge, the judge's staff, and the court's administrative staff. Parties and lawyers recognize that the appointment of a neutral can save them substantial fees and costs, and can lead to a much quicker resolution of their disputes. Judges who use professional and experienced neutrals know how valuable they can be to achieve effective and efficient case management and resolution.

Section 1 of this book summarizes the various roles court-appointed neutrals can serve.

Section 2 covers appointment orders. It explains the rules that govern appointment orders and contains detailed checklists of items to include in an appointment order.

Section 3 covers ethical issues and practical concerns. It explains the sources of authority for ethics rules that govern court-appointed neutrals, gives an overview of the rules, and provides a checklist for judges to review with the neutrals they are considering.

The checklists provided in **Sections 2 and 3** focus on key issues in the appointment process. Although the checklists are tailored to federal rules, they are also applicable in state courts because of the substantial similarity between state and federal rules, and because the same practical issues arise in all jurisdictions.

Section 4 includes an article about the *ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Litigation*. The Guidelines and the Report appear in Appendix B.

Section 5 details provisions of Federal Rule 53 and the respective rules and statutes empowering court-appointed neutrals for every state. These provisions permit comparative reviews among various procedural and substantive neutral regulations. **Section 6** contains citations and concise descriptions of articles, books, websites, and literature about the use of neutrals. Finally, several **Appendices** provide sample appointment orders, Federal Rule 53 with Comments, and codes of professional conduct.

The goal of the Academy of Court-Appointed Neutrals is to assist the courts in providing all parties with the fair, affordable, and speedy resolution of litigation.

ACAN members are available to serve as court-appointed neutrals and you can locate our neutrals here. We hope that you find these materials to be a practical, informative source and reference. And we look forward to working with you to promote civil, criminal, and social justice. Our website provides information about the Academy and links to contact information and credentials of our members:

www.courtappointedneutrals.org
Executive Director: Merril Hirsh at execdir@courtappointedneutrals.org

Using Court-Appointed Neutrals
Section 1
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 and state law equivalents.

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 court-appointed 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 adjunct 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 Neutrals

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. Court-appointed 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.

Academy of Court-Appointed Neutrals

Section 2
Appointment Orders

2.1 Order of Appointment

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

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

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

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

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

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

2.2 Checklist of Provisions

Rule 53 of the Federal Rules of Civil Procedure currently prescribes a number of specific items an appointment order must include and suggests others that should be included. A copy of Rule 53 appears at Appendix 3, along with the relevant Advisory Committee Notes published with the Amendments. The Notes deserve attention because they elaborate on many of the issues addressed in the rule.

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

Table 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?
☐	1	Direct neutral to "proceed with all reasonable diligence"	Rule 53(b)(2)	Yes
☐	2	Identify the neutral's duties	Rule 53(b)(2)(A)	Yes
☐	3	Identify when *ex parte* communication may occur	Rule 53(b)(2)(B)	Yes
☐	4	Identify what records the neutral must maintain	Rule 53(b)(2)(C)	Yes
☐	5	Describe how the neutral's rulings will be received and reviewed	Rule 53(b)(2)(D)	Yes
☐	6	Describe clearly how the neutral will be compensated	Rule 53(b)(2)(E)	Yes
☐	7	Statement that appointment of a neutral is appropriate	Rule 53(a)(l)	No, but good practice

✓	Step	Provision for Appointment Order	Section of Rule 53	Mandatory to Include in Appointment Order According to Federal Rules?
☐	8	Identify source of authority for appointment (Rule 53, or other source)		No, but good practice
☐	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.
☐	10	List hearing procedures and location, including a possible initial meeting with the neutral	Optional	Optional
☐	11	Describe how documents submitted by parties/ lawyers may be provided to neutral	Optional	Optional
☐	12	Describe scope of discretion and authority of neutral not previously covered in Step 2	Optional	Optional
☐	13	Certification, Oath, or Bond may need to be included under state law	Optional	Optional
☐	14	Include any stipulations agreed to by parties and approved by court relating to the neutral	Optional	May be included in separate Order
☐	15	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 it's 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 also appoint a neutral to "perform duties consented to by the parties." Fed. R. Civ. P. 53(a)(1)(A).

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

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

a. Case-management duties

- Assisting with preparation for attorney conferences (including formulating agendas), court scheduling, and negotiating changes to case management orders.
- Establishing discovery and other schedules; reviewing and attempting to resolve informally any discovery conflicts (including issues such as privilege, confidentiality, and access to documents and records); and supervising discovery.
- Overseeing the management of docketing, including the identification and processing of matters requiring court rulings.
- Compiling data and assisting with the interpretation of scientific and technical evidence or making findings and recommendations with regard to such evidence.

- Helping to coordinate federal, state, and international litigation.
- Chairing committees of lawyers regarding issues of common interest.
- Working with lawyers to draft and submit proposed orders to the judge.

b. Discovery-Related Responsibilities

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

c. Settlement-related duties

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

d. Decision-making duties

- Assisting with legal analysis of motions or other submissions, whether made before, during, or after trials, and making recommended findings of fact and conclusions of law and proposed orders.
- Resolving non-dispositive motions, including motions related to discovery and disclosures.
- Interpreting any agreements reached by the parties.
- Issuing reports and recommendations.
- Holding trial proceedings and making or recommending findings of fact on issues to be decided by the court without a jury, if warranted by the conditions set out in Rule 53(a)(1)(B) & (C).
- Pursuing investigative or quasi-prosecutorial roles.
- Recommending that sanctions be imposed on a party or lawyer for wrongdoing.

e. Post-trial duties

- Proposing structures and strategies for attorney's fee issues and fee settlement negotiations, reviewing fee applications, and evaluating individual claims for

fees (*see also* Fed. R. Civ. P. 54(d)(2)(D)).

- Administering, allocating, and distributing funds and other relief.
- Adjudicating eligibility and entitlement to funds and other relief.
- Monitoring or enforcing compliance with structural injunctions.
- Directing, supervising, monitoring, and reporting on implementation and compliance with the court's orders, and making findings and recommendations on remedial action if required.

f. Duties that might arise in any role

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

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

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

> The Mediator shall periodically report to the Court the status of the Mediation process, but those reports should be limited to matters general to the Mediation and its progress and not to specifics or to the merits of the Mediation or to the respective parties' positions or statements made during

> the course of the proceedings. The Mediator shall not, without the prior written consent of both parties, disclose to the Court any matters which are disclosed to him by either of the parties or any matters which otherwise relate to the Mediation.

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

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

Ex parte communication may be appropriate in the following circumstances:

a. With the court

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

b. With the parties

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

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

Rule 53 states that the court must define "the nature of the materials to be preserved and filed as the record of the neutral's activities." Fed. R. Civ. P. 53(b)(2)(C). 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 to the 2003 Amendments recommend that appointment orders "routinely" require neutrals to maintain a record of evidence considered unless there is no prospect that the neutral will make or recommend evidence-based findings of fact.

❑ 5. An appointment order must describe how the neutral's rulings will be received and reviewed.

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

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

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

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

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

- Include an explicit statement that the court has "consider[ed] the fairness of imposing the likely expenses on the parties" and has taken steps to "protect

against unreasonable expense or delay." Fed. R. Civ. P. 53(a)(3).

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

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

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

a. Perform duties consented to by the parties;

b. Hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by

(1) Some exceptional condition, or
(2) The need to perform an accounting or resolve a difficult computation of

damages; or

c. Address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.

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

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

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

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

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

❑ 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 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). It is good practice to state this authority explicitly in the appointment order and provide that the neutral shall have the full cooperation of the parties and their counsel, including making available appropriate agents, employees, and personnel and access to facilities, files, databases, or documents the neutral requires to fulfill all functions.

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

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

  The prior Rule 53 required an initial meeting with the neutral. Many found such a meeting to be a productive start to working with the neutral and the court may consider requiring or suggesting such a meeting in the appointment order.

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

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

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

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

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

  State statutes or rules may require a neutral to provide a certification or oath which states, in summary, that the neutral is familiar with the applicable standards and grounds for conflicts of interest and disqualification, and that nothing known to the neutral

disqualifies the neutral. Or a neutral may need to procure a surety bond for the benefit of the parties, especially if the neutral is performing receivership or accounting duties.

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

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

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

  Rule 53(b)(3) provides that the court may enter an appointment order "only after the neutral has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455." *See also* Rule 53(a)(2) (discussing grounds for disqualification). It is good practice to attach the affidavit to the appointment order or make reference in the appointment order to the affidavit's separate filing. While the court and the neutral should review § 455 very carefully to ensure there are no grounds for disqualification, or that all such grounds have been disclosed to the parties, the key averment in the neutral's affidavit could directly state:

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

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

2.4 Sample Neutral Appointment Order

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

NEUTRAL APPOINTMENT ORDER

This matter was submitted to the undersigned upon *[choose one:* the joint request of the parties / the consent of the parties / the motion of _____ / the Court's own initiative].
Counsel appearances were:
Based upon the *[recite in some detail the basis of the Court's authority for appointment, such as the consent of the parties, the press of business, the needs of the case, or other demanding circumstances], and having given the parties notice and an opportunity to be heard:*

IT IS HEREBY ORDERED:

1. Authority for and Scope of the Appointment. [Name of Neutral] of [Address] is appointed pursuant to [insert appropriate Rule citation] as Neutral for the purpose of *[specify scope of roles and duties in detail - options include the following]:*

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

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

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

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

3. Ex Parte Communications.

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

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

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

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

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

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

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

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

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

Dated this ____day of _____, 20___. Judge_____

2.5 Affidavit of Neutral

AFFIDAVIT OF [NAME]

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

STATE OF _____)
) ss. AFFIDAVIT
COUNTY OF _____)

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

1. I am an attorney at law, duly licensed to practice law in the States of [____]. My bar admissions are as follows:
   [list]

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

_____

Sworn to before me and subscribed in my presence this day of _____, 20__.

_____
Notary Public

AFFIDAVIT DECLARATION OF [NAME]

STATE OF _____)
) ss. AFFIDAVIT
COUNTY OF _____)

[Name] declares under penalty of perjury that:

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

Date_____ Name_____

Academy of Court-Appointed Neutrals

Section 3
Ethical Issues and Practical Concerns

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.)

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.gove/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
>
> 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

Code	Acronym	Applicability	Notes
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	

Code	Acronym	Applicability	Notes
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

	Rule	Sources of Authority
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; ABAIAAA 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; ABAIAAA 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
☐	1	Conflicts of Interest
☐	2	Relationship With the Judge
☐	3	Relationship With the Parties
☐	4	Relationships Among Neutrals
☐	5	Gifts and Favors
☐	6	Interactions With Media
☐	7	Interactions With Legislative and Investigative Bodies
☐	8	Political Activity
☐	9	Timekeeping and Compensation
☐	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?

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Section 4

Making Effective Use of Court-Appointed Neutrals

An Article on the ABA Guidelines for the Appointment and Use of "Special Masters" in Federal and State Civil Litigation

In January 2019, the ABA approved Guidelines for the Appointment and Use of Special Masters[1], recognizing that the use of neutrals should become a more common part of the litigation process. The ABA Report that accompanied the Guidelines concluded that the use of neutrals enhanced the litigation process by:

- Enabling faster and more efficient resolution of disputes.
- Relieving burdens on limited judicial resources.
- Allowing for specialized expertise in any field that assists judicial administration.
- Allowing for creative and adaptable problem solving.
- Serving in roles that judges are not, or may not be, in a position to perform.
- Facilitating the development of a diverse and experienced pool of neutrals by introducing an expanded universe of practitioners to work as neutrals.
- Helping courts to monitor implementation of orders and decrees.

These Guidelines and Conclusions recognize the growing acceptance in practice of neutrals. Those of us who serve as neutrals reflect the value we provide to our justice system. In our conversations with lawyers and our debriefing of parties after the conclusion of cases, we have learned how neutrals provided efficient, effective, and affordable services and results.

Empirical research is hard to come by in the world of litigation, and it is always difficult to perform a comparative analysis of the path taken and the bypassed path. For that reason, empirical analysis of the benefits that neutrals visit upon litigation is difficult ascertain—particularly given the infrequency of published judicial opinions regarding neutrals. But the research that has been performed, anecdotal, as much of it may be, strongly points to the fact that the use of neutrals brings efficacy to the litigation process and generally enhances the quality of litigation outcomes.

For all these reasons, the Guidelines provide that, in all appropriate cases, courts should consider the appointment of neutrals. We, as members of the Academy dedicated to the use of neutrals, wholeheartedly agree.

[1] We anticipate that the House of Delegates in August 2023 will take up the issue of changing the references to "Court-Appointed Neutrals."

The History of the ABA Guidelines

A few years ago, the Lawyers Conference of the ABA Judicial Division formed a Committee on Special Masters to encourage and promote research and education concerning neutrals and to make proposals concerning their appointment and use. The Committee concluded that one of the difficulties faced by both courts and practitioners is the lack of standardization in connection with the appointment and use of neutrals.

To address this lack of standardization and to urge greater use of this valuable resource, the Committee brought together stakeholders from diverse segments of the ABA to propose best practices in using neutrals. The ABA formed a Working Group in the fall of 2017 and included representatives of the Judicial Division (including three of its conferences – the National Conference of Federal Trial Judges, the National Conference of State Trial Judges and the Lawyers Conference), the ABA Standing Committee on the American Judicial System, and the ABA's Section of Litigation, Business Law Section, Section of Dispute Resolution, Section of Intellectual Property Law, Tort Trial and Insurance Practice Section, and Section of Antitrust. The membership included current and former federal and state judges, members of the Academy of Court-Appointed Neutrals (ACAN), ADR professionals, academics, and litigators who represent plaintiffs, defendants, or both in numerous fields.

The Working Group also gathered information from a wide variety of interested and knowledgeable agencies, organizations, and individuals, including the Federal Judicial Center (FJC), federal and state judges, court ADR program administrators, private dispute resolution professionals, representatives of a number of state bar associations, the academic community, professional groups (including ACAN), litigators, and in-house counsel.

This Working Group produced a set of Guidelines, appearing in Appendix B, which were adopted by the ABA House of Delegates in 2019, declaring that the use of special masters should be considered at the outset of litigation in all complex litigation and in cases involving facts or situations that would make the use of a neutral advantageous to the court and the parties. The Guidelines also recite many of the functions that can be performed by neutrals to make litigation more cost-effective and efficient. The Guidelines also encouraged courts to develop rules and practices for selecting, training and evaluating neutrals and encouraged courts and, where appropriate, legislatures to make changes to laws and rules to effectuate the purposes of the Guidelines.

The Rationale for Using Neutrals: Solutions to Problems

In addition, the Working Group's presentation to the House of Delegates included a detailed discussion of the rationale for the Guidelines and for the expanded use of neutrals in civil litigation, referred to herein as the "Report." As the Report noted, none of the rules that govern litigation and litigants are self-executing. Ensuring that parties will not gain an advantage by unreasonable conduct or delay requires judicial case management, which is possible only where adequate resources are available to implement strategies designed to minimize the likelihood of unnecessary disputes, to facilitate the resolution of disputes that do arise, and to focus the attention of the parties on fairly resolving the issues in controversy.

The appointment of a neutral to manage the pretrial process can relieve courts of the burden of reviewing voluminous discovery materials or information withheld as privileged or proprietary, or addressing other disputes, allowing courts to focus on merits-based resolution of issues on a concise record. Where a case warrants this type of assistance, neutrals have the time that judges do not. The goal of these guidelines is not to detract in any way from the role of judges, including magistrate judges. It is to assist them and serve the ends of justice.

The Report discusses issues the courts can face in providing effective case management, particularly in complex and highly resource-consuming matters. For example, courts often lack sufficient resources to manage certain cases–particularly complex commercial cases--or the practical ability to increase resources when such cases are encountered. Resources allocated to a single case can consume resources that would otherwise be available for other cases. Neutrals can offer the time and attention complex cases require without diverting judicial time and attention from other cases.

Additionally, certain cases benefit from specialized expertise. This is particularly true in federal multidistrict litigation ("MDL"), which accounts for nearly forty percent of the federal case load, excluding prisoner and social security cases.[2] Managing those cases oftentimes requires a diverse set of skills (e.g., managing discovery, reviewing materials withheld as privileged or proprietary, facilitating settlement of pretrial issues or the entire case, addressing issues related to expert qualifications and opinions, resolving internecine disputes among plaintiff and/or defense counsel, allocating settlement funds or awards, evaluating fee petitions, or providing other needed expertise).

Judges in MDLs and other large, complex cases are called upon to bear knowledge about many fields, including, for example, science, medicine, accounting, insurance, management information systems, business, economics, engineering, epidemiology, operations management, statistics, cybersecurity, sociology, and psychology. No one person can be an expert in all these fields. Experienced neutrals who have specialized expertise in relevant fields can provide a practical resource to courts in cases that would benefit from subject-matter expertise.

Finally, the judicial role limits the involvement courts can have in some aspects of the litigation process. Judicial ethics limit the ability of judges to facilitate informal resolutions of issues and cases, particularly if the process requires *ex parte* meetings with parties or proposing resolutions of issues on which the court may eventually need to rule.

Everyone Sometimes Needs a Nudge

Despite the considerable assistance neutrals can offer, appointing neutrals has historically been viewed as a special measure to be employed only on necessary occasions. This view appears to have stemmed from concerns regarding the delegation of judicial authority and the costs that

[2] Andrew D. Bradt, "The Long Arm of Multidistrict Litigation," 59 WM. & MARY L. REV. 1, 2 (2017); Elizabeth Chamblee Burch, "Monopolies in Multidistrict Litigation," 70 VAND. L. REV. 67, 72 (2017). The Judicial Panel on Multidistrict litigations reports that, as of April 16, 2018, 123,293 cases were part of pending MDL actions. http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-April-16-2018.pdf

the parties will incur. But neither concern justifies limiting the consideration of using neutrals in appropriate cases.

A concern about delegating authority should apply only to situations where the special master is asked to perform an adjudicative role, and unless the parties agree otherwise, a neutral's "adjudication" is merely a report and recommendation that can be appealed to the trial court as a matter of right. The ultimate decision-making authority continues to reside with the court.

Effective neutrals reduce costs by dealing with issues before they evolve into disputes and by swiftly and efficiently disposing of disputes that do arise. There is broad consensus that anticipating and preventing disputes before they arise or resolving them quickly as they emerge significantly improves the effectiveness and efficiency of dispute resolution. Neutrals can also inculcate a culture of compliance with procedural rules by strictly monitoring compliance by the parties and lawyers with the rules and ensuring that no one gains leverage or advantages from non-compliance.

The failure to consider using neutrals in appropriate cases may disserve the goal of securing "a just, speedy, and inexpensive determination." This failure has also led to appointments being made without systems or structures to support selection, appointment, or the use of neutrals and, frequently, after cases have already experienced management problems. Reliable evidence indicates that courts and parties are generally satisfied with their experiences neutrals. courts and commentators will continue to thoroughly address basic issues, such as: what qualifications neutrals should possess, how those qualifications reflect the role the neutral is performing, what best practices for neutrals should be, and what ethical rules should govern the conduct of neutrals. The Guidelines take an initial step in addressing these issues and encourage other stakeholders to continue to work on the adoption of standards for the appointment of neutrals. As the court use neutrals on a more consistent and regular basis, there will be greater opportunities for research and analysis on ways to make the work of neutrals more efficient and effective.

Acknowledgements

If every moving thing has at least one source of propulsion, the source of propulsion for this initiative and the Work Group was the Group's Covener, Merril Hirsh. It is fair to say that Mr. Hirsh was not only the Group's leader and official task neutral, he was also the driving force the brought about a successful end to the Group's work. We all owe him our heartfelt thanks.

The Working Group itself was comprised of representatives from the Judicial Division (Hon. J. Michelle Childs; Hon. David Thomson; Merril Hirsh (Convener); Cary Ichter (Reporter); Christopher G. Browning; David Ferleger and Mark O'Halloran); the ABA Standing Committee on the American Judicial System (Hon. Shira A. Scheindlin (ret.)); the Business Law Section (William Johnston (convener, policy subgroup); Hon. Clifton Newman; Richard L. Renck; Hon. Henry duPont Ridgely (ret.); Hon J. Stephen Schuster; and Hon. Joseph R. Slights III); the Section of Litigation (Mazda Antia, John M. Barkett, David W. Clark, Koji Fukumura and Lorelie S. Neutrals); the Section of Dispute Resolution (Hon. Bruce Meyerson (ret.); Prof. Nancy Welsh); the Section of Intellectual Property Law (David L. Newman; Scott Partridge; Gale R. ("Pete") Peterson); the Section of Antitrust Law (Howard Feller, James A. Wilson) and the Tort Trial and Insurance Practice Section (Sarah E. Worley). The members also wish to thank Hon. Frank J. Bailey and his staff, and ABA Staff members Amanda Banninga, Denise Cardman, Julianna Peacock, and Tori Wible for their assistance. We also owe than our deep appreciation.

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Section 5
Table of State Court Authorities Governing Neutrals

This Section contains the state rules and provisions governing the appointment of neutrals. There are various alternative names some states use for a court-appointed neutral. This Section also compares state provisions with Federal Rule 53.

State	**Authorities and Comparison to FED. R. CIV. P. Rule 53**
Alabama	ALA. R. CIV. P. WITH DIST. CT. MODIFICATIONS 53 Adopts pre-2003 amended version of the federal rule but state rule does not apply to state district courts.
Alaska	ALASKA R. CIV. P. 53 ALASKA CT. R., CHILD IN NEED OF AID 4 ALASKA CT. R., DELINQUENCY 4
Arizona	16 PART 1, A.R.S. RULES OF CIV. PROC., RULE 53 ARIZ. R. SUPER. CT. 96(e) (granting presiding judge in Superior Court power to appoint Court Commissioners with agreement of each party) Adopts pre-2003 amended version of the federal rule.
Arkansas	ARK. R. CIV. P. 53 Modeled after pre-2003 amended version of the federal rule but limited to non-jury actions.
California	CAL CIV. PROC. CODE §§ 638-639 (West 2004) Requires agreement of the parties.
Colorado	COLO. C. C.P.R. 53 Adopts pre-2003 amended version of federal rule.
Connecticut	CONN. R. SUPER. CT. PROC. FAMILY MATTERS § 25-53 Limited scope—only applies to family law matters. Pilot program established for civil/family discovery neutrals and civil matter settlement conferences scheduled to end 12/31/2004.
Delaware	DEL. S. CT. R. 43(B)(V) DEL. CT. CH. R. 135–47 DEL. FAM. CT. C.P.R. 53 DEL. SUPER. CT. CRIM. R. 5 Limited to hearing issues of fact.

State	Authorities and Comparison to FED. R. CIV. P. Rule 53
District of Columbia	D.C. SUPER. CT. R. CIV. P. 53 D.C. SUPER. CT. R. DOM. REL. 53 D.C. SUPER. CT. R. CRIM. P. 117 Adopts pre-2003 amended version of the federal rule.
Florida	FLA. STAT. ANN. R.C.P. RULE 1.490 (West 2004 & Supp. 2005) Florida Family Law Rule 12.492 Florida Probate Rule 5.697 All require consent with the possible exception of Probate Rule 5.697.
Georgia	GA. CODE ANN. §§ 9-7-1 to -6 (1982 & Supp. 2004)
Hawaii	HAW. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule.
Idaho	IDAHO R. CIV. P. 53 IDAHO CRIM. R. 2.2 Adopts pre-2003 amended version of federal rule.
Illinois	Illinois does not use fee officials.[3]
Indiana	IND. R. TRIAL P. 53 Adopts pre-2003 amended version of federal rule.
Iowa	IOWA R. CIV. P. 1.935 Adopts pre-2003 amended version of federal rule.
Kansas	KAN. STAT. ANN. § 60-253 (1994 & Supp. 2002) When parties consent, any issue can be referred to a neutral. Contains language where without the parties' consent, the court can only refer a case to a neutral when justice will be measurably advanced, or to cases that will be tried to a jury when they involve examination of complex or voluminous accounts.
Kentucky	KY. R. CIV. P. 53.01 When appointed to matters other than judicial sales, settlement, receivership, and bills of discovery assets of judgment debtors, appointment requires that the matter involve complex calculations, multiplicity of claims, or other exceptional circumstances.
Louisiana	LA. REV. STAT. ANN. § 13:4165 (West Supp. 2004) Court can appoint in any civil action with parties' consent if there is a complicated issue or when exceptional circumstances exist.
Maine	ME. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule.

[3] *Mullaney, Wells & Co. v. Savage*, 282 N.E.2d 536, 538 (Ill. App. Ct. 1972).

State	Authorities and Comparison to FED. R. CIV. P. Rule 53
Maryland	MD. CIR. CT. R. CIV. P. 2-541 Limited to non-jury matters.
Massachusetts	MASS. R. CIV. P. 53 MASS. R. CRIM. P. 47 Adopts pre-2003 amended version of federal rule but also requires assent of all parties prior to neutral appointment.
Michigan	MICH. CT. RULES PRAC. R. 3.913 Applies to probate and juvenile court. Can conduct preliminary inquiries and can preside at hearings other than a jury trial or preliminary examination.
Minnesota	MINN. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule.
Mississippi	MISS. R. CIV. P. 53 Can refer any issue to a neutral with the written consent of the parties, otherwise appointment requires an exceptional condition.
Missouri	MO. R. CIV. P. 68.01 Adopts pre-2003 amended version of federal rule.
Montana	MONT. CODE ANN. § 25-20-R. 53 (2003) Adopts pre-2003 amended version of federal rule.
Nebraska	NEB. REV. STAT. §§ 25-1129 to -1137 (2004) Appointment requires written consent of the parties.
Nevada	NEV. R. CIV. P. 53 NEV. 1ST JUD. DIST. CT. R. 5 Adopts pre-2003 amended version of federal rule.
New Hampshire	N.H. R. SUPER. CT. 85-A Appointment requires parties' written consent.
New Jersey	N.J. CONST. art. 11, § 4, ¶ 7 N.J. R. CIV. PRAC. 4:41 Appointment requires parties' consent.
New Mexico	N.M. R. CIV. P. 1-053 Adopts pre-2003 amended version of federal rule.
New York	N.Y. UNIF. TRIAL CT. R. § 202.14 Chief Administrator of courts has power of appointment.

State	Authorities and Comparison to FED. R. CIV. P. Rule 53
North Carolina	N.C. GEN. STAT. § IA-1, R. 53 (2003) Modeled after pre-2003 amended version of federal rule. Certain actions require parties' consent prior to appointment.
North Dakota	N.D. R. CIV. P. 53 Amendment effective March 2011, amended in response to the December 1, 2007 revision of the Federal Rules of Civil Procedure.
Ohio	OHIO REV. CODE ANN. CIV. R. 53 OHIO REV. CODE ANN. CRIM. R. 19 OHIO REV. CODE ANN. JUV. R. 40 Modeled after pre-2003 amended version of federal rule. Does include pre-trial and post-trial matters, or matters where the parties consent.
Oklahoma	OKLA. STAT. ANN. tit. 12, §§ 612-619 (West 2000) Can appoint to any civil action with the parties' written consent.
Oregon	OR. R. CIV. P. 65 Appointment requires parties' written consent; without consent of the parties, appointment requires an exceptional condition.
Pennsylvania	42 PA. CONST. STAT. ANN. § 1126; PA. R. CIV. P. 1558, 1920.51 Court can appoint at any time after the preliminary conference and neutral can hear any issue or the entire matter.
Rhode Island	R.I. R. CIV. P. 53 R.I. R. PROC. DOM. REL. 53 Adopts pre-2003 amended version of federal rule but also provides greater latitude in appointing a neutral; and the neutral may be appointed to any issue where the parties agree.
South Carolina	S.C. R. CIV. P. 53 Allows appointment when the parties' consent.
South Dakota	S.D. CODIFIED LAWS § 15-6-53 (West 2004) Adopts pre-2003 amended version of federal rule.
Tennessee	TENN. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule.
Texas	TEX. R. CIV. P. 171 Adopts pre-2003 amended version of federal rule but requires parties' consent to appointment of a neutral. Other modifications include that the case must be an "exceptional one" and there must be "good cause" for appointment of a neutral. Texas also uses neutrals in tax cases.

State	Authorities and Comparison to FED. R. CIV. P. Rule 53
Utah	UTAH R. CIV. P. 53 Adopts pre-2003 amended version of federal rule.
Vermont	VT. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule with minor modifications. State rule is narrower because for actions to be tried by a jury, appointment is only made when the action requires investigation of accounts or examination of vouchers.
Virginia	VA. S. CT. R. 3:23 A court decree refers a matter to a "commissioner in chancery."
Washington	WASH. SUPER. CT. CIV. R. 53.3 Adopts rule that is broader than the pre-2003 amended version of federal rule. State rule allows appointment for "good cause" and allows appointment of neutral to discovery matters.
West Virginia	W. VA. R. CIV. P. 53
Wisconsin	WIS. STAT. § 805.06 (1994) Adopts pre-2003 amended version of federal rule with minor modifications, i.e. "referee" used in place of "special master."
Wyoming	WYO. R. CIV. P. 53 Adopts pre-2003 amended version of federal rule.

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Section 6
Articles, Books, Websites, and Literature About Neutrals

A variety of sources contain information and materials on neutrals. The following resources contain references to the use of court-appointed neutrals, or explain their roles, or describe their work. Please contact ACAN to include other sources not listed in this Section. See Table of Contents.

BOOKS

1. **David Herr and Roger Haydock, *Fundamentals of Litigation Practice*, Chapter 6 (Thomson Reuters).**

2. **Roger S. Haydock and David F. Herr, *Discovery Practice,* Chapter 2 (Wolters Kluwer).**

3. **David F. Herr and Roger S. Haydock, *Motion Practice*, Chapter 2 (Wolters Kluwer).**

4. **Roger Haydock and John Sonsteng, *Trial Advocacy: Before Judges, Jurors, and Arbitrators*, Chapter 3 (West Academic).**

5. **Roger S. Haydock and Peter B. Knapp, *Lawyering: Practice and Planning*, Chapter 1 (West Academic).**

6. **Roger Haydock, David Herr, and Jeffrey Stempel, *Fundamentals of Pretrial Litigation,* Chapter 1 (West Academic).**

ARTICLES

7. ***2004 Special Masters Conference: Transcript of Proceedings,* 31 WM. MITCHELL L. REV. 1193 (2005), *available at* https://www.courtappointedneutrals.org/ACAN/assets/file/public/articles/SpecialMastersTranscript.pdf**

   Westlaw Abstract: A historic gathering of neutrals occurred on October 15th and 16th, 2004 in Saint Paul, Minnesota. Federal and state court-appointed neutrals from around the country met for the first time to share their experiences as neutrals and to form a national association of court-appointed neutrals. This issue of the William Mitchell Law Review contains articles presented at the conference and the transcript of faculty presentations.

Citing Reference:

Francis E. McGovern, Appointing Special Masters and Other Judicial Adjuncts: A Handbook for Judges (2007) (ALI-ABA & Federal Judicial Center Continuing Legal Education Course of Study, materials available on Westlaw as SN009 ALI-ABA 1911)

> Westlaw Abstract: This bench book is designed to help federal and state court judges: (1) decide whether and when to appoint a neutral; (2) draft effective appointment orders; and (3) anticipate and effectively address ethical issues and practical concerns that arise in neutral work. These materials may also be helpful to prospective adjuncts and to parties considering whether to request the appointment of a judicial adjunct. All courts have the power to appoint a neutral or other type of judicial adjunct to assist with civil and criminal cases. Rule 53 of the Federal Rules of Civil Procedure governs the appointment of neutrals in federal court. In state courts, various procedural rules or state statutes empower judges to obtain assistance.
>
> Many federal and state court judges use neutrals…Judicial adjuncts can provide courts, parties, and lawyers with essential services without tapping into court resources. Neutrals can act as mediators and settle civil and criminal cases away from the courthouse; they can monitor discovery and resolve time-consuming disputes; they can be assigned trial duties; they can testify as expert witnesses, especially in cases involving technical and specialized issues; they can help coordinate multi-party, multi-jurisdictional, and multi-district litigation (MDL) cases; they can administer settlement claims; and they can monitor compliance with a court order or settlement agreement. An adjunct can markedly reduce the burden on a judge, the judge's staff, and even the court's administrative staff. Parties and lawyers recognize that in some cases the appointment of a neutral can save them substantial fees and costs, and can lead to a much quicker resolution of their disputes. Judges who use professional and experienced neutrals know how valuable they can be to case handling and resolution.

8. Richard H. Agins, Comment: An Argument for Expanding the Application of Rule 53(b) to Facilitate Reference of the Special Master in Electronic Data Discovery, 23 PACE L. REV. 689 (2003).

Westlaw Abstract: The volume and volatility of computer-generated data present novel problems of evidentiary discovery, requiring the employment of a neutral party with the requisite technical, legal, and business experience to provide effective oversight and management. A neutral, referred to serve as an impartial officer of the court pursuant to Rule 53 of the Federal Rules of Civil Procedure, can bring a greater level of specialized knowledge, flexibility, involvement, and efficiency to pretrial discovery of electronically generated and stored data ("electronic data") than can most trial court judges burdened with managing a full docket.

Citing References:

David Herr, Ann. Manual Complex Lit. § 13.1 Trial Judge's Role: Use of Special Masters (2009).

David Ferleger, Special Masters under Rule 53: A Welcome Evolution, ABA-ALI CLE, available on Westlaw as SN040 ALI-ABA 1 (2007).

> From Article Introduction: In recent years, and increasingly since the amendment of Rule 53 in 2003, courts turn to neutrals in constitutional, commercial, mass tort and other litigation for assistance at all stages in the adjudication process. Neutrals may be appointed pre-trial, to preside over trials, and in the post-trial monitoring and compliance phases of a suit. The use of neutrals has been constructive and beneficial to litigants and to the courts. Few administrative difficulties have been reported.
>
> Federal Rule of Civil Procedure 53 has been a primary support for this approach. However, even post-amendment, courts continue to declare their inherent authority to appoint neutrals "beyond the provisions" of Rule 53. Pre-amendment, appointment of a neutral was reserved to the "exceptional case" and there was significant dispute in particular instances over whether a case was sufficiently exceptional to warrant a neutral. The 2003 rule in effect abandoned the notion that appointment of a neutral is disfavored, and many features of the rule are now designed to facilitate expanded use of neutrals. This article describes the early use of neutrals, the functions to which courts have put neutrals, and a selection of issues regarding the appointment and operation of neutrals. [Westlaw]

Lynn Jokela & David Herr, Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool, 31 Wm. Mitchell L. Rev. 1299 (2005).

> Abstract from article: This article examines the role neutrals have played in litigation and explores the benefits that might be obtained from the greater use of neutrals in the future. The FJC survey of federal judges appointing specialized neutrals concluded that neutrals were "extremely or very effective." The FJC study is an empirical survey of the effectiveness of neutrals, and it includes commentary from judges regarding their experience after appointing neutrals. These benefits include better, faster, and fairer resolution of litigation in the cases in which neutrals are used, as well as an easing of the burdens these cases place on the judiciary. This article also analyzes the barriers to the use of neutrals and how they might be removed.

9. Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725.

LexisNexis Abstract: The court's powers to enforce a consent decree include interpreting the decree, issuing injunctions to implement the decree, granting supplemental relief, delegating authority to a neutral, and holding a party in contempt of court. ... A court emphasizes the contractual nature of consent decrees when it undertakes to resolve disputes over the meaning

of certain provisions. ... The actual experiences of attorneys, judges, and monitors in the research cases reveal a pervasive pattern of [non-adjudicative] techniques for making consent decrees work; reported cases rarely reveal such techniques. ... Written reports would have been helpful because they would have provided the parties a clear record upon which to determine in what areas defendants were not complying and how the parties had resolved various issues. ... One way the monitor responded to this situation was simply to order upper-level mental health agency officials to attend meetings to discuss areas of noncompliance. ... A lenient judicial posture toward requests for substantive modification would introduce uncertainty and therefore discourage voluntary settlement and increase litigation over implementing consent decrees. ... The economy improved, a newly elected administration was strongly committed to implementation of the decree, and the legislature fully funded all the community programs.

Citing Reference:

Ellen E. Deason, Managing the Managerial Expert, 1998 U. Ill. L. Rev. 341

> Westlaw Abstract: While most lawyers think of court-appointed experts as witnesses, judges increasingly appoint experts for managerial roles. For instance, court-appointed experts evaluate pretrial discovery; they play key roles in encouraging settlements and helping judges decide whether or not those settlements should be approved; they determine complex damages; they advise judges on remedial orders and monitor compliance and implementation. Professor Deason analyzes the proliferation of court-appointed experts for these indispensable functions in the absence of any explicit authority or procedures for their appointment. She argues that the current Federal Rules of Evidence and Federal Rules of Civil Procedure do not contemplate managerial functions for court-appointed expert witnesses or neutrals and hence their limitations on appointments and their procedures are inadequate. Moreover, the other source of appointment authority, inherent judicial power, has ambiguous boundaries and offers courts little guidance. Thus, Professor Deason suggests the development of new appointment authority tailored to the legitimate needs of the courts for managerial assistance, designed to encourage the maximum effectiveness in the use of experts, and constructed to prevent unnecessary interference with party autonomy.

10. Elizabeth Berkowitz, *The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund*, 24 YALE L. & POL'Y REV. 1 (2006).

Lexis Abstract: Less than two weeks after the collapse of the World Trade Center, a unified Congress passed the Air Transportation Safety and System Stabilization Act (ATSSSA, or "the Act"), a bill intended to help stabilize the economy by protecting the airlines from an avalanche of litigation. ... As noted above, the Act provides the airline industry with a range of benefits, including federal loan guarantees of up to ten billion dollars; compensation of up to five billion dollars for "direct losses incurred ... as a result of any Federal ground stop order;" compensation for "incremental losses" from September 11 to December 31, 2001; reimbursement for any increase in the cost of insurance through October 1, 2002; and a cash

flow benefit from the deferral of the deposit of excise taxes. ... The architecture of the Fund was based in part on the Agent Orange settlement compensation scheme, and the Special Master was based on the Agent Orange court-appointed Special Master. Before Congress enacted the ATSSSA, David Crane, one of Senator Trent Lott's congressional staffers, drafted a model of the Special Master which Congress soon incorporated into the statute. ... A comparison with other victim compensation funds emphasizes the failure of the ATSSSA to provide for a suitable tort option. ... Suddenly, any Fund-eligible parties considering the tort option would find themselves vying to litigate with a host of new parties.

Citing References:

Judge John G. Farrell, Administrative Alternatives to Judicial Branch Congestion, 27 J. Nat'l Assn Admin. L. Judiciary 1 (Spring 2007)

> Lexis Summary: ... Workers' Compensation Law (originally called "Workmen's Compensation Law") involved a new legal concept: liability without fault. ... Many more workers were assured a recovery for a work accident than were assured under the tort litigation system. ... In addition to providing compensation to the victims, the legislation was also intended to save the airline industry from bankruptcy and the U.S. economy from collapse. ... Under the legislation, a monetary fund was created and the attorney general appointed a neutral, Kenneth Feinberg, a respected attorney with considerable experience with giant class-action lawsuits. ... There are some very limited exceptions which allow certain tort actions in court. ... Strictly speaking, I note that adoption of such programs is not always motivated solely to relieve judicial congestion or delays. ... I believe that both emerging technologies of nanotechnology and biotechnology are extremely likely to bring with them environmental risks which could result in injuries and illnesses with long latency periods and difficult causation issues, involving multiple plaintiffs, all of which are problematic under traditional common law tort schemes. ... It is my belief that carefully crafted administrative alternatives in these areas could help to provide fair and rapid relief to the victims. [LexisNexis]

11. Samuel J. Brakel, *Special Masters in Institutional Litigation*, 1979 AM. B. FOUND. RES. J. 543 (1979).

Wiley Abstract: Litigation concerning conditions in institutions such as prisons or mental hospitals does not stop at the issuance of a remedial decree. Steps must be taken to assure implementation. Increasingly, the courts are resorting to neutrals to assist them in implementing such institutional reform. While the use of neutrals by courts is a firmly established tradition, the role assigned to neutrals in the institutional context is often an extraordinarily broad and intrusive one. As a result, serious questions have arisen about this new extra-traditional neutral role and about the applicability, the sufficiency, of the traditional rationales and restraints. This article is among the first in a small but developing body of literature that begins to examine the new neutral role and the questions concerning it. [Wiley Inter Science - http://bit.ly/1LFKfL]

12. Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?* 53 U. CHI. L. REV. 394 (1986).

Westlaw Abstract: In recent years, courts have used neutrals to help manage complex civil cases. But this use has raised serious questions of efficacy and ethics. This paper first identifies the needs and ambitions that inspire courts to appoint neutrals, in order to demonstrate why recourse to this tool can be so rich in potential yet so controversial. Then, in describing some recent roles neutrals have played, it assays their potential contributions as well as the risks attending their use. It concludes that as neutrals are used more ambitiously, the potential benefits and risks increase. Neutrals can bring significant new skills and flexibility to bear on cases whose complexity threatens to overwhelm our traditional system. However, a correlative danger exists that using neutrals will fundamentally alter that system in ways we find troubling: by making adjudication too informal, by removing it from public scrutiny and challenge, and by encouraging judges to rely on neutrals to a degree incompatible with appropriate exercise of the judicial function. [Westlaw]

Citing References:

Jeffrey W. Stempel, New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform, 59 Brook. L. Rev. 659 (Fall 1993)

> Introduction: This Article assesses the landscape of litigation reform activity and the current political tension between continuing commitment to open access to the courts and a desire for faster, less expensive dispute resolution. It will also examine the state of the reform process but refrain from evaluating specific proposals. Part I describes major recent and current activities affecting American litigation. Part II then analyzes current debates about litigation by identifying the leading schools of thought on both litigation practice and litigation reform. It attempts to situate current litigation issues in a broader inquiry: whether the perceived post-1938 consensus attending adjudicatory procedure and civil litigation reform has merely come unglued (in whole or in part) or, rather, whether it has been supplanted by a new consensus, a "new paradigm," reflecting an altered vision of the litigation process. Finally, Part III proposes a more integrated and deliberate method to govern civil litigation reform as a means of thwarting troublesome recent tendencies. [Westlaw]

Irving R. Kaufman, Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts, 59 Fordham L. Rev. 1 (October 1990).

> Introduction: Many observers see the courts on the verge of buckling under the strain; one view from the trenches sees the problem of delay as "'beyond the crisis stage.'" The problem is not merely one of harried judges. Litigants, people with grievances, are being denied meaningful access to the courts. Delay prevents the courts from doing their job—resolving people's disputes at reasonable costs so that they may return to their normal lives... Flexibility, experimentation and a willingness to innovate are essential if the administration of justice is to keep up with the society we serve. What follows is a brief

examination of proposed changes in judicial administration, stressing those that hold the greatest promise to reduce the major costs of justice—expense and delay. [Westlaw]

13. Wayne D. Brazil, *Special Masters in the Pre-trial Development of Big Cases: Potential and Problems*, 1982 AM. B. FOUND. RES. J. 289 (1982).

Abstract: This article explores the advantages and disadvantages of referring discovery matters in complex cases to neutrals. In the first section Brazil explains how the results of his earlier research into the discovery system exposed problems that the appointment of neutrals might help solve. He then describes the kinds of pretrial tasks and roles federal courts have assigned to neutrals and the ways that using a neutral can expedite and rationalize the case development process. In the second half of the article, the author assesses the major objections to delegating judicial responsibilities to neutrals and the problems that frequent appointments might cause. Along the way, Brazil offers practical suggestions to judges about how to avoid potential difficulties and how to maximize the effectiveness of this increasingly popular procedure. [Wiley InterScience.

14. Wayne D. Brazil, Geoffrey C. Hazard Jr. & Paul R. Rice, *Managing Complex Litigation: A Practical Guide to the Use of Special Masters*, American Bar Foundation (1983).

Abstract from 63 Tex. L. Rev. 721: Professors Geoffrey Hazard and Paul Rice provide an illuminating case study of the management techniques that worked for them as neutrals in the massive United States v. ... The purposes of pretrial conferences as stated in the new rule include concerns for efficiency such as "establishing early and continuing control so that the case will not be protracted because of lack of management," "discouraging wasteful pretrial activities," "improving the quality of the trial through more thorough preparation," and facilitating settlement. ... They believe that a full-time position is not likely to offer the pay and status needed to attract persons whose neutrality of the subject and intellectual prowess will enable them to work well with the able and aggressive attorneys usually involved in complex cases. Instead, the authors recommend the use of co-neutrals, one with day-to-day management functions and the other with duties related to subject matter expertise. ... Judges should hold a conference with counsel and the neutral to discuss the tasks and powers being delegated and the procedures to be followed. ... Brazil, Hazard, and Rice's Proposals The Brazil-Hazard-Rice book is concerned primarily with discovery management and addresses these administrative matters in much more detail than does Schwarzer. ... In that case, all discovery demands were required to be filed with the neutrals, thus rejecting the Federal Rules' view that the attorneys should generally conduct discovery without court involvement. ... According to Hazard and Rice, "The end product was a combined narrative stipulation, pretrial order of issues in dispute, and a tentative order of proof."

15. Victoria E. Brieant, *Techniques and Potential Conflicts in the Handling of Depositions*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and States Courts, Chicago, Ill. 2005.

Abstract: Part 1 of this article addressed the use of depositions in the United States and the rules that govern them. Topics included deposition techniques, sanctions, the limitations of

depositions, objections, instructions not to answer, Rule 30(c)(2), neutrals and magistrate judges, discovery of documents reviewed by deponents, videotaped depositions, the form of questions, witness preparation, non-party subpoenas, and authentication of electronic evidence. These topics are, however, of utility only when you can actually take the deposition. Getting to take a deposition is the United States is relatively easy. Despite variations in rules among the states, the fundamentals tend to be consistent. Taking the deposition of non-citizens or outside the U.S., on the other hand, can pose some serious problems.

16. Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625 (2002).

Lexis Abstract: However, the arcane procedures and delegations of authority used by the Court in executing its original jurisdiction—where the Supreme Court functions as a trial court—have garnered newfound attention of late. ... The precedent that guides the Neutral, particularly in boundary dispute cases, is a fragile body of specialized federal common law, pasted together from international law treatises, property concepts, contract law, and sovereignty principles... " New Jersey initiated the first boundary dispute with New York in 1829, a suit in which New Jersey conceded that New York had obtained jurisdiction over Ellis Island, Staten Island, and neighboring islands by adverse possession. ... Other possible solutions include creating a specialized federal court, establishing concurrent original jurisdiction in the federal district courts, delineating procedures applicable to original jurisdiction cases, and institutionalizing the prior practice of appointing senior or retired Article III judges... Third, a specialized court likely would be better equipped to standardize the procedures applicable to original jurisdiction cases, given their continued exposure to cases raising similar procedural difficulties. ... The United States Court of Federal Claims and the United States Tax Court are specialized Article I courts; the United States bankruptcy courts are specialized federal courts, but they are considered "units" of the federal district courts, and their judges are not subject to the appointment provisions or protections of Article III. [LexisNexis]

Citing References:

Amalia D. Kessler, Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial, 90 Cornell L. Rev. 1181 (July 2005)

> Westlaw Abstract: Professor Kessler suggests… that some of the worst abuses of modern litigation--and, in particular, our discovery practice--can be traced to the ill-considered way in which inquisitorial devices were imported into a common-law-based adversarial framework. By rediscovering our lost inquisitorial history, she argues, we can learn how our botched marriage of inquisitorial and adversarial traditions resulted in much of the inefficiency and unfairness of modern civil litigation, and we can begin self-consciously and systematically to develop the inquisitorial framework necessary to remedy our adversarial excesses.
>
> To facilitate procedural reform, Professor Kessler challenges our conception of inquisitorial procedure as alien to and incompatible with our commitment to due process.. this transformation in equity procedures led in the early twentieth century to a

reconfiguring of the inquisitorial neutral as a trial neutral. She suggests that the subsequent rise of increasingly complex litigation during the second half of the twentieth century, and especially the structural injunction suit of the Civil Rights era, led to a re-emergence of the neutral's inquisitorial role, but that scholars have mistakenly viewed this role as a new phenomenon. Professor Kessler then posits that much of the inefficiency and unfairness of modern civil litigation--and, most especially, of the pretrial discovery process--results from integrating equity procedures into an adversarial context that permits parties to abuse powerful devices that were once controlled by the courts. Finally, she points to recent French procedural reforms to suggest that we can adopt more inquisitorial procedures without violating the core values of due process. [Westlaw]

17. Frank M. Coffin, *The Frontier of Remedies: A Call for Exploration*, 67 CAL. L. REV. 983 (1979).

Abstract from 1983 Duke L.J. 1265: The proposals are those made by Judge Frank M. Coffin, who has suggested major procedural changes to accommodate the exigencies of organizational change litigation. [135] He is prepared to permit an "outside expert judge" to sit in on the remedial phase, since ex parte "influence would not seem to be of as much concern at the remedial stage as when liability is at issue." [136] Judge Coffin also recommends that appellate judges "sit in on critical arguments [in the trial court], absorb the atmosphere, gain a better appreciation of the problem, and help inform the court of appeals so that it could play a more sensitive role." [137] Likewise, Judge Coffin would sanction conferences between trial and appellate judges before the trial judge decides on a remedy, [138] and he advocates the participation of the trial judge as "a resource person" [*1302] at the appellate argument. [139] He is ready to adapt existing institutions in dramatic ways to make possible inquisitorial procedures by trial judges and to make available to them "the help of proven experts." [140] Frustration with the inadequacy of the courts to cope with organizational change litigation has thus generated a willingness to tinker with procedure in quite fundamental ways, with very little awareness that such changes might redound to the disadvantage of the system as a whole.

18. James S. DeGraw, *Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters*, 66 N.Y.U. L. REV. 800 (1991).

Abstract: In addition to performing traditional trial-stage tasks, neutrals often participate extensively in the pretrial phase by overseeing discovery proceedings and conducting settlement conferences. ... By contrast, if the order of reference appointing a neutral to implement a remedial decree is unclear, she has little guidance. ... A court may use its inherent authority or its authority under Rule 53 to appoint an expert as a neutral to advise the court. ... Despite the appointment of an expert neutral, the *Lanzaro* court retained substantial responsibility for the ultimate resolution of the case. ... The appointment of a biased neutral thus restricts the court's inquiry even further and escalates exponentially the potential for abuse when accompanied by the ability to proceed ex parte, the authority to conduct broad discovery, and a deferential standard of review. ... For example, in *Toussaint v. McCarthy,* the order of reference granted the neutral broad discovery and ex parte powers as well as the power "[t]o review the placement and retention of prisoners in segregation, and to require the

release of prisoners assigned to segregation without sufficient basis, in accordance with the provisions of . . . the Permanent Injunction." ... When stated in the order of reference, the neutral shall have the ability to monitor the defendant's compliance with the court's decree. ... [LexisNexis]

Citing References:

Thomas L. Creel & Thomas McGahren, Use of Special Masters in Patent Litigation: A Special Master's Perspective, 26 AIPLA Q.J. 109 (Spring 1998).

> Introduction: Are there unique aspects of patent infringement trials that make the use of a neutral of particular benefit to the judge and the litigants? Yes, is the answer from many judges who have used them. The unanimous decision of the Supreme Court in Markman v. Westview Instruments, Inc. lends credence to the use of neutrals. In Markman, the Supreme Court stated that claim construction is exclusively for the court in a jury trial. Thus, the judge is to construe the claim for the jury much like a statute, and the jury then decides infringement of the claim so construed. Because claim construction is a matter of law, the United States Court of Appeals for the Federal Circuit ("Federal Circuit") reviews the construction under a de novo, not clearly erroneous, standard. As a result, a judge who is untutored in the science of the patented invention and in the vagaries of patent law is required to make a claim construction that can be reversed without regard to findings of fact. Such a reversal could negate a potentially lengthy trial and necessitate a re-trial. A judge may wish for help in making this cornerstone decision… This paper also explores the legal and practical requirements for the appointment and use of neutrals. For example, Rule 53 of the Federal Rules of Civil Procedure only allows the appointment of a neutral in non-jury trials in "exceptional conditions" and in jury trials where the issues are "complicated."

Alexis C. Fox, Using Special Masters to Advance the Goals of Animal Protection Laws, 15 Animal L. 87 (2008)

> Westlaw Abstract: This article suggests that courts should appoint neutrals to large-scale animal abuse cases. The work of neutrals in two recent high profile cases, Sarah v. PPI and Vick, demonstrate that neutrals can help advance the goals of the animal protection movement in three ways. First, neutrals can ensure that individual animal victims are cared for once they are rescued from large-scale abuse situations. Second, court orders that appoint neutrals to large-scale animal abuse cases insert a best-interest-of-the-animal analysis into formal court proceeding. Finally, court-appointed neutrals may encourage better enforcement of animal protection laws by taking responsibility for animal victims from local officials. In addition to advocating for neutral appointments in large-scale animal abuse cases, this article discusses some of the possible barriers courts and advocates might face when appointing neutrals to large-scale animal abuse cases.

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 (Winter 2001)

> From Article Introduction: This article attempts to justify the utilization and appointment of neutrals in appropriate and rare bankruptcy cases and proceedings by explaining the unique case management role neutrals contribute in exceptional circumstances. Specifically, this article calls for an amendment to the Federal Rules of Bankruptcy Procedure to provide expressly that United States district and bankruptcy courts may appoint a neutral in a highly complex and rare bankruptcy case or proceeding. Notwithstanding the appropriateness of the appointment of a neutral, Federal Rule of Bankruptcy Procedure 9031, a procedural rule, currently prohibits the appointment of a neutral by both the United States district and bankruptcy courts in any "case" under the Bankruptcy Code ("Code"). This article focuses on the distinctive need for neutrals to be appointed and authorized to participate in appropriate and rare bankruptcy "cases" and "proceedings." … Concomitantly, this article respectfully suggests that the Federal Rules of Bankruptcy Procedure should be amended pursuant to the Rules Enabling Act to expressly authorize the appointment of a neutral by United States district and bankruptcy courts in appropriate and rare bankruptcy cases and proceedings. This article also respectfully requests the current United States Judicial Conference Advisory Committee on Bankruptcy Rules to reconsider its two prior declinations and thereafter recommend and transmit to the United States Judicial Conference Standing Committee on Rules of Practice and Procedure a proposed amendment to the Federal Rules of Bankruptcy Procedure providing that United States bankruptcy and district courts have the express authority to appoint neutrals in highly complex and rare bankruptcy cases and proceedings.

Allison Glade Behjani, Delegation of Judicial Authority to Experts: Professional and Constitutional Implications of Special Masters in Child-Custody Proceedings, 2007 Utah L. Rev. 823 (2007).

> From Article Introduction: Child-custody proceedings are an intricate, dramatic, and multi-faceted area of the family law system… judges increasingly appoint mental-health professionals as neutrals and delegate to them fact-finding authority in order to inform their determination of the child's best interests. Use of neutrals, however, may be problematic. Neutrals in custody cases contribute to efficiency and provide family courts with psychological insights. Yet, the lack of professional and educational guidelines coupled with the power such an expert can wield over the court might ultimately harm the fragile nature of child-custody proceedings. To avoid this negative outcome, courts need clearer professional and judicial guidelines to ensure that neutrals can continue to provide valuable assistance to family courts.

The Sanction of Special Masters: In Search of a Functional Standard, SN040 American Law Institute-American Bar Association 35 (2007)

> Introduction: Under amended Rule 53, Neutrals are required to perform their duties in accordance with judicial standards of conduct -- even though the Rule permits courts to

authorize neutrals to perform tasks, such as conduct investigations, and adopt procedures, such as ex parte communications, in which judges themselves could not engage. This article examines the use of neutrals in complex litigation and concludes that consideration needs to be given to the appropriateness of standards to which neutrals are held when they carry out different functions -- adjudication, investigation, administration or mediation -- and the consequences of violating those standards. It finds that it may be untenable to hold neutrals to judicial standards of conduct when they are not full-time judges and perform non-judicial functions. Further, it notes that neutrals need more clarity about their accountability to the appointing courts, the litigants, third parties, and the bar. Finally, it concludes that the range of remedies imposed to redress excessive or problematic conduct -- reversal, removal, disbarment, damages, injunction, etc. --needs to be examined for proportionality, their effect on other interested parties and their fairness to neutrals. [Westlaw]

19. Margaret G. Farrell, *Special Masters in the Federal Courts under Revised Rule 53: Designer Roles*, ALA-ABA Course of Study: The Art and Science of Special Masters, Chicago, Ill. (2005).

Lexis Abstract: The federal courts are overburdened and understaffed. The continued expansion of federal caseloads, the technological complexity of the subject matters presented to federal courts, the vast amounts of information available (often as a result of sophisticated computer technology), the number of claimants and the amounts of money involved have all put heavy burdens on the federal judiciary. In response, judges have increased their use of "para-judicials", or judicial assistants, to perform some of the functions usually performed by judges as well as some functions not usually performed by judges. Federal Rule of Civil Procedure 53 has been revised to support these efforts by legitimating many of the roles and responsibilities given to neutrals in the past and clarifying the array of prerogatives that may be given them in the future. [LexisNexis]

20. Margaret G. Farrell, *Amended Rule 53 and the Use of Special Masters in Alternative Dispute Resolution*, SJ034 ALI-ABA 261 (2003).

Lexis Abstract: Rule 53 of the Federal Rule of Civil Procedure, which permits the appointment of neutrals, has been completely replaced by an amended rule that will become effective December 1, 2003. This paper explores the ways in which the new rule may or may not facilitate the use of alternative dispute resolution techniques in the federal courts. Faced with growing dockets, more complex litigation and the information explosion, federal judges have urgently sought ways to enhance their effectiveness. Their efforts have given rise to at least two developments. First, judges have increased their appointments of neutrals under Rule 53 to assist in complex litigation, including class actions; and second they have fostered the growth of alternative dispute resolution as encouraged by Congress, to reduce the number of cases going to trial. This paper examines the convergency of these trends. [LexisNexis]

21. Margaret G. Farrell, *The Role of Special Masters in Federal Litigation*, ALI-ABA Course of Study: Civil Practice and Litigation Technique in the Federal Courts, SG046 ALI-ABA 1005 (2002).

Lexis Abstract: In the last decade, judges have increasingly sought the assistance of neutrals in handling complex litigation. The expansion of federal caseloads, the technological complexity of the subject matters presented, the vast amounts of information available (often as a result of computer technology), and the number of claimants and amounts of money involved have put heavy burdens on the federal judiciary. The appointment of neutrals is one of several procedures, including the use of magistrates, court-appointed experts and technical advisors, available to judges to extend their effectiveness. [LexisNexis]

22. Margaret G. Farrell, *Experts Testify on Expert Testimony*, Civil Justice Reform 213 (Larry Kramer & Linda Silberman eds., 1996) (No Abstract Available).

23. Margaret G. Farrell, *The Function and Legitimacy of Special Masters: Administrative Agencies for the Courts*, 2 WIDENER L. SYMPOSIUM J. 235 (1997).

Westlaw Abstract: This article… describes one rationalizing technique employed by federal judges to assist them in managing complex mass toxic tort litigation, the appointment of neutrals under Rule 53(b) of the Federal Rules of Civil Procedure. Moreover, it evaluates the ability of neutrals to efficiently and fairly meet the extraordinary managerial challenges presented by such lawsuits and their ability to humanize the process. Finally, it argues that the flexibility and diversity of neutral practice is legitimate in its conformance with the basic constitutional values expressed in Article III and the Due Process Clause of the United States Constitution. [Westlaw]

Citing References:

Alexis C. Fox, Using Special Masters to Advance the Goals of Animal Protection Laws, 15 Animal L. 87 (2008).

> Abstract: This article suggests that courts should appoint neutrals to large-scale animal abuse cases. The work of neutrals in two recent high-profile cases, Sarah v. PPI and Vick, demonstrate that neutrals can help advance the goals of the animal protection movement in three ways. First, neutrals can ensure that individual animal victims are cared for once they are rescued from large-scale abuse situations. Second, court orders that appoint neutrals to large-scale animal abuse cases insert a best-interest-of-the-animal analysis into formal court proceeding. Finally, court-appointed neutrals may encourage better enforcement of animal protection laws by taking responsibility for animal victims from local officials. In addition to advocating for neutral appointments in large-scale animal abuse cases, this article discusses some of the possible barriers courts and advocates might face when appointing neutrals to large-scale animal abuse cases.

Clayton Gillette, Appointing Special Masters to Evaluate the Suggestiveness of a Child-Witness Interview: A Simple Solution to a Complex Problem, 49 St. Louis U. L.J. 499 (2005) (No abstract available).

Elizabeth Berkowitz, The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund, 24 Yale L. &. Pol'y Rev. 1 (2006) (No abstract available).

Francis E. McGovern, Appointing Special Masters and Other Judicial Adjuncts: A Handbook for Judges, ALI-ABA Course of Study: Civil Practice and Litigation Techniques in Federal and State Courts, SN009 ALI-ABA 1911 (2007).

Michael Dore, Special Problems in Toxic Tort Discovery: Use of Special Masters, 2 Law of Toxic Torts § 22:25 (2009) (No abstract available).

24. Margaret G. Farrell, *The Judicial Alternative: Special Masters in Federal Practice*, 1994 Practical Litigator 37 (ABA-ALI, 1994) (No abstract available).

25. Margaret G. Farrell, *Extraordinary Procedures: Special Masters, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, The Federal Judicial Center (1994) (No abstract available).

26. Margaret G. Farrell, *Coping with Scientific Evidence: The Use of Special Masters*, 43 EMORY L.J. 927 (1994).

Lexis Abstract: As discussed in Part III, the use of neutrals to provide scientific expertise to our generalist judges deviates significantly from each of the major elements of our traditional adversary model. ... In order to illustrate ways in which neutrals have been helpful in meeting the needs of judges for expert scientific assistance, the following discussion characterizes neutrals with reference to both their tasks and the stage of litigation at which they are appointed. ... While most settlement neutrals fulfill their function through informal procedures, some hold more formal hearings in the form of [mini-trials] used to evaluate claims for purposes of settlement negotiations. Thus, it provides that in actions involving complicated issues tried before a jury or exceptional conditions in bench trials, neutrals may require the production of evidence, hold formal hearings in which the rules of evidence apply, issue subpoenas, administer oaths, and create a record for review. ... Finally, like neutrals appointed to recommend remedial decrees, some court monitors were authorized to seek out scientific and technical experts and make findings of fact based on their own viewings of institutional conditions and ex parte interviews with party and nonparty witnesses. ... Some expert neutrals, like some lay neutrals, saw themselves as knowledgeable facilitators, not [decision makers], who moved the parties to find areas of agreement about scientific and technical facts and develop agreed upon procedures for settling their factual disputes. ... Thus, issues which go to the propriety of the appointment itself--conflicts of interest, ex parte communications, scope of authority--might well be addressed expressly in the order of reference, while more procedural issues--the discovery process, the appointment of experts, formal hearing procedures--might be left to negotiation between the neutral and the parties after the appointment. ... When neutrals perform these same functions, it is believed they, too, may engage properly in ex parte communications. ... Some neutrals and judges feel that time-limited appointments, particularly before liability is determined, help promote negotiations

and settlement, since the parties are aware that failure to settle will result in the expense of a trial. [LexisNexis]

Citing References:

United States v. Hines, 55 F.Supp.2d 62 (1999).

> Lexis abstract: Handwriting analysis testimony was admissible as to similarities or dissimilarities but could not extend to an ultimate conclusion, and accuracy of cross-racial identification was a relevant issue. Defendant, charged with bank robbery, moved to exclude expert testimony comparing his handwriting to the robbery note. The prosecution moved to exclude expert testimony on the subject of cross-racial identification. The court granted defendant's motion in part because the field of handwriting analysis was not sufficiently reliable to permit an expert to render an ultimate opinion as to authorship. Handwriting analysis evidence was admissible for the limited purpose of assisting the jury in evaluating similarities, if any. The court denied the prosecution's motion, holding that because a witness of another race identified defendant, expert testimony citing scientific studies of decreased accuracy of cross-racial identification would provide the jury with relevant and useful information.

Joe S. Cecil and Thomas E. Willging, The Randolph W. Thrower Symposium: Scientific and Technological Evidence: Accepting Daubert's Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity, 43 Emory L.J. 995 (1994).

> From the article introduction: In brief, we found that much of the uneasiness with court-appointed experts arises from the difficulty in accommodating such experts in a court system that values, and generally anticipates, adversarial presentation of evidence. Even judges who have appointed experts view such appointments as an extraordinary activity that is appropriate only in rare instances in which the traditional adversarial process has failed to permit an informed assessment of the facts. Section IV discusses the problems that arise in identifying and appointing a suitable expert. Parties rarely suggest appointing an expert and typically do not participate in the nomination of appointed experts. As a result, judges may not recognize the need for such assistance until the eve of trial and may have difficulty identifying and instructing an expert without disrupting the trial schedule. Section V discusses communication with the appointed experts. Communication between the judge and the expert is sometimes inhibited, especially in instances in which ex parte communication with the expert is sought by the judge. Also, we found that the testimony or report presented by an appointed expert exerts a strong influence on the resolution of the issue addressed by the expert. Section VI discusses sources of compensation of appointed experts and the problems that arise when one party is indigent. Finally, in Section VII we suggest possible changes to Rule 706 and outline a pretrial procedure that facilitates the early identification of disputed issues arising from scientific and technical evidence, clarifies and narrows disputes, and eases appointment of an expert when an independent source of information is necessary for a principled resolution of a conflict.

Clayton Gillette, Appointing Special Masters to Evaluate the Suggestiveness of a Child-Witness Interview: A Simple Solution to a Complex Problem, 49 St. Louis U. L.J. 499 (2005).

> From the Article: Deciding if [a child witness] interview was so suggestive that the child's memory is irreparably distorted and the child should not be allowed to testify in court is a difficult decision that will often turn on a multitude of subtle technical issues. A neutral, trained in these issues, is better equipped to decide, and should decide, such an issue when so much hangs in the balance. The possibility exists that an untrained judge might exclude a valid interview based on the testimony from an expert for the defense or that an untrained judge might admit into evidence an interview conducted suggestively. Part II of this Comment consists of background information and a historical overview of the problem of the suggestibility of children in the investigative setting. Part III details the psychological research in the area of suggestibility of children during interviews. Part III also sets forth real-world examples of the effects of suggestive questioning of children. Part IV provides an analysis of the various proposed solutions to the problem of suggestibility of children, including the response of psychological scholars and courts. Part V concludes that New Jersey's solution of taint hearings should be conducted by specially trained adjudicators. Part V also outlines the procedure that should be followed for the appointment of such an adjudicator.

27. Kenneth R. Feinberg, *What is Life Worth? The Unprecedented Effort to Compensate the Victims of 9/11*, Public Affairs (2005).

Abstract: As head of the 9/11 Victim Compensation Fund, Kenneth Feinberg was asked to do the impossible: calculate the dollar value of over 5,000 dead and injured as a result of the 9/11 terrorist attacks. Just days after September 11, 2001, Kenneth Feinberg was appointed to administer the federal 9/11 Victim Compensation Fund, a unique, unprecedented fund established by Congress to compensate families who lost a loved one on 9/11 and survivors who were physically injured in the attacks. Those who participated in the Fund were required to waive their right to sue the airlines involved in the attacks, as well as other potentially responsible entities. When the program was launched, many families criticized it as a brazen, tight-fisted attempt to protect the airlines from lawsuits. The Fund was also attacked as attempting to put insulting dollar values on the lives of lost loved ones. The families were in pain. And they were angry.

Over the course of the next three years, Feinberg spent almost all of his time meeting with the families, convincing them of the generosity and compassion of the program, and calculating appropriate awards for each and every claim. The Fund proved to be a dramatic success with over 97% of eligible families participating. It also provided important lessons for Feinberg, who became the filter, the arbitrator, and the target of family suffering. Feinberg learned about the enduring power of family grief, love, fear, faith, frustration, and courage. Most importantly, he learned that no check, no matter how large, could make the families and victims of 9/11 whole again. [Public Affairs - https:/www.law.upenn.edu/live/files/5012-feinberg-what-is-life-worth-151-191pdf

Kenneth R. Feinberg, *Creative Use of ADR: The Court-Appointed Special Settlement Master*, 59 ALB. L. REV. 881 (1996).

Lexis Abstract: ... In disputes involving protracted mass torts, such as asbestos, DES, and the Dalkon Shield, as well as in many environmental insurance coverage disputes, Neutrals can enter the fray and efficiently resolve trial-ready disputes by coordinating settlement negotiations using case values long recognized by the parties themselves. ... After each of the co-defendant companies and plaintiff class counsel argued their cases separately to the Neutral, all parties agreed to ask the court for its view concerning final settlement terms. ... In analyzing the role of court-appointed Special Settlement Neutral, it is useful to highlight other functions which are often overlooked once settlement is achieved. ... In mass tort litigation such as the "Agent Orange" and Dalkon Shield cases, resolution between plaintiffs and defendants is only the first step, and the serious obstacle of determining eligibility criteria for payment of limited amounts to a wide variety of plaintiffs claiming a wide-ranging series of illnesses and adverse medical conditions remains to be dealt with. ... Docket control requires innovative case management techniques and the court-appointed Special Settlement Neutral is one example of innovative use of limited judicial resources. [LexisNexis]

Citing References:

Elizabeth Berkowitz, The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund, 24 Yale L. &. Pol'y Rev. 1 (2006).

> From the article: As authorized by the [Air Transportation Safety and System Stabilization Act], the Neutral singlehandedly controls all operations of the Fund, wields broad power to create procedural and substantive rules, adjudicates claims exempt from judicial or administrative review, and manages an unlimited budget with no cap on expenditures. Congress failed to set bright-line rules, enunciate exclusionary definitions, or articulate a principled system of compensation. There is simply no "rationale, restraint, ethic or coherence" in the definition of awards, leaving the Neutral unilaterally responsible for filling in nearly every detail of the program.
>
> In certain respects, the power the Act entrusts to the Neutral is sensible. Significant judicial review or congressional oversight generally slows the process of compensation. Furthermore, a single individual, especially one with expertise like the Neutral, is better suited to issue appropriate awards through a uniformly administered compensation scheme and can promptly construct a reliable and efficient procedure providing more immediate closure to the victims. Notwithstanding these benefits, the role granted to the Neutral is highly problematic and represents a significant defect in the Act. The ATSSSA's Neutral is a powerful decision maker vested with unfettered discretion to craft and run the Fund. All of our traditions, constitutional, doctrinal, and otherwise, militate against such authority being concentrated in a single individual. Moreover, previous congressional experience with national compensation schemes warns against the vesting of such discretion in a single individual. "The September 11th Fund will remain controversial because the source of the definition of its awards-- however able and committed--is not in any sense democratic."
>
> More disconcerting is the effect the Fund might have on future policy. Some argue that because the Fund was a unique response to a national crisis of extraordinary

proportions, the Fund will not shape succeeding compensation schemes, and the role of the Neutral will not present a model for the future.

28. Kenneth R. Feinberg, *The Dalkon Shield Claimant Trusts*, 53 LAW & CONTEMP. PROB. 79 (1990).

Westlaw Abstract: The purpose of this article is to examine such methods of resolving mass tort litigation. It is intended as a road map of issues that must be considered in attempting an aggregate settlement of a mass tort litigation and in developing a viable, efficient administrative system for delivering compensation.

The remainder of the article is divided into three sections. The first section discusses the issues involved in attempting a comprehensive, aggregate settlement in the mass tort context. The second section examines the development of a mechanism for distributing funds to individual plaintiffs. The article concludes with a case history of the Dalkon Shield litigation, which provides an illustrative example of the issues involved in aggregating claims and of various options for distributing compensation through an administrative mechanism.
In each of these areas, the intent of this article is to raise the various issues that will arise in attempting an aggregate settlement of a mass tort controversy and, where appropriate, to offer some options that might be considered in addressing these issues. Although each case will present new and unique issues, it is hoped that this article will help guide parties who find themselves embroiled in such a controversy to a fair and effective resolution of the matter. [Westlaw]

29. Stuart P. Feldman, *Curbing the Recalcitrant Polluter: Post-Decree Judicial Agents in Environmental Litigation*, 18 B.C. ENVTL. AFF. L. REV. 809 (1991).

Lexis Abstract: The Court limited the sulphur content percentage permitted in defendant's waste fumes and specified the maximum allowable amount of emissions. ... Historically, the special master was a frequently employed agent of the equity courts. ... Traditionally, the neutral was the most benign of an equity court's agents. Appointed by nineteenth-century courts to relieve the judge of the courts' most routine duties, the special master originally performed clerical functions. ... Judge La Buy had appointed a neutral to make both factual determinations and conclusions of law in resolving two antitrust actions. ... Another plaintiff, a citizens' action committee, requested that a neutral examine the factual circumstances surrounding the defendant's admittedly noncompliant activities. ... By its terms, Rule 53 allowed a reference to a special master in an "exceptional condition." ... [LexisNexis]

Citing References:

United States v. Alisal Water Corp., 326 F. Supp. 2d 1010, 2002 U.S. Dist. LEXIS 27504 (N.D. Cal. 2002).

Lexis Overview: The court found that the adjudicated violations were serious and included falsification of records designed to protect public health under 42 U.S.C.S. § 300g-3(b), and that defendants had a decade long history of such violations. The court

further observed that defendants had adopted an inordinately combative stance against legitimate regulatory oversight and had repeatedly failed to accept responsibility for their conduct, seeking to shift blame to others including the regulators themselves. Specifically, the court found that defendants not only failed to monitor and report results of water samples, but also reported numerous false results, at best with gross negligence and at worst with conscious intent to deceive. The court added that defendants lacked the managerial competence to operate compliant drinking water systems and lacked access to the significant financial resources to operate compliant drinking water systems. Accordingly, the court found that the usual remedies were inadequate and that imposition of an equitable receivership was necessary to manage defendants' water systems consistent with the objective of providing maximum feasible protection of the public health.

Charles M. Haar, The 1991 Bellagio Conference on U.S.-U.S.S.R. Environmental Protection Institution: Boston Harbor: A Case Study, 19 B.C. Envtl. Aff. L. Rev. 641 (1992).

Lexis Summary: These conditions have made it harder than ever to develop and implement solutions for the widespread environmental degradation that is one of the most enduring legacies of the Soviet state. ... The Boston Harbor litigation was unusual even in the United States and is of interest chiefly for its innovative use of a neutral. ... THE POLLUTION OF BOSTON HARBOR: HISTORY AND LITIGATION ... Nonetheless, for years the agencies responsible for environmental protection in Massachusetts failed to take effective action to address this pollution. ... Some Soviet environmental law experts have recognized that the introduction of citizen suit provisions and a judicial system capable of responding meaningfully to such suits is a necessity for the continued development of environmental protection in the new republics. ... In determining the causes of the pollution in Boston Harbor and the measures necessary to alleviate it and then preparing his report, the neutral consulted many scientific and other experts. ... The case demonstrates that the courts cannot replace the legislature in dealing with environmental protection, nor should they, but that problems such as the Boston Harbor, which require complex and long-term solutions, can benefit from the courts and the legislature working together. ... Even now, the problems of the pollution of Boston Harbor are far from solved...

Elizabeth F. Mason, Comment: Contribution, Contribution Protection, and Nonsettlor Liability Under Cercla: Following Laskin’s Lead, 19 B.C. Envtl. Aff. L. Rev. 73 (1991).

Lexis Summary: In reality, courts using the comparative fault approach in CERCLA cases have not first allocated PRP fault according to proportional share of the harm, then imposed joint and several liability, and then allowed contribution actions based on the court's initial allocation of fault. ... The EPA incorporated the UCATA approach into its 1985 settlement policy in order to enable the government to settle with some of the PRPs at a site and then pursue the nonsettling PRPs for the balance of the cleanup costs, even if that amount exceeded the nonsettlors' "fair share" of the cleanup costs. ... Second, according to the Rohm & Haas court, the UCFA approach is inconsistent with SARA's goals of minimizing litigation and promoting voluntary settlements.

Jason Feingold, Comment: The Case for Imposing Equitable Receiverships Upon Recalcitrant Polluters, 12 UCLA J. Envtl. L. & Pol'y 207 (1993).

> Lexis Summary: As a result of the attorney general's actions, the widget factory pays a substantial fine and pledges to bring its facility into compliance with the terms of its pollution discharge permit. ... In Langdell, the attorney general secures environmental compliance without threatening the viability of the defendant's enterprise. ... The authority of a court of equity to impose a remedial receivership on a recalcitrant polluter is "founded in the broad range of equitable powers available to [a] court to enforce and effectuate its orders and judgements." ... The importance to the community of preserving the enterprise can also be characterized as supporting the advisability of imposing receivership, since persistent noncompliance is likely to inflict severe harm on the defendant in the form of cumulative environmental fines, contempt penalties, and civil judgements. ... However, if environmental receivership is viewed as primarily a remedial, rather than punitive, measure, the goal of achieving environmental compliance will be well served by imposing receivership in cases lacking bad faith, if the defendant exhibits persistent inability to comply with the law. ... Another tactic for avoiding losses during the receivership is to restrict the receiver's powers to only those aspects of the enterprise which affect environmental compliance.

Michael B. Gerrard et al., 2-7 Environmental Impact Review in New York §7.17 (2008)(No abstract available).

30. **Mark A. Fellows & Roger S. Haydock, *Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation*, 31 WM. MITCHELL L. REV. 1269 (2005), *available at* https://www.courtappointedneutrals.org/ACAN/assets/file/public/articles/FellowsHaydock.pdf**

Lexis Abstract: The need for their services will continue to increase, making neutral appointments more common and important in the years ahead. ... " Courts provided a strict interpretation of exceptional conditions, making it clear that neither the congestion of the court docket nor the complexity of the litigated issues were sufficient to justify a neutral appointment. ... As a response, the revised rule delineates three specific roles to be filled by a neutral appointment: pre-trial neutrals, post-trial neutrals, and consent neutrals. ... Even in the era of the restrictive La Buy exceptional condition standard for neutral appointments, reference of the management and supervision of discovery in complex cases was relatively uncontroversial. ... It is clear that the order of appointment should prescribe ex parte communication guidelines for the settlement neutral that both facilitate settlement processes and preserve an unbiased forum for judicial dispute resolution. ... Such guidelines would alert judges, parties and neutrals to possible future conflict situations and help judges prescribe appropriate ex parte communications rules in neutral appointment orders. ... Support staff reductions above a certain level clearly could reduce judicial capacity to handle increased caseloads - especially complex cases with a large load of filings. [LexisNexis]

Citing References:

Jeffrey W. Stempel, F. Hodge O'Neal Corporate and Securities Law Symposium: Mutual Funds, Hedge Funds, and Institutional Investors: Class Actions and Limited Vision: Opportunities for Improvement Through a More Functional Approach to Class Treatment of Disputes, 83 Wash. U. L. Q. 1127 (2005)

> From the article: The type of hearing neutral use I advocate has been common as part of class action or mass tort settlements. Agent Orange, asbestos, discrimination, and securities claims all provide examples. In my view, this approach has worked well, so well that we should not insist on settlement as a prerequisite to such use of judicial adjuncts to make preliminary fact finding on individual damages questions within a class. To be sure, incorporation of this approach in a settlement has certain advantages because the parties can agree to be bound by the neutral's findings, thereby eliminating the additional cost and uncertainty of de novo challenge to the neutral's work. But if the neutral-managed damages processing is done well, de novo challenges (or at least de novo challenges that are taken very far) should be relatively few in number. This appears to have been the experience with court annexed arbitration, where litigants appear either to accept their awards or to file for de novo trial only to have some negotiating leverage, eventually resolving the matter well short of trial.

31. David Ferleger, ***Neutrals in Complex Litigation & Amended Rule 53*** **(2005),** ***available at*** **https://www.courtappointedneutrals.org/ACAN/assets/file/public/articles/Ferleger.pdf**

Abstract: This article is in three parts, the first two of which appear here. Part 1 reviews the functions of neutrals in complex and structural litigation, including extensive citation resources intended to assist practitioners and courts. Part 2 details the new landscape established by the 2003 revision to Federal Rule of Civil Procedure 53. Part 3 will focus on challenging questions which arise when courts utilize neutrals such as overlap of the neutral role with the expert witness role, whether neutrals may be called as witnesses, ex parte communication between neutrals and the court or parties.

32. David Ferleger, *Neutrals in Disability Litigation & Amended Rule 53*, 29 MENTAL & Physical DISABILITY L. REP. 157 (American Bar Association 2005).

In the past 25 years, many court orders enforcing the rights of people with physical and mental disabilities have been managed for courts by judicial adjuncts who, in the federal system, are typically special masters appointed by the responsible court. These include cases involving such issues as community placements from institutions,[1] special education,[2] early childhood screening,[3] annuities,[4] prison mental health care,[5] hospital barrier removal,[6] housing access,[7] and employment.[8]

Disability litigation often results in "structural injunctions,"[9] which are highly complex; require development of multiple plans and establishment of policies, procedures, and safeguards; and typically necessitate mid-course refinements. Such litigation may involve years of active post-judgment oversight by the court. Sometimes, defendant government officials "succumb to political pressures to shirk their constitutional responsibilities."[10] Commitments in consent decrees or court-approved plans may not be met. Individual cases may also involve sufficiently diverse tasks to be appropriate for use of a master to conserve judicial resources.

Courts typically do not have the time or expertise to oversee decrees without the assistance of an adjunct. For vulnerable people with disabilities, it is often a matter of some urgency when they turn to the court for relief under existing injunctions. In such situations, a master's availability may be essential to affording adequate and timely relief. As one court observed, "time is of the essence with these motions. When the physical or emotional health and safety of a [disabled] child is threatened, the matter cannot wait for the Court's calendar to clear."[11]

This article describes the variety of functions that masters perform and explains the major changes wrought by the recent amendment to the federal rule on masters. The extensive endnotes may serve as a resource for courts and counsel considering the use of masters.

[Hein Online – http://www.heinonline.org.proxy.wmitchell.edu/HOL/Page?handle=hein.journals/menphydis29&id=1&size=2&collection=journals&index=journals/menphydis]

33. Clayton Gillette, *Appointing Special Masters to Evaluate the Suggestiveness of a Child-Witness Interview: A Simple Solution to a Complex Problem*, 49 ST. LOUIS. U. L.J. 499 (2005).

Abstract: ... While this may be a "cute" phenomenon among children in everyday life, it is certainly not "cute" when the child is a witness to a serious crime or is alleged to be a witness to a serious crime. ... However, it would be virtually impossible to eliminate the researcher's and child's awareness of the reason for the encounter. ... There are obviously extremes on either side of the false positive/false negative argument. ... The Supreme Court of New Jersey addressed the issue of whether or not a particular interview (or battery of interviews) of a child (or children) was suggestive in Michaels, holding that a pretrial taint hearing should be conducted wherein the trial court can make a ruling on the suggestiveness of the interview and

thereby decide if the transcript of the interview (and other evidence of the interview) should be excluded from trial and even if the child should be excluded from testifying at trial. ... " The Court based this decision to exclude, in part, on the suggestive interview techniques used by the interviewer. ... Appointment of a court-appointed expert will lead to undue delay during a taint hearing because the expert will need to take the time to educate a judge on the issues, while a neutral could simply decide the issues based on the technical knowledge already possessed by the neutral. ... [MLV: LexisNexis]

Citing References:

Gregory M. Bassi, Comment: Invasive, Inconclusive, and Unnecessary: Precluding the Use of Court Ordered Psychological Examinations in Child Sexual Abuse Cases, 102 Nw. U.L. Rev. 1441 (2002).

> Lexis Summary: ... Before we can answer this question, we must examine the legal history of compelled psychological examinations, the empirical research regarding the effectiveness of children as witnesses, and the role of mental health experts in child sexual abuse cases. ... Osgood, the Supreme Court of South Dakota listed a series of factors: 1 The victim's age; 2 the nature of the examination requested and whether it might further traumatize the victim; 3 whether the prosecution employed a similar expert; 4 whether the evidence already available to the defendant suffices for the purpose sought in the examination; 5 whether there is a reasonable basis for believing that the child's mental or emotional state may have affected the child's veracity; 6 whether evidence of the crime has little or no corroboration beyond the testimony of the victim; 7 whether there is other evidence available for the defendant's use; and 8 whether the child will testify live at the trial. ... Bruck and Ceci's amicus brief used the extreme facts of the investigation in Michaels's case to highlight weaknesses in the reliability of child victim witnesses. ... In addition to evidence of previous false allegations, the defendant may also impeach the credibility of the witness by providing the jury with existing records of the victim's previous medical and psychological examinations, supplemented by expert testimony to explain their contents. ... Such a special standard for child victims of sex crimes places those victims in a significantly subordinate legal position to victims of other crimes. ... In sum, a categorical ban on compelled psychological examinations of complainant witnesses in child sex abuse cases would give effect to strong public policies that favor victims' welfare and rights. ... Abbott and Nobrega exemplify the divide among jurisdictions regarding how to balance the victim's welfare and right to be free of burdensome discovery techniques against the defendant's right to a fair trial.

Tamar R. Birckhead, The Age of the Child: Interrogating Juveniles After Roper v. Simmons, 65 Wash & Lee L. Rev. 385 (2008).

> Lexis Summary: ... It explains how Simmons can inform a new approach by both law enforcement and the courts to the questioning of juvenile suspects, one that is consistent with what recent studies have revealed about the ways in which adolescent’s experience interrogation and is also consistent with the law's approach to the questioning of minors who are witnesses or alleged victims of crime. ... That Kennedy began the opinion by

recounting the rather harrowing facts of the murder of Shirley Crook speaks to the question of whether capital jurors should have the discretion to decide which juvenile offenders should be executed as well as to the matter of the proper weight that a defendant's youth should be given in the death penalty calculus. ... In order to demonstrate Simmons's applicability to the questioning of adolescent suspects, it is necessary first to explain how interviewer bias combines with the Reid Technique, the widely utilized interrogation strategy of police investigators, to produce statements from suspects that are false or inaccurate. ... Simmons for why juveniles could not be classified among the worst offenders in the context of capital punishment also serve to explain, at least in part, why children and adolescents are particularly vulnerable in the context of interrogation. ... Alvarado: Privileging "Objective" Standards Pre-Simmons As discussed in Part II, one of the most significant aspects of Justice Kennedy's opinion in Roper v. ... Relying on past precedent-from cases in which the suspects were adults, not juveniles-Kennedy found that seventeen-year-old Michael Alvarado was not in custody when he confessed to the murder of a truck driver after two hours of interrogation without Miranda warnings.

34. Ronald J. Hedges, *Discovery of Digital Information*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. 2005(No abstract available).

35. Ronald J. Hedges, *Complex Case Management*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. (2005) (No abstract available).

36. Ronald J. Hedges, *Mediation Developments and Trends*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. (2005) (No abstract available).

37. Ronald J. Hedges, *Punitive Damages*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. (2005) (No abstract available).

38. Lonny S. Hoffman, *November 2005 Caselaw Update (to Problems in Federal Forum Selection and Concurrent Federal State Jurisdiction*), ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. (2005) (No abstract available).

39. Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L. J. 1265.

Abstract from Lexis: ... The defendants have been such governmental bodies as school systems, prison officials, welfare administrations, mental hospital officials, and public housing authorities. ... The decree that purports to reform a public institution often injects the courts into the public budgeting process. ... In institutional reform cases, the operational meaning of the American equity tradition is to legitimize detailed affirmative decrees having a

long life, in the name of insuring that equity does not suffer a wrong without a remedy. ... Underlying these developments is a growing recognition that institutional reform litigation has requirements different from those of earlier, more conventional, if protracted, litigation, requirements that justify extraordinary procedural flexibility. ... Just as institutional reform litigation comprises a small but highly significant minority of cases on the federal docket, so judges who have engaged in attempts to supervise organizational change comprise only an important minority of all federal judges. ... Institutional reform litigation may be different, and it may be difficult, but it is not impossible. ... The assumptions carried by the traditional model into institutional reform litigation are easily stated. ... Among the more common devices is appointment of a neutral, a monitor, a review committee, or, in more extreme cases, a receiver to take over administration of the agency. ... In a Rhode Island prison case, a neutral was empowered to monitor compliance with the decree.

Citing References:

Chris H. Miller, The Adaptive American Judiciary: From Classical Adjudication to Class Action Litigation, 72 Alb. L. Rev. 117 (2009).

> Lexis Abstract: Unless the expected return from the classed mass tort claims, net of the costs of litigating ... exceeds the return expected from competing sporadic claims, plaintiff attorneys would admit the sporadic and exclude the mass tort claims from the system... Indeed, nearly all legal models have normative underpinnings and their authors frequently articulate normative reactions and prescriptive suggestions to those models. ... They also accounted for important changes by revising inherited models to more accurately reflect contemporary features of the legal system and provide an adequate framework for understanding and describing legal issues and processes... Also, although Chayes briefly gestures at "outsiders" as a common feature of public law litigation, for Horowitz, Federal Rule 53's provision of a neutral is "the most significant procedural device" recently applied by the courts. ... At any rate, the underlying similar, and at times identical, features of the two models describe essentially the same transitional phenomenon - the judicial movement from adjudication of private disputes to ongoing and widespread relief of government entitlement failures. ... In this respect, legal scholars have probably overstated the degree of difference present in the transition from Chayes' public law litigation to Horowitz and Resnik's managerial litigation. ... Other critics challenge alternative forms of adjudication on grounds that they violate the constitutional separation-of-powers doctrine and argue that judicial policymaking encroaches on the policymaking responsibilities of the legislature.

40. Johnson, *Equitable Remedies: An Analysis of Judicial Neoreceiverships to Implement Large Scale Institutional Change*, 1976 WIS. L. REV. 1161 (1976).

This comment deals with the problems posed by recent applications of neoreceiverships. Because current use of receiverships involves substantial shifts from earlier applications, the law of receivership is best understood developmentally. Thus, this comment traces the development of receivership law through three major phases. Initially, receivers were used to protect private property for the benefit of one party to the litigation: for example, the creditor or the trustee.[11] Section Two of this comment[12] illustrates the use of receiverships to protect private property and outlines the particular equitable characteristics which made the remedy functional. Second, receivership was used to protect private property interests where such protection was essential to preserve the public welfare: for example, in railroad reorganization[13] and in municipal default.[14] Section Three of the comment[15] illustrates that the American experience with use of receiverships to preserve the public welfare has centered on two specific equitable characteristics of the remedy: its inherent flexibility and its coercive potential. The final phase of receivership development involves abandonment of the protection of property interest as a requirement for using equitable powers and extends receiverships to protection of constitutional rights of private individuals. Section Four of the comment[16] discusses the expansion of the traditional receivership concept to include protection of nonproperty rights and argues for the legitimacy of such expansion. Section Five[17] addresses further the problems surrounding the current application of neoreceiverships, focusing on implementation procedure, remedial propriety, receivership duties, and other related problems. This section illustrates that the remedy is favored where extraordinary circumstances exist and where remedial adaptation to these conditions is essential because other forms of relief are impractical, unavailable, or unsuccessful. Furthermore, this remedy is favored where control of a local institution is mandated, requiring specific administrative and supervisory skills in order to effectuate internal organizational change, or where judicial coercion is essential to accomplish a particular result.

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11. SMITH, *supra* note 3, at § 4(a)-(d).
12. *See* text accompanying notes 18-45 *infra*.
13. See T. FINLETTER, PRINCIPLES OF CORPORATE REORGANIZATION IN BANKRUPTCY (1937) [hereinafter cited as FINLETTER] for a general history of corporate reorganization; *see also* Rosenberg, *Reorganization—The Next Step*, 22 COLUM. L. REV. 14 (1922); Glenn, *The Basis of the Federal Receivership*, 25 COLUM. L. REV. 434 (1925); Finletter, *Federal Consent Receiverships*, 15 PA. B. ASS'N. Q. 1 (1933); Note, *Equity Jurisdiction in the United States Courts with Reference to Consent Receiverships*, 19 IOWA L. REV. 540 (1934); MOORE, FEDERAL PRACTICE § 66.06[2], for specific applications to railroads.
14. See C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES VOL. VI: RECONSTRUCTION AND REUNION 1864-88 chs. 12, 13 (P. Freund ed. 1971) for a detailed history of federal court involvement in municipal bond disputes.
15. *See* text accompanying notes 46-90 *infra*.
16. *See* text accompanying notes 91-207 *infra*.
17. *See* text accompanying notes 208-74 *infra*.

41. Frank. M. Johnson, Jr., *The Role of the Federal Courts in Institutional Litigation*, 32 ALA. L. REV. 271 (1981)(No abstract available).

42. Lynn Jokela & David F. Herr, *Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool*, 31 WM. MITCHELL L. REV. 1299 (2005), *available at* http://www.courtappointedneutrals.org/resource_articles.asp.

Abstract: This article examines the role neutrals have played in litigation and explores the benefits that might be obtained from the greater use of neutrals in the future. The FJC survey of federal judges appointing neutrals concluded that neutrals were "extremely or very effective." The FJC study is an empirical survey of the effectiveness of neutrals, and it includes commentary from judges regarding their experience after appointing neutrals. These benefits include better, faster, and fairer resolution of litigation in the cases in which neutrals are used, as well as an easing of the burdens these cases place on the judiciary. This article also analyzes the barriers to the use of neutrals and how they might be removed.

Citing References:

Scott Paetty, Complex Litigation in California and Beyond: Classless not Clueless: A Comparison of Case Management Mechanisms for Non-Class-Based Complex Litigation in California and Federal Courts, 41 Loy. L.A. L. Rev. 845 (2008).

> Lexis Abstract: Ultimately, the flexibility of federal summary judgment procedures, which allow judges to dispense with individual issues in a cause of action, better serves the principles of effective case management than CCCS summary judgment procedures, which only permit summary judgment on entire causes of action. ... For example, the Northridge Earthquake litigation highlighted the CCCS's successful resolution of thousands of insurance claims brought in the wake of the 1994 disaster. ... Given the inherent complexity of cases in the CCCS, the need to "get it right" in the initial determination of coordination is of paramount importance. ... While the use of neutrals has not disappeared, CCCS judges tend to limit them to provisionally complex cases or construction defect actions where complicated discovery issues necessitate special care... This Part provides a brief overview of the different definitions of consolidation, describes the various rules that govern consolidation in the CCCS and the federal courts, and shows the ways that coordination and consolidation blend when discussing complex case management... CCCS judges can dispense with the actions by settlement, dismissal with prejudice, summary judgment, judgment after trial, or remand of individual cases to their original courts.... After pretrial proceedings are concluded, however, the transferee judge sends the case back to the MDL Panel for remand to the court from which it was first transferred.... If our hypothetical case were filed in the CCCS, the judge could order counsel for Joe Writer and BYDA to propose jury instructions on an element of the cause of action two weeks into proceedings.

43. Irving R. Kaufman, *Neutrals in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452 (1958) (No abstract available).

44. Ron Kilgard, Discovery Neutrals: When They Help – and When They Don't, 40 ARIZ. ATT'Y 30 (2004).

Abstract: The use of discovery neutrals in civil cases is a practice, like mediation, that has grown gradually, not because of any top-down directive from the judiciary or the legislature, but because of the necessities of actual cases. Like mediation 10 years ago, discovery neutrals are largely unregulated by rule or statute: The current rule on neutrals, Rule 53, has nothing to say about discovery neutrals. And discovery neutrals are the subject of few cases. This article takes a look at these neglected creatures.

45. David I. Levine, *Calculating Fees of Special Masters*, 37 HASTINGS L. J. 141 (1985).

Lexis Abstract: ... The Article discusses four standards that federal courts have recently considered for setting neutrals' fees: First, unbounded discretion of the trial court; second, application of a test, developed by the Supreme Court of the United States in 1922, that compensation should be "liberal but not exorbitant"; third, basing the fee on one-half of the prevailing rates for commercial attorneys; and fourth, basing the fee on some variation of the lodestar method of setting attorney's fees. ... Retiring neutrals collaborated with the Lord Chancellor, who actually made the appointments, to obtain payments from the new neutral in exchange for the appointment. ... Calculating Neutrals' Fees for Work Done as a Neutral From the preceding discussion, four different approaches to the problem of calculating neutrals' fees can be discerned, particularly in the institutional reform setting: first, unbounded discretion of the trial court; second, application of a test, developed by the Supreme Court in Newton, that compensation should be "liberal but not exorbitant"; third, the Hart/Reed II & IV method of basing the fee on one-half of the prevailing rates for commercial attorneys; and fourth, the Reed III approach of basing the fee on some variation of the lodestar method of setting attorney's fees. ... Thus, an academic institution does not expect a professor to perform outside work that will generate income for the institution; the institution encourages and supports faculty public service endeavors by a variety of services and overhead expenses, such as office space, secretarial and student research assistance, library books, stationery, and telephone service. ... It is not clear, however, if all of these modified Johnson factors should apply to a neutral who is compensated using a lodestar rate. [LexisNexis]

Citing References:

Jackson v. Nassau County Bd. Of Supervisors, 157 F.R.D. 612 (E.D.N.Y. 1994).

> The court considered Fed. R. Civ. P. 53(a) and the award of attorney fees determined by the lodestar method and other methods. The court found that a computer print-out delineating the time charges submitted by the neutral adequately set forth the amount of time spent by the neutral and certain attorneys working on this case. The only specific dollar objections by the county that the court found valid were the arithmetic errors in the tabulation of daily time records, which amounted to an overcharge of 3.75 hours in the sum of $ 937.50, a specific entry for 2.75 hours of work, in the sum of $ 269.50, that did not describe what was performed during that time, and the time charged for time spent at meals. The court excluded the time and costs of meals. Further, the rates charged for the

work of summer interns, paralegals and other support staff were excessive. The court rejected the county's objections regarding the fees and disbursements of a doctor. Because of the nature of the case, namely, one involving public institutional relief and service to the public, a twenty-five percent reduction of the neutral's fee application was appropriate.

Cordoza v. Pac. States Steel Corp., 320 F.3d 989 (9th Cir. 2003).

Lexis Overview: The appellate court lacked jurisdiction to consider the appeal because even though the neutral had a right to appeal a district court order setting his compensation, the district court orders at issue were not final judgments under 28 U.S.C.S. § 1291. The district court's orders disqualifying the neutral and ordering disgorgement were intertwined with the corpus of the litigation in that they determined what share of an existing pool of money went to the neutral and what share went to the plaintiffs in the underlying litigation. Although the compensation issue was important to the neutral, the interest was not weightier than the societal interest in a final judgment in the underlying litigation. Treating the request as a mandamus petition, the neutral was not entitled to relief as the trial judge had not abused discretion in entering the orders. Mandamus was also not warranted under 28 U.S.C.S. § 455 because the trial judge's evaluation of the neutral's performance of duties was part and parcel of supervisory duties and the receipt of limited information ex parte was done in order to preserve the integrity of the judicial process.

LeRoy L. Kondo, Untangling the Tangled Web: Federal Court Reform Through Specialization for Internet Law and Other High Technology Cases, 2002 UCLA J.L. & Tech. 1 (2002).

Lexis Summary: Topics for discussion include (1) the specialist/generalist court debate over increased specialization within the judiciary; (2) the effects of specialization within the federal court system on uniformity, determinacy, accuracy, precision, and predictability of judgment--with particular focus placed upon the Federal Circuit, a stabilizing semi-specialized tribunal; (3) criticisms of the Federal Circuit and federal courts for indeterminacy due to "panel dependency," doctrinal vagueness in claim interpretation, and inexperienced lay jury panels; (4) the impact of specialization in prevention of forum shopping through the uniformity of nationwide application of intellectual property law; (5) judicial efficiency and economy resulting from specialization in attempts to relieve the crisis in volume plaguing the federal courts; and (6) the effects of a more specialized judiciary on the protection of American business interests, promotion of research and development, with discussion of countervailing policy considerations. ... The Federal Circuit's Impact On Patent Law Policy Transformation And The CAFC's Role In Protection Of United States' Business Interests Notwithstanding its lack of specific expertise, the Federal Circuit has significantly advanced the delineation of patent law doctrine over the past three decades, due, at least in part, to its semi-specialized jurisdiction and focus. ... ICANN effectively utilizes its authority and URDP policies to resolve domain name disputes at low cost and within a short two-month time frame. ... Since federal courts have historically deployed primarily

generalist judges, and since specialized judges have primarily resided in state courts (e.g., family court, drug court) having lower status and compensation, specialization has been unfairly stigmatized as being inferior. ... Thus, specialized judges, with technical training and calendars dedicated to intellectual property matters, would possess both the ability and time to become "expert judges" in the intricacies, nuances and subtleties of complex areas of law. ... Lack of uniformity of application of patent laws historically led to rampant forum shopping, with bitterly fought battles in the circuits over patent infringement cases. ... § 1835, experts under Rule 706, and neutrals under Rule 53 to permit greater comprehension of complex technical/legal issues; (2) the Federal Circuit's own use of technical advisors in its appellate review of PTO and District Court decisions; (3) recommended court reform thorough increased use of specialist judges and adjudicators in the Federal Circuit, PTO, and federal district courts; (4) establishment of specialized divisions within the Federal Circuit, PTO, or District court; (5) the deployment of professional or educated "blue ribbon" juries in the resolution of complex issues of fact, with discussion of the shortcomings of the existing lay jury system in high technology cases; and (6) establishment of federal high technology judicial or administrative courts. ... Rich, the "elder statesman of the patent bar" recently died, Richard Linn, a former patent attorney from Foley & Lardner, replaced him as the newest appointment to the twelve-member Federal Circuit. ... Another progressive specialization proposal would be to establish the Federal Circuit as an entirely specialized high technology court staffed by panels of specialized adjudicators, attorneys and juries that would hear cases involving their respective fields of specialization, such as biotechnology, engineering, telecommunications, computer science, business methods, and Internet law. ... However, high technology proponents, such as those in Internet and other newly evolving arenas, may look optimistically towards increased specialization in the federal courts and in international forums as a means for solving the complexity problem--at least in part.

46. David I. Levine, *The Authority for the Appointment of Remedial Special Masters in Federal Institutional Reform Litigation: The History Reconsidered*, 17 U.C. DAVIS L. REV. 753 (1984).

The issues in the debate over the authority to appoint remedial special masters can be briefly summarized. First, does rule 53, with its prominent references to trial-stage appointments of special masters, give courts that have already decided upon the liability of the defendants authority to appoint special masters to perform complex tasks up to and including running a state institution such as a prison or a mental hospital? Second, does rule 70, with its language referring to the appointment of "some other person" to perform specific acts on behalf of a party, authorize courts to appoint remedial special masters to perform complex tasks? The term "master" does not even appear in the rule, and the rule expressly mentions only limited tasks such as conveyances of property. Finally, do courts have inherent power to appoint remedial special masters and, if so, what is the relationship between that power and these two rules, which may fully regulate those appointments?

This Article discusses the ongoing controversy over the adequacy of these sources of authority, which federal courts have used to appoint special masters to assist in the development and implementation of institutional reform decrees.[10] Each source of authority will be discussed in light of an important but largely unknown and unpublished primary source concerning the intent of the original Advisory Committee on Rules for Civil Procedure, the drafters of the Federal Rules of Civil Procedure.[11] This source is the extensive collection of papers maintained by Charles E. Clark, then Dean of the Yale Law School and Reporter for the original Advisory Committee. To understand fully the intent of the drafters, which was to preserve existing tradition and practice, this Article then discusses, in the context of rules 53 and 70, the use of special masters for remedial purposes in the period prior to the promulgation in 1938 of the Federal Rules of Civil Procedure.[12] This Article draws the implications of this history for the appointment of remedial special masters in modern institutional reform cases.[13] Finally, to preserve expressly the clear intent of the drafters, this Article proposes some clarifying amendments to rules 53 and 70 to confirm the authority of the courts under the federal rules to appoint remedial special masters.[14]

Diagnostic Clinic, Inc. v. Instromedix, Inc., 725 F.2d 537 (9th Cir. 1984) (en banc); Wharton-Thomas v. United States, 721 F.2d 922 (3d Cir. 1983).

[10] *See infra* text accompanying notes 15-43, 107-15.

[11] *See infra* text accompanying notes 63-89, 116-30.

[12] *See infra* text accompanying notes 94-106, 131-38.

[13] *See infra* text accompanying notes 198-242.

[HeinOnline (Right from the Text)]

Citing References:

Vikramaditya Khanna & Timothy L. Dickinson, The Corporate Monitor: The New Corporate Czar?, 105 Mich. L. Rev. 1713 (2007).

> Lexis Summary: Following the recent spate of corporate scandals, government enforcement authorities have increasingly relied upon corporate monitors to help ensure law compliance and reduce the number of future violations. ... The corporate monitor of today can be traced to the neutrals of the past... As these enforcement methods developed, regulators began to experiment with various types of settlements leading to the landmark 1994 Prudential Securities case in which the government provided for the first modern appointment of an independent expert whose role was to monitor compliance of the

company as per a DPA. ... Monitors often have more expertise than management on compliance matters (indeed, this is an important raison d'etre for a monitor), and this results in benefits for the firm to balance against the costs of a monitor. ... A large cash fine could induce a firm to hire an expert to consult on compliance issues (like a monitor), thereby reducing wrongdoing and avoiding the large cash fines. ... However, for recidivist corporations, the monitor-advisor may be less valuable than the influential monitor... Reliance on fiduciary duty places courts as the monitor of monitors, whereas agency monitoring places the agency as the monitor of monitors.

47. Michael K. Lewis, *The Special Master as Mediator*, 12 SETON-HALL LEGIS. J. 75 (1988).

THE SPECIAL MASTER AS MEDIATOR

Michael K. Lewis

Introduction

Courts have increasingly begun to use special masters to aid in the implementation of complex institutional reform orders or consent decrees as well as to aid in the settlement process. The use of special masters in either circumstance raises significant questions. This paper discusses some of those questions and focuses on those issues peculiar to the special master as mediator.

[HeinOnline (Right from Text)]

48. Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867 (2000).

Lexis Abstract: In the national mass tort context, "cooperation" has more often been a euphemism for a case management strategy of aggregating and centralizing litigation and encouraging state trial judges to defer to a federal multidistrict transferee judge in resolving litigation. ... These efforts have focused upon the problems of excessive transaction costs, delayed access to courts, lack of horizontal equity in outcomes, and the overall challenges to the legitimacy of the judicial process in the resolution of mass torts. ... The institutional cooperative strategy is thus a hybrid approach, attempting to accentuate the strengths of the case-by-case model of litigation and federalism, while minimizing the model's inefficiencies and inequities. ... Finally, there is a small group of law firms capable of pursuing any strategy - boutique, class action, or wholesale - depending upon the opportunities presented by each mass tort. ... If the MDL panel made it explicit that the transferee judge is not to engage in aggregation other than discovery until the mass tort matured in the marketplace of state court litigation, there would still be some duplicative discovery. ... A strategy of cooperation at the institutional level - taking advantage of the state courts to create a marketplace of litigation and the federal courts to coordinate discovery and promote a national settlement - can create otherwise unobtainable joint gains.

From Article's Introduction: "Judges are now players in the mass tort game. Whatever approach any judge takes in managing a mass tort, judicial input is a critical factor in the ultimate progress of the litigation. To certify or not to certify, for example, is a question that must be answered with profound results for the outcome of the mass tort. Recognizing the role

of judges, recent legal literature has suggested that the ubiquity and massness of the tort should lead to cooperation among judges. Through cooperation, judges can promote efficiency and horizontal equity in the adjudication.

"Cooperation" among judges has been promoted in multiple and often confusing forms; "cooperation" has varyingly meant communication, coordination, collaboration, or cooperation in the negotiation sense of seeking joint gains. In the national mass tort context, "cooperation" has more often been a euphemism for a case management strategy of aggregating and centralizing litigation and encouraging state trial judges to defer to a federal multidistrict transferee judge in resolving litigation. This strategy has critical weaknesses that limit its ultimate value. It has behavioral, structural, and political impediments; it can conflict with an appreciation of the maturity and elasticity of mass torts, and it may run contrary to recent Supreme Court jurisprudence. There is an alternative cooperative strategy that has significantly more potential for benefiting judges, litigants, and the legal system as a whole. The alternative strategy can be implemented de jure or de facto and focuses at the institutional, rather than individual, level and suggests complimentary, rather than competing, roles for state and federal courts.

Citing References:

Beko Reblitz-Richardson, Lockheed Martin and California's Limits on Class Treatment for Medical Monitoring Claims, 31 Ecology L.Q. 615 (2004).

> From the article: In Lockheed Martin, the court considered class certification for individuals seeking medical monitoring damages based on exposure to harmful chemicals in their local water source... This Note focuses on the question of whether or not medical monitoring claims, and more specifically the chemical exposure claims at issue in Lockheed Martin, are suitable for class treatment. ... In Lockheed Martin, the court not only considered class certification for medical monitoring claims, but did so with environmental pollution claims... A medical monitoring program nonetheless places certain burdens on the court. For example, a court implementing a medical monitoring program will need to appoint a commission or a neutral to determine who is covered, how payments should be made, and the scope of the program. Monitoring programs require an ongoing involvement by the court in the administration of the fund, a level of judicial involvement distinct from traditional models of compensation. In response to these considerations, different jurisdictions have embraced or rejected such medical monitoring claims.

49. Gregory P. Miller, *How to Develop a Special Master Practice*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. (2005) (No abstract available).

50. Vincent M. Nathan, *The Use of Neutrals in Institutional Reform Litigation*, 10 U. TOL.L.REV. 419 (1979).

The purpose of this article is to explore the developing use of masters by federal courts in institutional reform litigation. It commences with a review of the sources of authority for the appointment of such an agent. While it is generally recognized that masters may be appointed pursuant to the provisions of Rule 53 of the Federal Rules of Civil Procedure, one of the theses of this article is that this rule is not the sole source of the appointing court's authority; nor are all functions assigned to masters contemplated by Rule 53. Indeed, it will be urged that such appointments may be made under Rule 70 of the Federal Rules of Civil Procedure, in accordance with the Federal Magistrates Act, and, in spite of the adoption of Rule 53, through the exercise of the inherent power that resides in federal courts. The author then will move to a consideration of the authority and precedent for the appointment of a master in the specific context of institutional litigation. Within this setting, the advantages and disadvantages of a reference, the objectives of the court in appointing a master, and issues relating to the selection of such an agent, his powers, and the ethical and professional constraints upon his activities will be discussed. The article concludes with an examination of the effectiveness of the reference technique in the setting of institutional reform litigation.

The sources of authority for the appointment of a master. Historically

[HeinOnline (directly from the text)]

51. Martin Quinn, *Outline of Ethical Issues for a Special Master*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Neutral in Federal and State Courts, Chicago, Ill. (2005) (No abstract available).

52. Randi I. Roth, *Monitor Work in* Pigford v. Johanns: *Lessons Learned About Claims Processing Judicial Adjunct Work*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. (2005) (No abstract available).

53. Jerry Sandel & Sherry Wetsch, *Mediation of Criminal Disputes in the 278th Judicial District*, 25 IN CHAMBERS 3 (1998).

From the Article: Alternative dispute resolution (ADR) mechanisms □□mediation and arbitration □□often offer a quicker, less expensive, and more conciliatory way to settle a dispute than litigation. Potential litigants are using these alternatives more, particularly to resolve family law, consumer law, personal injury, and employment law disputes. Many state and federal laws and policies now promote or even mandate ADR.

Resorting to arbitration or mediation is faster and costs less than traditional litigation methods. In addition, litigation is public, while ADR mechanisms generally enable the parties to preserve their privacy. Although it usually helps to have a lawyer present during arbitration or mediation, it is not uncommon for parties to represent themselves, because the procedures are much more informal and flexible than those used in a court hearing. Alternative dispute resolution can produce better and more creative results for the parties, and possibly even

preserve an amicable relationship between them. On low dollar and simple cases, the parties may consider a telephone hearing.

Legal assistance attorneys are finding that mandatory mediation or arbitration provisions are often embedded in many contracts, including standard consumer purchase agreements, credit card contracts, insurance contracts, leases, utility contracts, and contracts involving securities. These clauses are also commonly included in employment contracts.4 Many contractual arbitration clauses specify binding arbitration as the only means to resolve any future disputes arising out of the contracts.

Almost any kind of dispute may be suitable for ADR, and legal assistance practitioners may find it advantageous for their clients to affirmatively seek out ADR services, particularly in divorce, child custody, or other family disputes. This article offers a practical introduction to mediation and arbitration and identifies several web resources. In addition, it includes some useful observations and insights into ADR from an experienced neutral. [Copy available at: http://adr.navy.mil/docs/jun2000talwetsch.pdf]

54. Shira A. Scheindlin & Jonathan M. Redgrave, *The Evolution and Impact of the New Federal Rule Governing Special Masters* 51 FED. LAW. 34 (Feb. 2004).

From the Article: The modern practice and use of neutrals gradually evolved from a strict and limited role for trial assistance prescribed by Rule 53 to a more expanded view, with duties and responsibilities of neutrals extending to every stage of litigation. Recognizing that practice had stretched beyond the language of the long-standing rule, the Advisory Committee on Civil Rules undertook an effort to conform the rule to practice. The result is a new rule (effective Dec. 1, 2003) that differs markedly from its predecessor and sets forth precise guidelines for the appointment of neutrals in the modern context. [Westlaw]

Citing References:

Frederick B. Lacey & Jay G. Safer, Magistrate Judges and Special Masters: The Authority, Roles, Responsibilities, and Utilization of Special Masters, 3 Bus. & Com. Litig. Fed. Cts. § 28:33 (2d ed.) 2008.

> Summary: Fed. R. Civ. P. 53 generally governs the appointment and compensation of masters, references to neutrals, powers of neutrals, proceedings before neutrals and reports of neutrals, when the appointment of the neutral is made under Rule 53. The full text of Rule 53 is set out at the end of this section.

William L. McAdams & Sherry R. Wetsch, Alternative Dispute Resolution of Criminal Disputes in the 12th Judicial District, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, San Francisco, CA 2006 (No abstract available).

Margaret G. Farrell, The Sanction of Special Master: In Search of a Functional Standard, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Washington, D.C., 2007.s

> From the Article: Under amended Rule 53, Neutrals are required to perform their duties in accordance with judicial standards of conduct -- even though the Rule permits courts to authorize neutrals to perform tasks, such as conduct investigations, and adopt procedures, such as ex parte communications, in which judges themselves could not engage. This article examines the use of neutrals in complex litigation and concludes that consideration needs to be given to the appropriateness of standards to which neutrals are held when they carry out different functions -- adjudication, investigation, administration or mediation -- and the consequences of violating those standards. It finds that it may be untenable to hold neutrals to judicial standards of conduct when they are not full time judges and perform non-judicial functions. Further, it notes that neutrals need more clarity about their accountability to the appointing courts, the litigants, third parties, and the bar. Finally, it concludes that the range of remedies imposed to redress excessive or problematic conduct -- reversal, removal, disbarment, damages, injunction, etc. --needs to be examined for proportionality, their effect on other interested parties and their fairness to neutrals.

55. Shira A. Scheindlin & Jonathan M. Redgrave, *Revisions in Federal Rule 53 Provide New Options for Using Special Masters in Litigation*, 76 N.Y. St. B.J. 18 (Jan. 2004).

From the Article: The modern practice and use of neutrals in federal courts gradually evolved from a strict and limited role for trial assistance prescribed by Federal Rule of Civil Procedure 53 to a more expanded view, with duties and responsibilities of neutrals extending to every stage of litigation. Recognizing that practice had stretched beyond the language of the long-standing rule, the Advisory Committee on Civil Rules undertook an effort to conform the rule to practice.

The result is a new rule, effective as of December 1, 2003, that differs markedly from its predecessor and sets forth precise guidelines for the appointment of neutrals in the modern context. In general, the changes provide more flexibility in the use of neutrals, permitting them to be used on an as-needed basis with the parties' consent or by court order when exceptional conditions apply.

This article reviews the history of Rule 53, the evolution of the use of neutrals in practice, and the significant new provisions of Rule 53. [Westlaw]

56. Shira A. Scheindlin & Jonathan M. Redgrave, *Neutraling Rule 53: The Evolution and Impact of the New Federal Rule Governing Special Masters*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. 2005 (No abstract available).

57. James K. Sebenius, Ehud Eiran, Kenneth R. Feinberg, Michael Cernea, and Francis McGovern, *Compensation Schemes and Dispute Resolution Mechanisms: Beyond the Obvious*, 21 NEGOTIATION J. 231 (Apr. 2005).

Wiley Abstract: Because compensation and dispute resolution lie at the core of most resettlement proposals, this panel had two main objectives: to get an accurate grasp of the current Israeli approach to these challenges and to glean insights from relevant experiences in other settings. Before reading our panelists' presentations, one might be forgiven for reasonably thinking that "compensation equals cash" and "dispute resolution equals court." As our panelists discussed, however, such a straightforward view is simply inadequate to the needs of the resettlement problem — a much richer view of compensation and dispute resolution is required. [From http://www3.interscience.wiley.com/journal/118656713/abstract]

58. Linda J. Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131 (1989).

From the article: This birthday celebration of the Federal Rules is a time to marvel at the enduring character of the 1938 Federal Rules of Civil Procedure. Given the dramatic changes that have taken place in litigation over these decades, it is no surprise that the proponents of the philosophy of uniform and trans-substantive rules believe that time has proved their case. I want to suggest, however, as indeed others already have, [FN1] that trans-substantive rulemaking in fact has been eroded and replaced by ad hoc versions of specialized rules. One clear example of such ad hoc proceduralism comes via the increased number of judicial adjuncts, who customize procedure for particular and individual cases. This example supports those who call for a different approach to federal rulemaking.

The court-appointed neutrals to whom I refer are primarily neutrals and magistrates. There are also the newly created arbitrators in court annexed arbitration used in a number of districts, but that experience is relatively new, and I bypass them for purposes of present discussion. There is no doubt that the use of court-appointed neutrals has been extremely valuable in processing our expanding and complicated contemporary litigation caseload, and thus I intend my comments less as an attack on the use of neutrals and magistrates than as an example of why more dramatic procedural reform is in order. In short, I think delegations of judicial power to neutrals and magistrates have become the substitute for a more precise and specialized procedural code. To some extent then, the debate can be seen as one between those who are satisfied with an individual case-by-case customized procedure put in place by court-appointed neutrals versus those who advocate more formal rules that do not slavishly adhere to a uniform and trans-substantive format. These divisions are also not as sharp as I first described them because I think the development and customization of specialized procedures under the present court-appointed neutral models actually provide some of the building blocks on which a more formal system of particularistic rules can be erected.

Thus, the case study I present has a two-fold purpose. First, I make the claim that a close examination of modern court-appointed neutrals exposes the myth that there is in fact a single set of 'federal rules of civil procedure,' and I advocate establishing formal alternative procedural tracks for processing different types of cases. Second, and on a less ambitious note, I believe that given the way special neutrals are now being used, specific revisions in Rule 53 itself are necessary. Because both of these proposals have more to do with the use of neutrals than magistrates, my emphasis will be on the use of neutrals. But it is worth looking at both models for points of contrast. [Westlaw]

Citing References:

Edward V. Di Lello, Fighting Fire with Firefighters: A Proposal for Expert Judges at the Trial Level, 93 Colum. L. Rev. 473 (1993).

> Westlaw Abstract: It is by now a common complaint that litigation in federal court takes too long and costs too much. The sheer number of parties and the complexity of their relationships in large cases have, in themselves, created new administrative problems. Court calendars are backlogged and trial judges are burdened today in ways never imagined a generation ago. Technical expert testimony is a major cause of this delay, cost, and complexity, and as scientific advances and new technologies find their way into the courtroom with increasing frequency, these trends will worsen. Recognizing the need to expedite, de-mystify, and where necessary curb or eliminate so-called "battles of experts" involving technical subject matter, this Note proposes the creation of a new adjunct judicial office for magistrate judges who are specialists in technical fields, and the adoption of certain related procedural reforms. Annexed to federal district courts, these court-appointed neutrals would bring about better, faster, more efficient and less expensive adjudication of factual issues involving technical evidence. Empowering expert magistrate judges to perform a number of flexible adjudicative functions would induce litigants to reduce their reliance on expert evidence and to focus and improve its presentation. Part I of this Note examines the problems associated with technical expert testimony and argues that such testimony is unreliable, costly, time-consuming, confusing and of questionable admissibility. Part II analyzes currently available methods of dealing with these problems- neutrals and court-appointed experts--and exposes their short-comings. Part III examines the historical evolution of the Court of Appeals for the Federal Circuit, a court with specialized jurisdiction in a small number of legal areas, as an example of the expertise that accrues to judges and the judicial system as a result of specialization. Part IV proposes the creation of a new federal judicial office bearing the title "Magistrate Judge (Expert)" ("MJE") and explores adjunct judicial functions MJEs could perform to make possible more efficient and effective determinations of fact in technical cases. This Part also anticipates possible criticisms and examines the feasibility of the proposal.

Samuel H. Jackson, Technical Advisors Deserve Equal Billing with Court-Appointed Experts in Novel and Complex Scientific Cases: Does the Federal Judicial Center Agree?, 28 ENVTL. L. 431 (1998).

> Westlaw Introduction: In the wake of the Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., courts are struggling to understand the full scope of their new role as "gatekeepers" of good science. In particular, the debate over the appropriate use of scientific experts under Federal Rules of Evidence 706, and the use of court-appointed experts under the courts' inherent power, has been renewed by recent developments in product liability, toxic tort, and environmental cases. This Comment explores the historical development of court-appointed expert witnesses and technical advisors culminating in the Federal Judicial Center's recently drafted Reference Manual on Scientific Evidence. Mr. Jackson uses this historical framework to discuss appropriate

applications of these increasingly necessary judicial resources. Several procedural safeguards are discussed in addressing the concerns that have been expressed by critics of these resources. Mr. Jackson concludes that in many cases, technical advisors are equally valid, and possibly more effective, alternatives to court-appointed experts in dealing with the exceedingly complex scientific issues presented in current litigation trends. Two recent cases in the Ninth Circuit are discussed as models for the appropriate use of such experts.

Jay Tidmarsh, Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power, 60 Geo. Wash. L. Rev. 1683 (1992).

From the Article: The burden of this Article, therefore, is to demonstrate that an inquiry into the form of complex litigation provides a useful perspective on the hydra-headed problem of complex litigation. Part I begins the inquiry by describing the practical and theoretical factors that have led various courts and commentators to label particular types of litigation "complex." Although all the definitions provide important data about the nature of complex litigation, none capture its full breadth. Thus, the task of the Article's next two Parts is to develop a formal and inclusive definition. Part II builds the theoretical framework for the definition by describing the form of adjudication and the positive assumptions of modern civil litigation. Next, Part III demonstrates that complex litigation arises from the friction between the real-world problems outlined in Part I and the theoretical framework developed in Part II. Part III argues that all complex cases initially involve at least one of four different modes of complexity: the attorneys have difficulty in amassing, formulating, or presenting relevant information to the decision maker; the factfinder has difficulty in arriving at an acceptably rational decision; the remedy is difficult to implement; or there exist procedural and ethical impediments to joinder. The unifying attribute of these four modes is that the dispute can be resolved rationally only through the accretion to the federal judiciary of powers traditionally assumed by the other "actors" (parties, lawyers, jurors, and state courts) in the litigation enterprise. This attribute alone, however, constitutes an overbroad definition of complex litigation; such cases, although "complicated," are not truly complex. Complex litigation also contains a second fundamental attribute: The increase in judicial power needed to deal with these complications threatens to overrun the deep-seated assumption of modern civil litigation that similarly situated claims, parties, and legal theories should be treated in procedurally similar ways. … Part IV applies the insights gained from Part III to the future of civil procedure. Complex litigation stands in the crossroads of the thorniest issues in modern civil procedure: case management; trans-substantivism; adversarialism; the wisdom of equitably based procedural codes; the relationship between procedure and the law and economics movement; and the involvement of courts in politically charged controversies. Part IV demonstrates that these issues, and consequently the direction of procedural reform, can be understood only against the backdrop of the four categories of cases (routine, complicated, complex, and polycentric) developed from the definition of complex litigation.

Patrick E. Longan, Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators, 73 Neb. L. Rev. 712 (1994).

> Westlaw Abstract: Many federal judges do not have time for their civil dockets. The amount of time the average district judge devotes to civil trials has declined steadily in the last ten years. Simultaneously, the criminal dockets have grown too large and become too complex for the district judges to spend sufficient time tending to civil cases which by law have lower priority. Congress continues to create more federal crimes despite urgent entreaties not to do so. The President and Senate have moved slowly to fill district court vacancies, and many believe that adding more judges is an unacceptable solution. The ever-increasing pressures on the district judges have resulted in two trends in the handling of civil cases. The first is the increasing use of judicial "adjuncts" such as magistrates, bankruptcy judges, law clerks, staff attorneys, interns, externs, and the other ingredients of "bureaucratic justice." The second development, more aptly called a movement, has been to direct civil cases away from adjudication to alternative forms of dispute resolution such as arbitration, mediation, early neutral evaluation, and summary jury trials… The two developments converge when court-appointed neutrals, particularly magistrates, mediate civil cases.…The trend toward using magistrates as mediators is no accident. To understand why, one must first understand what prevents parties from settling without assistance. Part II of this Article examines this question and concludes that parties increasingly need more information than the attorneys can provide. In addition, the parties also need a more satisfying and structured forum than lawyer-to-lawyer negotiation. One must then compare different forms of mediation to see how each meets those needs. Part III makes those comparisons with respect to mediation by private lawyers, trial judges, and magistrates. It concludes that magistrates are being used to mediate cases more because they are in a unique position to do so effectively…. This Article explains why magistrates can and should mediate more civil cases.

Lois Bloom & Helen Hershkoff, Federal Courts, Magistrate Judges, and the Pro Se Plaintiff, 16 Notre Dame J. L. Ethics & Pub. Pol'y 475 (2002).\

> From the Article: In Part I, we explore what one commentator calls "the flood of unrepresented litigants" in courts nationwide and the various approaches that federal courts have taken to deal with the pressures that pro se cases generate. In Part II, we focus on the Eastern District of New York and its decision to designate a special magistrate judge to oversee pro se matters. In Part III, we examine the advantages and disadvantages of the single magistrate judge approach for the processing and disposition of pro se matters, recognizing that the work of this office is still at an early stage of institutional development and that additional lessons will be learned with experience and practice.

R. Lawrence Dessem, The Role of the Federal Magistrate Judge in Civil Justice Reform, 67 St. John's L. Rev. 799 (1993).

> From the Article: This Article considers the role of the United States magistrate judge in civil justice reform and, more specifically, the role that the early implementation districts

envision for magistrate judges within their own districts. Part I briefly considers the evolution of the office of magistrate judge prior to the enactment of the Judicial Improvements Act of 1990.

Richard A. Posner, Coping with the Caseload: A Comment on Magistrates and Neutrals, 137 U. Pa. L. Rev. 2215 (1989).

From the article: Linda Silberman's paper for this conference [discusses two methods by which the federal court system and Congress have tried to cope with the enormous increase in the federal judicial caseload in recent times]. The first is the expanded use of magistrates; the second is the expanded use of neutrals. Silberman is more sanguine about the former than about the latter, in major part because the use of magistrates is more regularized by statute than the use of neutrals. Regarding magistrates, the author is concerned mainly that their availability to supervise pre-trial discovery makes it easier for that monster to flourish; hard-pressed district judges would perforce rein it in more. Regarding special neutrals, she is concerned about expense, potential conflicts of interest, lack of clear rules governing their use, and lack of institutional commitment (special neutrals are ad hoc recruits from private practice, not employees of the judicial branch). I, too, am concerned about the growing use by the federal courts of court-appointed neutrals, including magistrates and neutrals.

Margaret G. Farrell, The Function and Legitimacy of Special Masters: Administrative Agencies for the Courts, 2-Fall Widener L. Symp. J. 235, (1997).

From the article: This article… describes one rationalizing technique employed by federal judges to assist them in managing complex mass toxic tort litigation, the appointment of neutrals under Rule 53(b) of the Federal Rules of Civil Procedure. Moreover, it evaluates the ability of neutrals to efficiently and fairly meet the extraordinary managerial challenges presented by such lawsuits and their ability to humanize the process. Finally, it argues that the flexibility and diversity of neutral practice is legitimate in its conformance with the basic constitutional values expressed in Article III and the Due Process Clause of the United States Constitution.

Not surprisingly, neutrals do not function today as they did before the new demands engendered by technology were made upon them. The actual practice of modern neutrals differs dramatically from the hearing neutrals anticipated when Rule 53 of the Federal Rules of Civil Procedure ("Rule 53") was enacted in 1938… To carry out many of these assignments, courts need flexibility, expertise, informality, investigative authority, administrative capacity, and time, which are qualities usually associated with administrative agencies. Some of these capacities have been provided to courts through the appointment of neutrals. Without them, courts would be required to perform their quasi-legislative role in mass toxic tort and other complex litigation without the assistance that legislatures have created in the form of administrative agencies.'

Today, neutrals are appointed to play a number of different roles. They serve as surrogate judge, facilitator, mediator, monitor, investigator and claims processor. In playing these roles, neutrals perform a variety of traditional, passive judicial functions….

The article concludes that neutrals should be appointed to put a more intimate face on mass justice and to perfect procedural reforms that better use and cope with technology. In many of their roles, neutrals function like administrative agencies within the judiciary, appointed to carry out the new tasks we give to courts. Like administrative agencies, they are justified by their expertise, efficiency and availability. Yet, answerable only to the judges who appoint them, neutrals are not bound by an Administrative Procedures Act and are not accountable to the electorate through either the legislative or executive branches. They lack the longevity of agencies and leave no public law legacy in the form of regulations or precedent. Rather, the legitimacy of the use of neutrals, as it is described in this article, lies in their embodiment of the efficiency and fairness values that are part of the jurisprudence of Article III of the United States Constitution, and their ability to humanize modern legal process. The article recommends that neutral practice be allowed to evolve unrestrained by rigid limitations on the process they use. In doing so, we can rely on the supervision, discretion and integrity of the district court judges with whom they work, as well as review by the courts of appeals, and the rigors of the adversarial process to curb the potential for abuse.

59. Clarence J. Sundram, *Exit Planning and Phased Conclusion in the Remedial Phase of Systems Reform Litigation*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. 2005.

From the article: You have become the Neutral in the remedial phase of a lawsuit requiring structural reform of the complex governmental activity and are now responsible for supervising the implementation of a series of court orders requiring significant changes in the way in which governmental services are delivered. The services in question may involve the operation of state institutions like prisons, mental hospitals, or mental retardation facilities; they may involve services delivered by private organizations which are licensed, certified, supervised or funded one or more government agencies; they may involve some aspect of a public service like housing or education.

While each of these areas present their own subject matter complexity, in the remedial phase of the litigation they present some common challenges to a Neutral. One of the most common is a long and unsuccessful history of implementation efforts to comply with the court orders, a history which has probably necessitated the appointment of the Neutral in the first place. I have been involved in a number of these cases over the years, including the Wyatt litigation in Alabama, originally commenced in 1970; the Willowbrook litigation in New York commenced in 1972; Gary W. in Louisiana in the 1980s; Evans v. Williams in Washington DC, which has been going on since the mid-1970s and CAB v. Nicholas in Maine which is about the same age.

In examining a number of such cases, which have been open for a long time, it seems that they all run through a fairly typical lifecycle. I don't know if this is true of commercial litigation as well. [Westlaw: SL083 ALI-ABA 753]

60. Clarence J. Sundram, *Memorandum Regarding Certification of Compliance Process*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. 2005.

From the article: The following documents may be useful to an understanding of how the process of certification of compliance works.

1. Certification Procedure – This document sets out a fairly "bare-bones" procedure for the Defendant's to certify compliance with discrete provisions of the Court Orders, along with a summary of the supporting evidence. It provides the plaintiffs with access to the evidence as well as further discovery, if needed. It lays out a process for resolving factual disputes about the status of compliance before the Neutral prepares a report and recommendation to the Court.
2. Certification Document regarding ISCs. This is an example of the type of certification expected from the Defendant and the specific factual issues the certification should address.
3. Neutral's Report and Recommendation to the Court regarding Compliance. (This document, when filed with the Court, is accompanied by Exhibits containing the supporting evidence *766 submitted by both parties, and the record of the case before the Neutral.)
4. The Court Order accepting the Neutral's report and endorsing the recommendations. [Westlaw: SL083 ALI-ABA 763]

61. George M. Vairo, *Problems in Federal Forum Selection and Concurrent Federal State Jurisdiction: Supplemental Jurisdictions; Diversity Jurisdiction; Removal; Preemption; Venue; Transfer of Venue; Personal Jurisdiction; Abstention and the All Writs Act*, ALI-ABA Course of Study: The Art and Science of Serving as a Special Master in Federal and State Courts, Chicago, Ill. 2005 (No abstract available).

62. Thomas E. Willging, Laura L. Hooper, Marie Leary, Dean Miletich, Robert Timothy Reagan, John Shapard, *Special Masters' Incidence and Activity* (Federal Judicial Center 2000), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/SpecMast.pdf/$file/SpecMast.pdf.

Executive Summary: This report examines how pretrial and post-trial neutral activity can take place under a rule designed to limit neutral appointments to trial-related fact-finding in exceptional cases.8 In commissioning the Federal Judicial Center to conduct this study, the Judicial Conference Advisory Committee on Civil Rules' Subcommittee on Neutrals indicated its awareness that neutral activity had expanded beyond its traditional boundaries. The subcommittee expressed an interest in learning how that phenomenon occurred in the face of a static and restrictive rule.

More specifically, the subcommittee wanted to know how often and under what authority judges appointed neutrals to serve at the pretrial and post-trial stages of litigation, whether any special problems arose in using neutrals, how courts' use of neutrals compared with their use of magistrate judges, and whether rule changes are needed. We responded to the subcommittee's request by examining docket entries and documents in a

random national sample of closed cases in which appointment of a neutral was considered. We followed up with interviews of judges, attorneys, and neutrals in a select subset of that sample.

Citing References:

Georgene Vairo, Why Me? The Role of Private Trustees in Complex Claims Resolution, 57 Stan. L. Rev. 1391 (2005).

Westlaw Abstract: This Article explores whether private persons, as opposed to a judge or, perhaps, another governmental official, should have the authority to exercise a high degree of discretion in developing standards for compensation and determining compensation awards for claimants. It is important to look directly at this issue because the question whether administrative trusts are an appropriate alternative to litigation cannot be answered without a discussion about the private persons who develop the compensation standards and administer an administrative trust and how they should be selected.

63. Linda DeBene, *Creative Case Management Techniques in the Face of Looming Budget Cuts*, (2012), *available at* https://www.courtappointedneutrals.org/acam/assets/file/public/articles/debene-creative-management-2012.pdf

64. David Ferleger, *Masters in Complex Litigation & Amended Rule 53* (2005), *available at* https://www.courtappointedneutrals.org/acam/assets/file/public/articles/ferleger.pdf

65. Francis McGovern, *Mediation of the Snake River Basin Adjudication* (2006), *available at* https://www.courtappointedneutrals.org/acam/assets/file/public/articles/mediation-of-the-snake-river-basin-adjudication.pdf

66. Edward F. Sherman, *Judicial Supervision of Attorney Fees in Aggregate Litigation: The American Vioxx Experience as Example for Other Countries*, (2009), *available at* https://www.courtappointedneutrals.org/acam/assets/file/public/articles/4cedwardsherman.pdf

67. Edgar C. Gentle III, *Administration of the 2003 Tolbert PCB Settlement in Anniston, Albama: An Attempted Collaborative and Holistic Remedy*, (2009), *available at* https://www.courtappointedneutrals.org/acam/assets/file/public/articles/tolbertpcb.pdf

68. Daniele B. Garrie, Esq., Edwin A. Machuca, Esq., *E-Discovery Mediation & the Art of Keyword Search,* (2000), *available at* https://www.courtappointedneutrals.org/acam/assets/file/public/articles/e-discovery_article_cardozacac209.pdf

69. Martin Quinn, *Managing Discovery in Patent Cases: Best Practices* (2009), *available at* https://www.courtappointedneutrals.org/acam/assets/file/public/articles/quinn.pdf

70. **The Honorable Shira A. Scheindlin, Jonathan M. Redgrave, *Special Masters and E-Discovery: The Interesction of two Recent Revisions to The Federal Rules of Civil Procedure,* (2008), *available at* https://www.courtappointedneutrals.org/acam/assets/file/public/articles/scheindlin_30_2.pdf**

71. **Howard R. Marsee, *Utilizing Special Masters in Florida: Unanswered Questions, Pracical Considerations and the Order of Appointment* (2009), *available at* https://www.courtappointedneutrals.org/acam/assets/file/public/articles/marsee.pdf**

72. **Lynn Jokela, David F. Herr, *Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool* (2005), *available at* https://www.courtappointedneutrals.org/acam/assets/file/public/articles/jokelaherr.pdf**

73. **Jay P. Kesan, Ph.D., Gwendolyn G. Ball, Ph.D., *A Study of the Role and Impact of Special Masters in Patent Cases* (2009), *available at* https://www.courtappointedneutrals.org/acam/assets/file/public/articles/specmapa.pdf**

74. **Recent Articles Leading Up to and Concerning the ABA Guidelines**

- Merril 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) 22. Available at www.courtappointedneutrals.org/acam/assets/file/public/resources/it%20is%20way%20past%20time%20to%20allow%20bankruptcy%20judges%20to%20use%20court-appointed%20masters.pdf

- So What Is A "Special Master" Anyway?, THE COURT MANAGER (Nov. 2022)

- "Bad Branding for a Great Idea: Making More Effective Use of Special Magistrates (Masters) in Florida, THE COMMON GROUND (Summer 2022).

- Interviewed in Lloyd Lui, "The Invaluable Role of Special Masters," Washington Lawyer 46 (July/Aug. 2022).

- "Necessity and Invention: Seven Steps for Using Special Masters to Help Courts with the Pandemic Caseload," American Bar Association Judicial Division, JUDGES JOURNAL, v.60, No. 3 at 18 (Summer 2021)

- "A Revolution That Doesn't Offend Anyone: The ABA Guidelines on the Appointment and Use of Special Masters in Civil Litigation," American Bar Association Judicial Division JUDGES JOURNAL (Fall 2019) at 30.

- "Special Masters: A Consensus Proposal for a New Approach to Civil Litigation," ALTERNATIVES (International Institute for Conflict Prevention and Resolution) (December 2018) 169.

- "Special Masters: Helping Judges' Reach Exceed Their Grasp," ALTERNATIVES (International Institute for Conflict Prevention and Resolution) (June 2017), available at http://altnewsletter.com/sample-articles/special-masters--how-to-help-judges--extend-their-reach--and-exceed-their-grasp.aspx

- "Special Masters: A Different Answer to a Perennial Problem," ABA THE JUDGES JOURNAL (with James Rhodes and Karl Bayer), v. 55 No. 2 (Spring 2016) at 26, available at http://www.troutmansanders.com/files/Uploads/Documents/JJ_SP16_v55n02_HirshRhodesBayer.pdf

WEBSITES

75. https://www.courtappointedneutrals.org/resource-center/articles/ Curated website with articles added.

76. American Bar Association, Judicial Division, Lawyers Conference Court-Appointed Neutrals Committee
https://www.americanbar.org/groups/judicial/conferences/lawyers_conference/committees/court-appointed-neutrals/

This website provides information and resource materials on the American Bar Association's Guidelines on the Appointment and Use of Special Masters in Court-Appointed, articles about the Guidelines and the use court-appointed neutrals, video resources, recommended criterial for the creation of a roster of court-appointed neutrals, a discussion draft of a model state rule on court-appointed neutrals and other materials.

77. Special Masters: How To Make the Best of Both Worlds (multi-part posting on Karl Bayer's Disputing blog, beginning November 2014)
http://www.disputingblog.com/special-masters-how-to-make-the-best-of-both-worlds-part-i/

Academy of Court-Appointed Neutrals

Using Court-Appointed Neutrals

Appendices

Appendix A

Sample Appointment Orders

Sample 1: Where Neutral Will Serve as Mediator and Was Previously Serving as Mediator Through an ADR Administrator

Sample 2: Where Neutral Will Supervise Discovery in a Criminal Case

Sample 3: Where Neutral Will Serve as Monitor in a Class Action

Pigford v. Glickman, No. 97-1978 (D.D.C. Jan. 4, 2000)
(available at https://casetext.com/case/pigford-v-glickman-6

Sample 4: Where Neutral Will Serve as a Conference Judge in a Criminal Case

Sample 5: Where Neutral Will Serve Various Roles in Multi-District Litigation

In re: Welding Rod Prods. Liab. Litig., 2004 WL 3711622 (N.D. Ohio Nov. 10, 2004).

Sample Appointment Order 1:
Where Neutral Will Serve as Mediator and Was Previously Serving as Mediator Through an ADR Administrator

After reviewing the progress of mediation in this action before _____, and with the consent of all parties, this Court finds that the appointment of a Neutral for purposes of further mediation and settlement is justified and necessary.

Pursuant to Federal Rule of Civil Procedure 53 it is **ORDERED** that the current mediator, _____, is appointed as Neutral for purposes of mediation and settlement.

The Court-Appointed Neutral shall have the following authority, which shall be exercised with all reasonable diligence in accord with Rule 53:

1. To direct and facilitate the settlement negotiations among the parties and their insurers.
2. To schedule mediation sessions, telephone conference calls, and other forms of communication among the parties, and to require the parties, counsel, expert consultants, and insurers to attend and participate in mediation sessions and/or other communications. The Special Master will make reasonable efforts to take into consideration the convenience of attendees when selecting locations for mediation sessions.
3. To require that parties and their insurers appear at and participate in mediation sessions with full authority to negotiate in a good faith effort to reach a settlement.
4. To take all appropriate measures to perform fairly and efficiently the responsibilities of a mediator in an effort to effectuate a complete settlement of this action.
5. To report to the Court at regularly scheduled status conferences the progress and status of the settlement negotiations.

[ADR administrator] shall charge $__/hour for _____'s services as Court-Appointed Neutral, plus the normal [ADR administrator] administrative fee of 10% of the professional charges. [Add details about what the master will/will not charge for.]

Pursuant to the parties' agreement, the parties shall pay the charge for the Court-Appointed Neutral's service [add details about how the parties will share responsibility for paying these charges.] If any party is added to or removed from the case, the pro rata shares shall be reallocated as the parties agree or by order of the Court. At the request of any party, the Court shall review and approve the charges for the Court-Appointed Neutral's services.

The parties may have *ex parte* communications with the Court-Appointed Neutral as to all matters related in any way to the mediation process. The Court-Appointed Neutral may communicate *ex parte* with the Court as deemed necessary concerning the status of the mediation process, but shall not disclose to the Court the specifics of any party's settlement position without the consent of that party.

The Court-Appointed Neutral need not preserve any record of activities.

The clerk is directed to add Court-Appointed Neutral _____to the court's electronic service list at _____.

IT IS SO ORDERED.

Sample Appointment Order 2:
Where Neutral Will Supervise Discovery in a Criminal Case

Upon consideration of [motions, objections, etc.], it is hereby:

1. ORDERED, that _____, a member of the bar of _____, is hereby appointed a Neutral; and it is

2. FURTHER ORDERED, that, in the execution of this reference the Neutral shall possess and may exercise all powers conferred upon Neutrals in like cases; shall likewise possess and may exercise, to the extent permitted by law and the Constitution, all powers conferred upon U.S. Magistrate Judges by 28 U.S.C. § 636; including all powers to make such orders as may be necessary and appropriate to fulfill the duties assigned to the Neutral under this Order, subject to review by the Court; and it is

3. FURTHER ORDERED, that the Neutral shall supervise and issue orders and reports appropriate and necessary to resolve all discovery disputes in this case, including but not limited to: _____ [include itemized list, where appropriate] (all referred to as "discovery"); and it is

4. FURTHER ORDERED, that the Neutral shall take all steps necessary, including issuing scheduling orders, issuing orders to compel, holding periodic hearings, and recommending sanctions as may be appropriate, to ensure that discovery in this case is thorough and complete in accordance with all the requirements of the Rules of Criminal Procedure, the Orders of this Court, and the law; and it is

5. FURTHER ORDERED, that the Neutral shall report to the Court on all relevant matters within 60 days of the date of this Order, and shall periodically report to the Court on the progress of discovery in this case; and it is

6. [For cases involving a Protective Order:] FURTHER ORDERED, that the Neutral shall apply to and be processed by the Court Security Officer for the necessary security clearance, shall sign the Memorandum of Understanding and be bound by the Court's Protective Order. Upon fulfilling these requirements, the Neutral shall be provided with and shall review any classified portions of the pleadings of each party filed with the Court and shall review the underlying documents submitted therewith to determine whether those documents or any portion thereof are properly discoverable under either Federal Rule of Criminal Procedure 16 or *Brady;* and it is

7. FURTHER ORDERED, that the Government shall submit to the Neutral any other relevant classified documents, to the extent they are not submitted directly to the defendants. The Neutral shall review those classified documents and determine the extent to which those classified documents are to be provided to the defendants, including the appropriateness and adequacy of any substitutions or redactions proposed by the Government; and it is

8. FURTHER ORDERED, that within 30 days of the date of this Order, the Government shall provide to the defendants all materials that the defendants have requested under *Brady* as well as any other materials that fall within the ambit of *Brady.* If there is any question as to whether particular materials fall within the ambit of *Brady,* those materials are to be submitted to the Neutral within 30 days of this Order for the Neutral's review and recommendation as to whether those documents are to be produced to the defendants. In addition, if the Government, after the initial production of materials to the defendants or the Neutral under this section of this Order, comes into possession of materials or determines that

any materials that have not been previously produced may fall within the ambit *of Brady,* it shall provide those materials to the defendants or the Neutral, as is appropriate, immediately after such acquisition or determination is made. The Neutral shall review any documents so provided and determine, within 30 days of the submission, whether they contain material properly discoverable by the defendants under *Brady;* and it is

9. FURTHER ORDERED, that any party may object to any order or report issued by the Neutral by filing such objection with the Court within 7 days of the issuance of such order or report. Any response to such objection must be filed within 7 days of the filing of the objection. The Court will determine whether, based on the reasons provided in the party's objection, it is appropriate to review the Neutral's orders or report under a *de novo* or other appropriate standard, and whether the objection is well founded; and it is

10. FURTHER ORDERED, that this referral is limited to the duties specified herein unless the Court shall expand the Neutral's duties. This reference shall terminate upon submission by the Neutral of his Final Report, unless extended by further order of the Court; and it is

11. FURTHER ORDERED, that the Neutral shall receive compensation for services at the hourly rate of $ _____. The Neutral's fee and other costs incurred by the Special Neutral in connection with this reference shall be borne by the Government pursuant to United States Attorneys Manual § 3-8.400; and it is

FURTHER ORDERED, that this Order is subject to amendment by the Court *sua sponte,* or upon application of the parties or the Neutral. Jurisdiction of this action is retained by the Court.

IT IS SO ORDERED.

Sample Appointment Order 3:
Where Neutral Will Serve as Monitor in a Class Action

The Consent Decree entered in this case on [date], provided for the appointment of an Independent Monitor to carry out certain enumerated duties. Those duties are listed in paragraph ___ of the Consent Decree. The Consent Decree, negotiated by the parties, provides a limited, clearly defined role for the Monitor. On [date], this Court issued an Order appointing [name] as the Independent Monitor in this case.

In accordance with the terms of the Consent Decree and its remedial purposes, [and any other grounds], and pursuant to the Court's inherent power, it is hereby

ORDERED that the Monitor, as an agent and officer of the Court, shall have the responsibilities, powers, and protections as set forth in the Consent Decree and in this Order of Reference; it is

FURTHER ORDERED that the Monitor shall have the full cooperation of the parties, their counsel, and the Facilitator, Adjudicator and Arbitrator, who shall promptly provide any and all documentation and information requested by the Monitor, whether requested orally or in writing, and in whatever form requested, provided that the Monitor is authorized to request only non-privileged materials that are not otherwise prohibited from disclosure and that are necessary to enable performance of the duties; and it is

FURTHER ORDERED that:

1. The Monitor shall have *ex parte* access to this Court without prior notice to or consultation with the parties.

2. The Monitor shall have the right to confer and conduct confidential working sessions informally and on an *ex parte* basis with the parties and with the Facilitator, Adjudicator and Arbitrator on matters affecting the discharge of the Monitor's duties and the implementation of the Consent Decree.

3. The Monitor shall have authority to make informal suggestions to the parties in whatever form the Monitor deems appropriate in order to facilitate and aid implementation of the Consent Decree and compliance with Orders of the Court and shall have the authority to make recommendations to the Court.

4. As an agent and officer of the Court, the Monitor shall enjoy the same protections from being compelled to give testimony and from liability for damages as those enjoyed by other federal court-appointed neutrals performing similar functions.

5. In addition to the power and authority granted elsewhere in this Order, the Monitor shall have all the responsibilities and powers enumerated in the Consent Decree. Specifically, as set forth in paragraph 12 of the Consent Decree, the Monitor shall:

   a. Make periodic written reports (not less than every six months) to the Court, the Secretary of Agriculture, Class Counsel, and Government Counsel on the good faith implementation of the Consent Decree;

   b. Attempt to resolve any problems that any class member may have with respect to any aspect of the Consent Decree;

   c. Direct the Facilitator, Adjudicator, or Arbitrator to reexamine a claim where the Monitor determines that a clear and manifest error has occurred in the screening, adjudication, or arbitration of the claim and has resulted or is likely to result in a fundamental miscarriage of justice; and

d. Be available to class members and the public through a toll-free telephone number in order to facilitate the lodging of any Consent Decree complaints and to expedite their resolution.

If the Monitor is unable within thirty (30) days to resolve a problem brought to attention pursuant to subparagraph (b), above, the Monitor may file a report with the parties' counsel, any of whom may, in turn, seek enforcement of the Consent Decree pursuant to paragraph 13 of the Decree.

6. In carrying out the duties under paragraph l2(b)(i) of the Consent Decree (issuance of written reports), the Monitor shall make such reports available to the public upon request. The Monitor shall not include in those reports any information that is prohibited from disclosure by the Privacy Act.

7. In carrying out duties under paragraph 12(b)(ii) of the Consent Decree (resolving class members' problems), the Monitor has broad authority to work with claimants [and any others] through correspondence, by telephone, and, if necessary, in person to attempt to resolve class members' problems, including problems involving injunctive relief (defined in paragraph ____ of the Consent Decree) [and any other specifically enumerated problems]. To fully carry out the duties, the Monitor is encouraged to establish a mechanism through which claimants can be met personally when necessary.

In carrying out duties under paragraph ____ of the Consent Decree (directing reexamination of claims), upon the filing of a Petition for Monitor Review, the Monitor shall review relevant materials and decide whether to order reexamination in accord with the following procedures:

a. Standard of Review. Pursuant to paragraph 12(b)(iii) of the Consent Decree, the Monitor may direct reexamination only when the Monitor determines that a clear and manifest error has occurred in the screening, adjudication, or arbitration of the claim and has resulted or is likely to result in a fundamental miscarriage of justice.

b. Reexamination Only. When the Monitor finds that the standard noted above has been met, the Monitor may direct the Facilitator, Adjudicator, or Arbitrator to reexamine the claim. The Monitor does not have the power to reverse any decision.

c. Filing of Petitions. Claimants or the government may file Petitions for Monitor Review by sending the Monitor a letter that explains why the Petitioner believes that the decision of the Facilitator, Adjudicator, or Arbitrator is in error. With respect to Track A claims only, claimants or the government may include with the Petition for Monitor Review any documents that help the Petitioner to explain or establish that an error occurred. Petitions for Monitor Review should be sent to the following address:

[address]

Claimants are encouraged to seek the assistance of counsel in preparing their Petitions for Monitor Review, but they are not required to have the assistance of counsel. Claimants may obtain such assistance at no charge from Class Counsel. Claimants may contact Class Counsel by writing, telephoning, or emailing:

[name & address]

Petitions must be filed in writing online or in paper, and the Monitor's review of the Petition will be a document review, that is, it will not be supplemented by a personal or phone interview.

d. Filing of Responses to Petitions. The non-petitioning party may file a response to any Petition for Monitor Review and, with respect to petitions regarding Track A

claims, the non-petitioning party may include documents as described in paragraph 8(e)(i), below. The Monitor shall establish a system for notifying the non-petitioning party of the pendency of the Petition and for forwarding to the non-petitioning party copies of the Petition and any additional materials submitted by the Petitioner. The non-petitioning party shall have thirty (30) days to file a response, after which the right to file a response shall be waived.

e. Materials Constituting Basis of Monitor Review. Generally, the Monitor's review will be based only on the Petition for Monitor Review, any response thereto, the record that was before the Facilitator, Adjudicator or Arbitrator, and the decision that is the subject of the Petition for Monitor Review.

(i) Review of Track A Claims. The Monitor may consider additional materials submitted by the claimant or by the government with a Petition for Monitor Review of a Track A claim or with a response to such a Petition only when such materials address a potential flaw or mistake in the claims process that in the Monitor's opinion would result in a fundamental miscarriage of justice if left unaddressed. The decision to consider additional materials regarding this flaw or mistake and to permit those materials to be made part of the record for review upon reexamination by the Facilitator or Adjudicator is within the discretion of the Monitor.

(ii) Review of Track B Claims. The Consent Decree provides for the development of a more comprehensive record in Track B than is possible Track A. Therefore, in Track B claims, the Monitor will not be permitted to consider additional materials on review or to supplement the record for review upon reexamination.

(f) Communication Regarding Reexamination. When the Monitor directs the Facilitator, Adjudicator, or Arbitrator to reexamine a claim, the Monitor shall send to the Facilitator, Adjudicator or Arbitrator a brief written explanation of the basis of the decision to direct reexamination (reexamination letters), which shall be attached to the Petition for Monitor Review. The explanation will clearly specify the error(s) identified by the Monitor. The Monitor will promptly forward to the claimant (and counsel, if any) and to USDA copies of all reexamination letters with the attached Petitions for Monitor Review and any additional materials admitted into the record by the Monitor pursuant to paragraph 8(e)(i). These materials will become part of the record for purposes of the Facilitator's, Adjudicator's or Arbitrator's reexamination.

9. Contacting the Monitor. In carrying out duties under paragraph ____ of the Consent Decree, the Monitor will be available to class members and to the public through the following toll-free telephone number and email: _____.

10. Where to Direct Communications. Inquiries, petitions and pleadings in this case should be directed as follows:

a. Inquiries regarding the status of Track A adjudication claims and regarding the timing of payments of approved claims should be directed to the Claims Facilitator at _____.

b. Motions seeking review of non-final rulings by an arbitration panelist, including issues relating to discovery and scheduling, should be directed to _____.

c. Petitions for Monitor Review of final decisions in both Track A and Track B claims should be directed to the Monitor's office as explained in paragraph 8(c) above.

d. Inquiries regarding problems with injunctive relief or with other aspects of the Consent Decree should be directed to the Monitor's office as explained in paragraph 9 above.

e. Pleadings regarding attorneys' fees should be directed to the Court. None of the matters described in subparagraphs (a) - (d), above, shall be filed with, or otherwise presented to, the Court.

11. Monitor Staff. The Monitor shall have the authority to employ and/or contract with all necessary attorney, paralegal, administrative, and clerical staff within a budget cap approved by the Court. The staff and contractors of the Office of the Monitor shall have whatever access to records and documents the Monitor believes is necessary to fulfill the staff or contracting role; however, the staff and contractors shall be given access only to non-privileged materials that are not otherwise prohibited from disclosure and that are necessary to enable the Monitor to perform duties under the Consent Decree.

12. Fees and Expenses. Pursuant to paragraph 12(a) of the Consent Decree, the United States Department of Agriculture ("USDA") shall pay the fees and expenses of the Monitor and the staff salaries.

13. Approval of Budgets. The Monitor shall submit budgets to the Court for approval. Each budget shall cover a period of at least three (3) months but not more than twelve (12) months. Copies of each budget shall be made available to USDA and class counsel, who will have a period of ten (10) working days from their receipt of the budget within which they may file with the Court, with copies to the Monitor and the opposing party, written objections to the budget. Any party that does not object to a budget within these ten (10) days shall be deemed to have waived any objection permanently. At the end of the ten (10) days, the Court will enter an order approving a total budget amount for the relevant time period.

14. Timing of Budget Submissions. The Monitor generally will submit proposed budgets to the Court one (1) month in advance of the beginning of the budget period.

15. Invoicing. The Monitor shall submit a statement to the Court approximately monthly for approval of fees and expenses with copies to counsel for both parties. Objections to the statement shall be filed with the Court, with copies to the Monitor and to the opposing party, within ten (10) days of the submission of the statement. Any party that does not object to a fee statement within ten (10) days of its submission shall be deemed to have waived any objection permanently. At the conclusion of the 10-day period, the Court will enter an order directing payment of any sums approved. Any sum approved by the Court shall be paid within fifteen (15) days unless otherwise ordered or agreed upon.

16. Records. The Monitor shall keep a complete record of all of fees and expenses, which shall be made available at the Court's or the parties' request for their inspection.

17. Payment into Court Registry. Within fifteen (15) days after the Court's approval of the first budget, USDA shall deposit with the Clerk of Court, United States District Court for the District of Columbia, the pro-rata portion of the approved budget for the month of April 2000. Within the first fifteen (15) days of May 2000, and within the first fifteen (15) days of each month thereafter during the Monitor's tenure, USDA shall deposit with the Clerk of Court a sum equal to a pro-rata month's portion of the approved budget. All deposits made by USDA shall be placed by the Clerk of Court in an interest-bearing account. Any monies on deposit with the Clerk of Court that are unspent in a given month shall be carried over and applied to payment of future fees and expenses of the Monitor.

18. Refund of Surplus. At such point as the Monitor's duties are completed, surplus funds on deposit with the Clerk's Office will be refunded to USDA. If the Court determines at any time that the Monitor will require supplemental funds, the Court may so order USDA to make additional deposits.

Sample Appointment Order 4:
Where Neutral Will Serve as a Conference Judge in a Criminal Case

The Court, having considered this cause appropriate for referral to an Alternative Dispute Resolution (ADR) process pursuant to [relevant Rules or Code, if any], ORDERS that the case be so referred for an ADR process to be conducted with [name of adjunct], a dispute resolution organization as defined in [relevant rules] (if necessary), and that [name of adjunct] is appointed as an impartial third party to conduct the ADR process and to facilitate settlement negotiations among the parties.

Unless written objections to this order are filed in accordance with [relevant rules], the parties are directed to communicate with [name of adjunct], located at [address] within ten (10) days from the date of this order to make arrangements regarding: (1) the payment of the expenses of the proceeding; and (2) the date, time, and place the proceeding will be conducted. Unless the parties otherwise agree, all fees and expenses shall be borne equally by the parties. [Or: The fees of [name of adjunct] shall be paid by the Court as Court Costs subject to reimbursement by the defendant.]

All counsel and all parties (or their duly authorized representatives with settlement authority) are directed to attend and participate in the proceeding.

The Court recognizes that Defendant has the right to remain silent and relies on 5th Amendment Rights under the United States Constitution against self-incrimination even though participating in this process. It is therefore ORDERED, ADJUDGED, AND DECREED that no statement, utterance, or conduct of Defendant during the proceeding will be used at any subsequent trial against the Defendant.

Unless the parties agree in writing to waive their right of confidentiality, all matters, including the conduct and the demeanor of the parties and their counsel during the settlement process, will remain confidential and will not be disclosed to anyone, including this Court. Upon completion of this proceeding, the conference judge is directed to advise the Court when the process was conducted, whether the parties and their counsel appeared as ordered, and whether a settlement resulted.

Sample Appointment Order 5:
Where the Neutral Will Serve Various Roles in Multi-District Litigation

On [date], [parties] in this matter filed a motion for appointment of a Neutral. The parties having had notice and an opportunity to be heard, that motion is GRANTED and, with the advice and consent of the parties, the Court now APPOINTS as Court-Appointed Neutral [name and address].

This appointment is made pursuant to Fed. R. Civ. P. 53 and the inherent authority of the Court.[1] As Rule 53 requires, the Court sets out below the duties and terms of the Court-Appointed Neutral and reasons for appointment, and ORDERS the Court-Appointed Neutral to "proceed with all reasonable diligence," Rule 53(b)(2).

I. BACKGROUND.

[Description of how Multi-District Litigation came into being and the specific reasons that appointment of a Neutral is appropriate].

It is clear that this MDL presents many difficult issues and will require an inordinate amount of attention and oversight from the Court. Other MDL courts, facing similar challenges, have easily concluded that appointment of a Court-Appointed Neutral was appropriate to help the Court with various pretrial, trial, and post-trial tasks.[2] Indeed, the appointment of a Court-

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[1] "Beyond the provisions of [Fed. R. Civ. P. 53] for appointing and making references to Neutrals, 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 Cit. 1956) *(quoting In re: Peterson,* 253 U.S. 300, 311 (1920)); *see Ruiz v. Estelle,* 679 F.2d 1115, 1161 n.240 (5th Cir. 1982), *cert. denied,* 460 U.S. 1042 (1983) (same); *Reed v. Cleveland Bd of Edu.*, 607 F.2d 737, 746 (6th Cir. 1979) (the authority to appoint "expert advisors or consultants" derives from either Rule 53 or the Court's inherent power). The Court's inherent power to appoint a Neutral, however, is not without limits. *See Cobell v. Norton,* 334 F.3d 1128, 1 142 (D.C. Cir. 2003) (in the absence of consent by the parties, the inherent authority of the court does extend to allow appointment of Court-Appointed Neutrals to exercise "wide-ranging extrajudicial duties" such as "investigative, quasi-inquisitorial, quasi-prosecutorial role[s]").

This Court first discussed with the parties the advisability of appointing a Neutral during a case management conference on [date]. *See* Fed. R. Civ. P. 16(c)(8, 12) ("At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to . . . (8) the advisability of referring matters to a magistrate judge or neutral; [or] . . . (12) 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").

[2] *See, e.g., In re: Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liab. Litig.,* 1999 WL 782560 at *2 (E.D. Pa. Sept. 27, 1999) (MDL No. 1203) (noting that the court had earlier appointed a Special Master to oversee discovery matters and "facilitate the timely remand of individual civil actions to their respective transferor courts;" the court later broadened the Court-Appointed Neutral's duties to include oversight and administration of the settlement trust funds); *In re: Bridgestone/Firestone Inc., ATX, ATX II, and Wilderness Tires Products Liab. Litig.,* Order at 3-5, docket no. 14 (MDL No. 1373) (S.D. Ind. Nov. 1, 2000) (available at www.insd.uscourts.gov/Firestone) (appointing a Neutral to assist the court with all phases of the litigation, from "formulating a governance structure of [the] MDL" in its earliest stage to assisting with "attorneys fees" issues and "settlement negotiations" during the latter stages of the litigation); *In re: Baycol Products Liab. Litig.,* 2004 WL 32156072 (D. Minn. Mar. 25, 2002) (MDL No. 1431) (appointing a Neutral early in the case and assigning all available "rights, powers, and duties provided in Rule 53;" the court has since appointed two additional neutrals to assist the first Neutral); *In re: Propulsid Products Liab. Litig_,* 2004 WL 1541922 (E.D. La. June 25, 2004) (MDL No. 1355) (appointing a Special Master and setting out a variety of duties).

Appointed Neutral in cases such as this is common. The 2003 amendments to Rule 53 specifically recognize the pretrial, trial, and post-trial functions of masters in contemporary litigation. Thus, the Court agrees with the parties that appointment of a Neutral to assist the Court in both effectively and expeditiously resolving their disputes.

II. RULE 53(B)(2).

Rule 53 was amended on December 1, 2003, and now requires an order of appointment to include certain contents. *See* Fed. R. Civ. P. 53(b)(2). The following discussion sets forth the matters required.

A. Master's Duties.

Rule 53(a)(1)(A) states that the Court may appoint a neutral to "perform duties consented to by the parties." [If applicable: The parties in this case consented to having a Court-Appointed Neutral: 1) assist the Court with legal analysis of the parties' submissions; and 2) perform any and all other duties assigned to him 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. The parties [further] request, however, that the Court retain sole authority to issue final rulings on matters formally submitted for adjudication. Motion for appointment at 2.][3] The Court has reviewed recent legal authority addressing the duties of a Court-Appointed Neutral that are permitted under the "Federal Rules of Civil Procedure and Article III of the Constitution."[4] Consonant with this legal authority, the currently-anticipated needs of the court, and the parties' broad consent, the Court states that the Court-Appointed Neutral in these proceedings shall have the authority to:[5]

1. assist with preparation for attorney conferences (including formulating agendas), court scheduling, and negotiating changes to the case management order;
2. establish discovery and other schedules, review and attempt to resolve informally any discovery conflicts (including issues such as privilege, confidentiality, and access to medical and other records), and supervise discovery;
3. oversee management of docketing, including the identification and processing of matters requiring court rulings;
4. compile data and assist with, or make findings and recommendations with regard to, interpretation of scientific and technical evidence;

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[3] In addition, the Court may appoint a neutral to: (1) "address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district;" and (2) "hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury," if warranted by certain conditions. Rule 53(a)(1)(B, C).

[4] *See, e.g.,* Fed. R. Civ. P. 53, advisory committee's notes (discussing the range of duties and authority of the Special Master). *See also* Mark Fellows & Roger Haydock, *Federal Court Special Masters: A Resource in the Era of Complex Litigation*, 31 Wm. Mitchell L. Rev.1269 (2005); David Ferleger, *Neutrals in Complex Litigation and Amended Rule 53,* Special Master Conference 2004 Course Materials (Nat'l Arbitr. Forum ed., 2004) (unpublished); Margaret Farrell, *Special Masters in the Federal Courts Under Revised Rule 53: Designer Roles,* Special Masters Conference 2004 Course Materials (Nat'l Arbitr. Forum ed., 2004) (unpublished). These three articles, written by federal court-appointed neutrals, note the increasing use and need for such appointments, and discuss the range of duties and limits of appointment. The articles are contained in reference materials distributed at the October, 2004 National Special Neutrals Conference.

[5] This list is meant to be illustrative, not comprehensive.

5. assist with legal analysis of the parties' motions or other submissions, whether made before, during, or after trials, and make recommended findings of fact and conclusions of law;
6. assist with responses to media inquiries;
7. help to coordinate federal, state and international litigation;
8. direct, supervise, monitor, and report upon implementation and compliance with the Court's Orders, and make findings and recommendations on remedial action if required;
9. interpret any agreements reached by the parties;
10. propose structures and strategies for settlement negotiations on the merits, and on any subsidiary issues, and evaluate parties' class and individual claims, as may become necessary;
11. propose structures and strategies for attorney fee issues and fee settlement negotiations, review fee applications, and evaluate parties' individual claims for fees, as may become necessary;
12. administer, allocate, and distribute funds and other relief, as may become necessary;
13. adjudicate eligibility and entitlement to funds and other relief, as may become necessary;
14. monitor compliance with structural injunctions, as may become necessary;
15. make formal or informal recommendations and reports to the parties, and make recommendations and reports to the Court, regarding any matter pertinent to these proceedings; and
16. communicate with parties and attorneys as needs may arise in order to permit the full and efficient performance of these duties. *See* discussion below.

B. Communications with the Parties and the Court.

Rule 53(b)(2)(B) directs the Court to set forth "the circumstances—if any—in which the master may communicate ex parte with the court or a party." The Court-Appointed Neutral may communicate ex parte with the Court at the Neutral's discretion, without providing notice to the parties, in order to "assist the Court with legal analysis of the parties' admissions" (e.g., the parties' motions). Motion for appointment at 2. The Court-Appointed Neutral may also communicate ex parte with the Court, without providing notice to the parties, regarding logistics, the nature of activities, management of the litigation, and other appropriate procedural matters. The Court may later limit the Court-Appointed Neutral's ex parte communications with the Court with respect to certain functions, if the role of the Court-Appointed Neutral changes.[6]

[6] If, for example, the Court later finds it desirable to use the Court-Appointed Neutral as a mediator regarding the merits of a particular dispute, which mediation would require disclosure of information by the parties to the Court-Appointed Neutral that the parties would prefer to keep from a final adjudicator, the Court may redefine the scope of allowed ex parte communications with the Court regarding that dispute. *See, e.g., In re: Propulsid Products Liab. Litig.,* 2002 WL 32156066 (E.D. La. Aug. 28, 2002) (after the Court-Appointed Neutral was given additional mediation duties, the scope of ex parte communications with the parties and the Court, as well as record-keeping obligations, changed); Rule 53(b)(4) (noting that an order of appointment may be amended). On the other hand, such imposition of different limits on ex parte communications does not necessarily require amendment of the order.

The Court-Appointed Neutral may communicate ex parte with any party or attorney, as the Special Master deems appropriate, for the purposes of ensuring the efficient administration and management of this MDL, including the making of informal suggestions to the parties to facilitate compliance with Orders of the Court; such ex parte communications may, for example, address discovery or other procedural issues. Such ex parte communications shall not, however, address the merits of any substantive issue, except that, if the parties seek assistance from the Special Master in resolving a dispute regarding a substantive issue, the Court-Appointed Neutral may engage in ex parte communications with a party or attorney regarding the merits of the particular dispute, for the purpose of mediating or negotiating a resolution of that dispute, only with the prior permission of those opposing counsel who are pertinent to the particular dispute.[7]

C. Neutral's Record.

Rule 53(b)(2)(c) states that the Court must define "the nature of the materials to be preserved and filed as a record of the master's activities." The Court-Appointed Neutral shall maintain normal billing records of time spent on this matter, with reasonably detailed descriptions of activities and matters worked upon. See also section II.E of this Order, below. If the Court asks the Court-Appopinted Neutral to submit a formal report or recommendation regarding any matter, the Special Master shall either submit such report or recommendation in writing, for electronic filing on the case docket. The Court-Appointed Neutral need not preserve for the record any documents created by the Court-Appointed Neutral that are docketed in this or any other court, nor any documents received by the Court-Appointed Neutral from counsel or parties in this case. The Court may later amend the requirements for the Court-Appointed Neutral's record if the role of the Special Master changes.[8]

D. Review of the Court-Appointed Neutral's Orders.

Rule 53(b)(2)(D) directs the Court to state "the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations." The Court-Appointed Neutral shall either: (1) reduce any formal order, finding, report, or recommendation to writing and file it electronically on the case docket via Electronic Case Filing ("ECF"); or (2) issue any formal order, finding, report, or recommendation on the record, before a court reporter. Pursuant to Rule 53(g)(2), any party may file an objection to an order, finding, report, or recommendation by the Special Master within 14 calendar days of the date it was electronically filed; failure to meet this deadline results in permanent waiver of any objection to the Special Master's orders, findings, reports, or recommendations.[9] Absent timely objection, the orders, findings, reports, and recommendations

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[7] To the extent it may be considered a "substantive issue," the Court-Appointed Neutral may engage in ex parte communications with a party or counsel, without first obtaining the prior permission of opposing counsel, to resolve privilege or similar questions and in connection with in camera inspections.

[8] *See, e.g., In re: Propulsid Products Liab. Litig.,* 2004 WL 1541922 (E.D. La. June 25, 2004) (setting out additional record-keeping requirements after the Special Master was charged with new duties of administering a settlement program).

[9] Rule 53(g)(2) provides that parties may file objections "no later than 20 days from the time the neutral's order, report, or recommendations are served, unless the court sets a different time." The Court chooses to set a period of 14 calendar days (NOT business days) in order to expedite final resolution of matters formally reported upon by the Special Master. Motions for extensions of time to file objections will not normally be granted unless good cause is shown. The Special Master may, however, provide in an order, finding, report, or recommendation that the period for filing objections to that particular document is some period longer than 14 calendar days, if a longer period appears

of the Court-Appointed Neutral shall be deemed approved, accepted, and ordered by the Court, unless the Court explicitly provides otherwise.

As provided in Rule 53(g)(4, 5), the Court shall decide de novo all objections to conclusions of law made or recommended by the Court-Appointed Neutral; and the Court shall set aside a ruling by the Court-Appointed Neutral on a procedural matter only for an abuse of discretion. The Court shall retain sole authority to issue final rulings on matters formally submitted for adjudication, unless otherwise agreed by the parties, and subject to waiver of objection to written orders or recommendations as noted above. To the extent the Court-Appointed Neutral enters an order, finding, report, or recommendation regarding an issue of fact, the Court shall review such issue de novo, if any party timely objects pursuant to the Rules and within the 14 calendar day time period set forth herein; see Rule 53(g)(3). Failure to meet this deadline results in permanent waiver of any objection to the Court-Appointed Neutral's findings of fact.

E. Compensation.

Rule 53(b)(2)(E) states that the Court must set forth "the basis, terms, and procedure for fixing the master's compensation;" see also Rule 53(h) (addressing compensation). The Court-Appointed Neutral shall be compensated at the rate of [$ per hour], with the parties bearing this cost equally (50% by the plaintiffs and 50% by the defendants). The Court-Appointed Neutral shall incur only such fees and expenses as may be reasonably necessary to fulfill duties under this Order, or such other Orders as the Court may issue. Within 14 days of the date of this Order, the parties shall **REMIT** to the Court-Appointed Neutral an initial, one-time retainer of [$____] (50% by the plaintiffs and 50% by the defendants); the Court will not order additional payments by the parties to the Court-Appointed Neutral until the retainer is fully earned. 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." Rule 53(a)(3).

From time to time, on approximately a monthly basis, the Court-Appointed Neutral shall submit to the Court an Itemized Statement of fees and expenses, which the Court will inspect carefully for regularity and reasonableness. Given that, at this juncture in the litigation, one of the duties of the Court-Appointed Neutral is to assist the Court with legal analysis of the parties' submissions, the Court expects these Itemized Statements will reveal confidential communications between the Court-Appointed Neutral and the Court. Accordingly, the Court shall maintain these Itemized Statements under seal, and they shall not be made available to the public or counsel. The Court-Appointed Neutral shall attach to each Itemized Statement a Summary Statement, which shall not reflect any confidential information and shall contain a signature line for the Court, accompanied by the statement "approved for disbursement." If the Court determines the Itemized Statement is regular and reasonable, the Court will sign the corresponding Summary Statement and transmit it to the parties. The parties shall then remit to the Court-Appointed Neutral their half-share of any court approved amount, within 20 calendar days of Court approval.[10]

Finally, the Court-Appointed Neutral shall not seek or obtain reimbursement or compensation for support personnel, absent approval by the Court.[11]

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warranted.

[10] The Court adopts this procedure from Judge Sarah Evans Barker, who used it in *In re: Bridgestone/Firestone. See* www.insd.uscourts.gov/Firestone/, docket no. 593 ("Entry concerning fees of Special Neutral").

[11] *Cf. Triple Five of Minnesota, Inc. v. Simon,* 2003 WL 22859834 at *2 (D. Minn. Dec. 1, 2003) (authorizing the

F. Other Matters.

1. Affidavit.

Rule 53(b)(3) notes that the Court may enter an Order of appointment "only after the master 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). Attached to this Order is the affidavit earlier submitted to the Court by the Special Master.

2. Cooperation.

The Special Master shall have the full cooperation of the parties and their counsel. Pursuant to Rule 53(c), the Court-Appointed Neutral may, if appropriate, "impose upon a party a non-contempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty." As an agent and officer of the Court, the Court-Appointed Neutral shall enjoy the same protections from being compelled to give testimony and from liability for damages as those enjoyed by other federal court-appointed neutrals performing similar functions.[12] The parties will make readily available to the Court-Appointed Neutral any and all facilities, files, databases, and documents which are necessary to fulfill the Special Master's functions under this Order.

IT IS SO ORDERED.

Court-Appointed Neutral to "hire accountants, real estate consultants, attorneys, or others as necessary to assist in carrying out duties under this Order" and further stating: "The special master shall be compensated at the rate of $400.00 per hour. Additionally, the parties shall pay the usual and customary rates for work which the special master delegates to others.."). In light of the complexity of this litigation, and depending on how it proceeds, it may become appropriate for the Court-Appointed Neutral to retain consultants or otherwise obtain assistance.

[12] *See Atkinson-Baker & Associates, Inc. v. Kolts,* 7 F.3d 1452, 1454-55 (9th Cir. 1993) (applying the doctrine of absolute quasi-judicial immunity to a Special Neutral).

Appendix B
ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation

The Guidelines are located at:

https://www.americanbar.org/content/dam/aba/directories/policy/mid-year-2019/100-midyear-2019.pdf

AMERICAN BAR ASSOCIATION ADOPTED BY THE HOUSE OF DELEGATES JANUARY 28, 2019 RESOLUTION

RESOLVED, That the American Bar Association adopts the *ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation*, dated January 2019.

FURTHER RESOLVED, That Bankruptcy Rule 9031 should 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.

ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation

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

1. **(1) It 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. **(2) In considering the possible use of a special master, courts, counsel and parties should be cognizant of the range of functions that a special master might be called on to perform and roles that a special master might serve.**
3. **(3) In determining whether a case merits appointment of a special master, courts should weigh the expected benefit of using the special master, including reduction of the litigants' costs, against the anticipated cost of the special master's services, in order to make the special master's work efficient and cost effective.**

4. **(4) Participants in judicial proceedings should be made aware that special masters can perform a broad array of functions that do not usurp judicial functions, but assist them. Among the functions special masters have performed are:**

   a. discovery oversight and management, and coordination of cases in multiple jurisdictions;

   2. **Facilitating resolution of disputes between or among co-parties;**
   3. **Pretrial case management;**
   4. **advice and assistance requiring technical expertise;**
   5. **conducting or reviewing auditing or accounting;**
   6. **conducting privilege reviews and protecting the court from exposure to privileged material and settlement issues; monitoring; class administration;**
   7. **conducting trials or mini-trials upon the consent of the parties;**
   8. **settlement administration;**
   9. **claims administration; and**
   10. **receivership and real property inspection.**

   In these capacities special masters can serve numerous roles, including management, adjudicative, facilitative, advisory, information gathering, or as a liaison.

5. **(5) Courts should develop local rules and practices for selecting, training, and evaluating special masters, including rules designed to facilitate the selection of special masters from a diverse pool of potential candidates.**

(6) Courts should choose special masters with due regard for the court's needs and the parties' preferences and in a manner that promotes confidence in the selection process by helping to ensure that qualified and appropriately skilled and experienced candidates are identified and chosen.

6. **(7) The referral order appointing the special master should describe the scope of the engagement, including, but not limited to, the special master's duties and powers, the roles the special master may serve, the rates and manner in which the special master will be compensated, power to conduct hearings or to facilitate settlement, requirements for issuing decisions and reporting to the court, and the extent of permissible ex parte contact with the court and the parties. Any changes to the scope of the referral should be made by a modification to the referral order.**
7. **(8) Courts and the bar should develop educational programs to increase awareness of the role of special masters and to promote the acquisition and dissemination of information concerning the effectiveness of special masters.**

8. **(9) Courts and, where applicable, legislatures should make whatever modifications to laws, rules, or practices that are necessary to effectuate these ends.**

REPORT Introduction

The American Bar Association ("ABA") has long advanced the use of dispute resolution tools to promote efficiency in the administration of justice. Thirty years ago, the ABA was a leading voice in favor of various forms of alternative dispute resolution ("ADR"). Today, there is an underutilized dispute resolution tool that could aid in the "just, speedy and inexpensive" resolution of cases: appointment of special masters.

In 2016, the Lawyers Conference of the ABA Judicial Division formed a Committee on Special Masters to promote research and education concerning special masters and to make proposals concerning using their use.[1] This Committee concluded that one of the difficulties faced by both courts and practitioners is the lack of a methodical and consistent approach to the appointment and use of special masters.[2]

To address this lack of standardization and to urge greater use of this valuable resource, the Committee brought together stakeholders from diverse segments of the ABA to propose best practices in using special masters. The ABA formed a Working Group in the fall of 2017 and included representatives of the Judicial Division (including three of its conferences – the National Conference of Federal Trial Judges, the National Conference of State Trial Judges and the Lawyers Conference), the ABA Standing Committee on the American Judicial System, and the ABA's Section of Litigation, Business Law Section, Section of Dispute Resolution, Section of Intellectual Property Law, Tort Trial and Insurance Practice Section, and Section of Antitrust. The membership

[1] Currently, 49 states have rules or statutes that provide for the appointment of court adjuncts to assist courts in the administration of justice. *See* Lynn Jokela and David F. Herr "Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool," WILLIAM MITCHELL LAW REVIEW, Vol. 31, No. 3, Art. (2005) "In fact, Illinois is the only state that does not have any mechanism governing appointment of special masters." *Id.* Courts have also recognized their inherent power to appoint special masters to assist judges in case management. *See id*. at 1302 n. 18. *See also* n.30, *infra.*

[2] Even the name for these judicial adjuncts is a source of confusion. These Guidelines use the term employed by Rule 53 of the Federal Rules of Civil Procedure – "special master" – to refer to any adjunct a court determines to be necessary and appropriate to appoint to serve any case-management function or to manage or supervise some aspect of a case. The term applies to persons appointed by any court to serve any of a wide variety of functions, regardless of whether statute, rules or practice have described these persons with other titles, such as "master," "discovery master," "settlement master," "trial master," "referee," "monitor," "technical advisor," "auditor," "administrator." Even states whose rules mirror the Federal Rules, use different titles to describe the court adjunct's officers. For example, a Rule 53 adjunct in Maine is a "referee." *See* Maine R. Civ. P. 53. States using the pre-2003 version of the Federal Rules often refer to a "master" as "any person, however designated, who is appointed by the court to hear evidence in connection with any action and report facts," suggesting more of a trial function than a pretrial role. *See* e.g., Mass. R. Civ. P. 53. *See also* 2006 Kan. Code § 60-253 (" may suggest a more limited function").

included current and former federal and state judges, ADR professionals and academics, and litigators who represent plaintiffs, defendants, or both in numerous fields.[3]

The Working Group also obtained information from other interested and knowledgeable agencies, organizations, and individuals, including the Federal Judicial Center ("FJC"), federal and state judges, court ADR program administrators, private dispute resolution professionals, representatives of a number of state bar associations, the academic community, professional groups (including the Academy of Court[-]Appointed Masters ("ACAM")), litigators, and in-house counsel. The Group has also benefitted from discussions among judges and stakeholders organized by the Emory Law School Institute for Complex Litigation and Mass Claims, which has worked with the FJC to explore ways of improving the administration of multidistrict and class action litigation.

Based upon the recommendation of federal and state judges both within and outside the Judicial Division and the Working Group's analysis, and consistent with the best practices described below, the ABA encourages courts to make greater and more systematic use of special masters to assist in civil litigation in accordance with these Guidelines.

Discussion and Rationale for the Guidelines

Courts and parties have long recognized that, in far too many cases, civil litigation takes too long and costs too much. Since 1938, Rule 1 of the Federal Rules of Civil Procedure has declared (in a principle echoed in many state rules) that the Rules are intended to deliver "a just, speedy, and inexpensive determination of every action and proceeding." Since December 1, 2015, the Rules have declared that they are to be "employed by the court and the parties to secure" that end. Indeed, virtually every amendment to the Federal Rules over the past thirty-five years has been intended, at least in part, to address concerns regarding the expense and duration of civil litigation.[4]

[3] The Working Group comprises representatives from the Judicial Division (Hon. J. Michelle Childs; Hon. David Thomson; Merril Hirsh (Convener); Cary Ichter (Reporter); Christopher G. Browning; David Ferleger and Mark O'Halloran); the ABA Standing Committee on the American Judicial System (Hon. Shira A. Scheindlin (ret.)); the Business Law Section (William Johnston (convener, policy subgroup); Hon. Clifton Newman; Richard L. Renck; Hon. Henry duPont Ridgely (ret.); Hon J. Stephen Schuster; and Hon. Joseph R. Slights III); the Section of Litigation (Mazda Antia, John M. Barkett, David W. Clark, Koji Fukumura and Lorelie S. Masters); the Section of Dispute Resolution (Hon. Bruce Meyerson (ret.); Prof. Nancy Welsh); the Section of Intellectual Property Law (David L. Newman; Scott Partridge; Gale R. ("Pete") Peterson); the Section of Antitrust Law (Howard Feller, James A. Wilson) and the Tort Trial and Insurance Practice Section (Sarah E. Worley). The members also wish to thank Hon. Frank J. Bailey and his staff, and ABA Staff members Amanda Banninga, Denise Cardman, Julianna Peacock, and Tori Wible for their assistance.

[4] *See, e.g.*, Fed. R. Civ. P. 26 Advisory Committee Note: "There has been widespread criticism of abuse of discovery"; 1983: the "first element of the standard, Rule 26(b)(1)(i), is designed to minimize redundancy in discovery and encourage attorneys to be sensitive to the comparative costs of different methods of securing information"; Rule 26(g) "provides a deterrent to both excessive discovery and

evasion"; 1993: "A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner

All too often, however, modifications to procedural rules intended to make the litigation process more efficient have merely changed the subject of the dispute: for example, limiting the number of interrogatories can lead to conflict over how to count interrogatories and subparts.[5] Unfortunately, the Rules are not self-executing.

Ensuring that parties will not gain an advantage by unreasonable conduct or delay requires a proportionate level of judicial case management. This case management is possible only where adequate resources are available to implement strategies designed to minimize the likelihood of unnecessary disputes, to facilitate the resolution of disputes that do arise, and to focus the parties on fairly resolving the issues in controversy.[6]

Judges, including magistrate judges, must dedicate the time needed to manage the pretrial process, and it is important to use their time most effectively. When warranted, appointment of a special master to manage the pretrial process can relieve courts of the burden of reviewing voluminous discovery materials or information withheld as privileged or proprietary, or addressing other disputes, allowing courts to focus on merits-based resolution of issues on a concise record. Where a case warrants this type of assistance, special masters have time that courts do not. The goal of these guidelines is not to detract in any way from the role of judges, including magistrate judges. It is to assist them.[7]

Courts at all levels face three particularly significant obstacles to effective case management. First, courts often lack sufficient resources to manage certain cases–particularly complex commercial cases or the practical ability to increase resources when

to achieve those objectives"; 2006: Rule 26(b)(2) is amended to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information and to regulate discovery from sources "that are accessible only by incurring substantial burdens or costs." 2015: Amendments that, among other things, expressly limit discovery to be "proportional to the needs of the case"; clarify when sanctions are appropriate for failure to preserve e-discovery; and specify that the rules not only be "construed," but also "administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

[5] *See* Merril Hirsh, James M. Rhodes and Karl Bayer, "Special Masters: A Different Answer to a Perennial Problem, JUDGES JOURNAL, v. 55, No. 2 at 28 (Spring 2016).
[6] *See id.* at 29-31; Merril Hirsh, "Special Masters: How to Help Judges Extend Their Reach ... And Exceed Their Grasp," ALTERNATIVES (June 2017), available at http://altnewsletter.com/sample-articles/special-masters--how-to-help-judges--extend-their-reach--and-exceed-their-grasp.aspx

[7] Appointed masters are also used in other settings. Courts have appointed special masters in criminal cases, for example, to consider *Brady* obligations, *see, e.g., United States v. McDonnell Douglas*, 99-CR-353 (D.D.C.), or to shield investigators from privileged documents that might be obtained through warrants executed at attorney offices, *see, e.g., United States v. Stewart*, No. 02 CR. 396 JGK, 2002 WL 1300059 (S.D.N.Y. June 11, 2002); United States Attorneys Manual § 9–13.420, at § F, available at

https://famguardian.org/Publications/USAttyManual/title9/13mcrm.htm#9-13.420. Masters are also appointed in non-judicial contexts (for example, by legislation, such as the appointment to administer the September 11 Victims Compensation Fund; by private entities to administer settlement funds designed to compensate injured parties in mass disasters, such as the BP Deep Water Horizon fund; and by government agencies to investigate and make recommendations, as with the special master appointed to investigate the student loan crisis). Many agencies and entities also use ombudsman to serve numerous functions, including avoiding and resolving disputes and facilitating communication among stakeholders. These roles illustrate the utility and flexibility of using masters as a tool. A thorough discussion of appointments outside the civil litigation context, however, is beyond the scope of these Guidelines.

such a case is filed. In the federal system and in some state courts, magistrate judges are available; in others they are not. In some courts, a few complex cases, or a single, particularly complex case, can strain a docket. Resources allocated to one case can consume resources that would otherwise be available for other cases. Special masters can offer the time and attention complex cases require without diverting judicial time and attention from other cases.

Second, some cases benefit from specialized expertise. This is particularly true in federal multidistrict litigation ("MDL"), which accounts for nearly forty percent of the federal case load, excluding prisoner and social security cases.[8] Managing those cases oftentimes requires a diverse set of skills (e.g., managing discovery, reviewing materials withheld as privileged or proprietary, facilitating settlement of pretrial issues or the entire case, addressing issues related to expert qualifications and opinions, resolving internecine disputes among plaintiff and/or defense counsel, allocating settlement funds or awards, evaluating fee petitions, or providing other needed expertise).

Judges in MDLs and other large, complex cases are called upon to bring to bear knowledge of many fields, including, for example, science, medicine, accounting, insurance, management information systems, business, economics, engineering, epidemiology, operations management, statistics, cybersecurity, sociology, and psychology. No one person can be an expert in all these fields. Special masters who have specialized expertise in relevant fields can provide a practical resource to courts in cases that would benefit from subject-matter expertise.

Third, the judicial role limits the involvement judges can have in some aspects of the litigation process. Judicial ethics limit the ability of judges to facilitate informal resolutions of issues and cases, particularly if the process requires *ex parte* meetings with parties or proposing resolutions of issues on which the court may eventually need to rule.[9]

Federal Rule 16(c)(2)(H) and certain state rules provide that "[a]t any pretrial conference, the court may consider and take appropriate action on...referring matters to a magistrate judge or a master...." As previously noted,[10] however, the experience of the Working Group suggests that it is rare for courts to make use of this provision, especially when compared to the use made of other settlement procedures described in Rule 16(c)(2)(I).[11] Few courts have a practice of regularly considering the appointment of a

[8] Andrew D. Bradt, "The Long Arm of Multidistrict Litigation," 59 WM. & MARY L. REV. 1, 2 (2017); Elizabeth Chamblee Burch, "Monopolies in Multidistrict Litigation," 70 VAND. L. REV. 67, 72 (2017). The Judicial Panel on Multidistrict litigations reports that, as of April 16, 2018, 123,293 cases were part of pending MDL actions. http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-April-16-2018.pdf

[9] *See* Ellen E. Deason, *Beyond "Managerial Judges": Appropriate Roles in Settlement*, 78 Ohio St. L. J. 73, 105-127 (2018) (describing the ethical, due process and decision-making difficulties that arise when a judge plays both an adjudicative and settlement role in a case); Nancy A. Welsh, *Magistrate Judges, Settlement and Procedural Justice*, 16 Nev. L. J. 983, 1004-1014, 1018-1023, 1028-35 (2016).

[10] *See supra* nn.5-6 and accompanying text.
[11] Rule 16(c)(2)(I) provides as follow: "At any pretrial conference, the court may consider and take appropriate action on... settling the case and using specialized procedures to assist in resolving the dispute when authorized by statute or local rule."

special master when they are preparing a scheduling order.[12]

Despite the considerable assistance special masters can offer, appointing special masters has historically been viewed as an extraordinary measure to be employed only on rare occasions.[13] This view appears to have stemmed from concerns regarding delegation of judicial authority and the costs that the parties will incur. But neither concern justifies limiting consideration of using masters to "rare occasions."

The Supreme Court has long used special masters in original jurisdiction cases and has vested in those individuals extraordinarily broad powers, including the responsibility to conduct trials on the merits. Thus, at least at the federal level, if the use of special masters were an improper delegation of judicial power, courts would be barred from using them, and obviously they are not.[14]

Moreover, as a matter of logic, a concern about delegating authority should apply only to situations where the special master is asked to perform an adjudicative role. And, unless the parties agree otherwise, a special master's "adjudication" is merely a report and recommendation that can be appealed to the trial court as a matter of right. The ultimate decision-making authority continues to reside with the court.

Cost concerns actually animate these Guidelines. Effective special masters reduce costs by dealing with issues before they evolve into disputes and by swiftly and efficiently disposing of disputes that do arise. Although no scientific study has empirically established that special masters reduce the cost of litigation, there is broad consensus that anticipating and preventing disputes before they arise or resolving them quickly as they emerge significantly improves the effectiveness and efficiency of dispute resolution.[15] Special masters can also inculcate a culture of compliance with procedural

[12] There are exceptions. *See infra* n.25.
[13] *See, e.g.*, 2003 Advisory Committee Note to Fed. R. Civ. P. 53 (noting, even as it revised the rule "extensively to reflect changing practices in using masters" for a broader array of functions that "[t]he core of the original [1938] Rule 53 remains, including its prescription that appointment of a master must be the exception not the rule"); Manual for Complex Litigation 4th, §10.14 at 14 (2004) ("Referral of pretrial

management to a special master (not a magistrate judge) is not advisable for several reasons. Rule 53(a)(1) permits referrals for trial proceedings only in nonjury cases involving "some exceptional conditions" or in an accounting or difficult computation of damages. Because pretrial management calls for the exercise of judicial authority, its exercise by someone other than a district or magistrate judge is particularly inappropriate. The additional expense imposed on parties also militates strongly against such appointment. Appointment of a special master (or of an expert under Federal Rule of Evidence 706) for limited purposes requiring special expertise may sometimes be appropriate (e.g., when a complex program for settlement needs to be devised)").

[14] *See* n.30 *infra* (discussing inherent authority of courts to appoint special masters to assist their judicial administration). *See also Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1944 (2015) ("The entitlement to an Article III adjudicator is 'a personal right' and thus ordinarily 'subject to waiver.' ... But allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process").

[15] *See* Thomas D. Barton and James P. Groton, "The Votes Are In: Focus on Preventing and Limiting Conflicts, DISPUTE RESOLUTION, v. 24 n.3, 9, 10 (Spring 2018). Barton and Groton report that a Global Pound Conference survey of more than 2,000 business leaders, in-house counsel, outside counsel or advisors,

rules by strictly monitoring the parties' compliance with the rules and ensuring that parties do not gain leverage or time from non-compliance.

Special masters may be particularly helpful in assisting parties to implement the December 2015 Amendments to the Federal Rules of Civil Procedure. Those amendments were designed to make litigation more efficient by, among other things, requiring discovery to be "proportional to the needs of the case"[16] and requiring objections to "state whether any responsive materials are being withheld on the basis of that objection."[17] Having a special master work with the parties in appropriate cases to apply these requirements as they propound or respond to discovery requests should promote cooperation and efficiency. Those benefits from using special masters do not detract from judicial administration; they enhance it.

A significant purpose of the 2015 Amendments was to use more proactive case management to prevent problems from arising or solving problems before they become needlessly expensive and time-consuming. Where warranted, if parties are unable to resolve disputes that have the potential to multiply, having a special master assist in the resolution helps to fulfill that goal and frees judicial resources for substantive decision-making and case resolution.

Hence, in all appropriate cases, the court should assess whether appointment of a special master will contribute to a fair and efficient outcome. Special masters can make those contributions by:

- Enabling faster and more efficient resolution of disputes.
- Relieving burdens on limited judicial resources.
- Allowing for specialized expertise in any field that assists judicial administration.
- Allowing for creative and adaptable problem solving.
- Serving in roles that judges are not, or may not be, in a position to perform.
- Facilitating the development of a diverse and experienced pool of masters by

introducing an expanded universe of practitioners to work as masters.

- Helping courts to monitor implementation of orders and decrees.

It is unclear whether the failure to use masters arises from hostility toward the concept or the unfamiliarity borne of under-utilization, or both. Indeed, the use of (or even consideration of using) special masters is so rare that the very idea is alien to many judges and lawyers. Other barriers to use include:

academics, members of the judiciary and government and dispute resolution providers concluded that, by far, the step that should be prioritized to achieve effective dispute resolution is to employ processes to resolve matters pre-dispute or pre-escalation. Although the survey focused on preventing disputes before litigation begins, there is no reason why the same principle would not apply to preventing disputes within litigation before they start or escalate. *See also* *http://globalpound.org/wp-content/uploads/2017/11/2017- 09-18-Final-GPC-Series-Results-Cumulated-Votes-from-the-GPC-App-Mar.-2016-Sep.-2017.pdf* at 42

[16] Fed. R. Civ. P. 26(b)(1) (2015).
[17] Fed. R. Civ. P. 34(b)(2)(C) (2015).

- A general lack of awareness among courts, counsel and parties about special masters and the ways in which they can be used.
- A concern among parties and their counsel of losing control of the litigation.
- A lack in many courts of structures and procedures for vetting, selecting, employing, and evaluating special masters (either as a matter of court

administration or as a practice of individual judges).

- Increased cost and delay.
- The introduction of another layer between the court and counsel.

Regardless of the reason, the failure to consider using special masters in appropriate cases may disserve the goal of securing “a just, speedy, and inexpensive determination.” This failure has also led to appointments being made without systems or structures to support selection, appointment, or use of special masters and, frequently, after cases have already experienced management problems. Although anecdotal evidence indicates that courts and parties are satisfied with their experiences with special masters,[18] the *ad hoc* nature of appointments can lead to inconsistent results and perceptions that undercut the legitimacy of appointees. Moreover, because special masters are rarely used, courts and academicians have not thoroughly addressed such basic issues as what qualifications special masters should possess, how those qualifications should vary based upon the role the special master is performing, what the best practices for special masters should be, and what ethical rules should govern the conduct of special masters. Adopting standards for the appointment of special masters and making their use more common will allow for more research into

ways to make the process more predictable and the work of special masters more effective.

Highlights of Specific Recommendations

(1) It 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.

Because courts do not typically consider appointing a special master at the outset of cases, special masters are most frequently appointed after case-management issues have emerged. Although special masters can be of use in these situations, this timing prevents courts and stakeholders from obtaining early case management that often eliminates the need for dispute resolution.

A special master can, for example, address discovery issues and privilege issues before discovery responses are due, thereby preventing disputes before they arise. While conferences that deal with discovery issues before the parties resort to costly motion

[18] Barbara Meierhoefer, "Special Master Case Studies" (2018) available at

https://www.americanbar.org/content/dam/aba/publications/judicial_division/2018lc-specialmasterscasestudy.authcheckdam.pdf

practice is useful, intervening before parties serve responses would be even more efficient and could reduce conflicts among counsel and costs to the parties.

(2) In considering the possible use of a special master, courts, counsel and parties should be cognizant of the range of functions that a special master might be called on to perform and roles that a special master might serve.

The suggestions offered here on how special masters might be used to assist in civil litigation are meant to be illustrative, not exhaustive. Indeed, it is not possible to list every conceivable role a special master can play. Courts, counsel, and parties are encouraged to consider creative approaches to integrating special masters into case management for the benefit of all participants.

Moreover, there are often different ways to serve the judicial process. For example, a special master charged with assisting in resolving discovery disputes could adjudicate issues relating to pending discovery motions or could assist counsel in working through discovery needs and obligations without motion practice, or both.

Special masters can address motions dealing with the admissibility of opinion testimony based upon the qualifications of a proposed expert or the soundness of the opinion expressed or methodology employed in reaching it. Special masters can also perform an advisory function, providing information and guidance to the court or the parties in areas that require technical expertise.

Special masters can also provide information to the court. For example, a special master could conduct a privilege review,[19] analyze damages calculations, or summarize and report on the content of voluminous records to prepare the court for a hearing or trial. Special masters can perform these functions in different ways from a court[-]appointed expert (for example, providing adjudication and not merely an opinion), using different procedures (for example, in a process that does not contemplate party-appointed experts or depositions of the independent adjunct). Rather than the parties and the court bearing the expense associated with several experts, there would be only one special master and challenges would be made by objection to the special master's rulings.

Special masters can productively serve as a flexible resource to address a range of problems. The order of appointment should describe the issues the master is to address and the powers afforded the master to do so. Once the court finds a need, the only practical limit that should constrain the decision to use special masters is whether the appointment of a master would impose a cost that outweighs the benefit.

[19] *See, e.g., In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789 (E. D. La. 2007). 8

(3) In determining whether a case merits appointment of a special master, courts should weigh the expected benefit of using the special master, including reduction of the litigants' costs, against the anticipated cost of the special master's services, and with the view of making the special master's work efficient and cost effective.

The appointment of a special master must justify the cost. In most instances, the potential for disputes is a function of the amount of money at stake, the number of parties involved, the number of issues and their factual or legal complexity, the number of lawyers representing the parties, and the level of contentiousness between or among the parties or counsel. In many, if not most, of those cases, the cost of procedural skirmishes vastly outstrips the costs of paying a special master to deter, settle, or quickly dispose of issues when they arise.

The benefits of a special master cannot always be measured entirely in dollars. The value of special masters to courts and stakeholders lies in the extraordinary flexibility their use offers to import resources, expertise, and processes that can be flexibly adapted to the needs of each case. In some cases, particularly those involving non-financial concerns, using a special master may be justified if the master adds a

resource, expertise, or process that enhances the effective administration of justice. Determining whether that value outweighs the cost requires a case-by-case assessment.

(4) Participants in judicial proceedings should be made aware that special masters can perform a broad array of functions that do not usurp judicial functions, but assist it. Among the functions special masters have performed are:

a. discovery oversight and management, coordination of cases in multiple jurisdictions;

2. **Facilitating resolution of disputes between or among co-parties;**
3. **Pretrial case management;**
4. **advice and assistance requiring technical expertise;**
5. **conducting or reviewing auditing or accounting;**
6. **conducting privilege reviews and protecting the court from exposure to privileged material and settlement issues; monitoring; class administration;**
7. **conducting trials or mini-trials upon the consent of the parties;**
8. **settlement administration;**
9. **claims administration; and**
10. **receivership and real property inspection.**

In these capacities special masters can serve numerous roles, including management, adjudicative, facilitative, advisory, information gathering, or as a liaison.

Special masters can be used creatively and thoughtfully in a wide array of situations. It 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 master 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.[20]
- Monitoring and claims administration.
- Receivership.

Depending upon the function(s) the special master is performing, the special master may serve in different types of roles, including:

- Adjudicative.
- Facilitative.
- Advisory
- Informatory
- Liaison.[21]

The role a special master performs in a case is subject to ethical and legal constraints, the court's control, and, in some instances, the consent of the parties. For example, a special master serving as a mediator may be subject to mediation-specific statutory or ethical obligations, such as confidentiality or a mediation privilege, and these mediation-specific obligations could be inconsistent with other roles the special master is required to play, particularly adjudicative or informatory roles.[22]

These Guidelines do not direct any particular use of special masters or identify all the legal or ethical obligations that might apply to their activities. Rather, they seek to help courts and parties by increasing awareness of the potential for using special masters creatively and effectively, while highlighting some of the legal or ethical obligations that might apply. As discussed under Point 8 below, one advantage of a greater acceptance of special masters is that experience will foster creativity and promote understanding of the appropriate legal and ethical obligations that apply to special masters.

[20] In some jurisdictions, if the parties consent, special masters are empowered to oversee trials, or to conduct "mini-trials" of specific, perhaps technical, issues. These proceeding differ from arbitrations in a number of ways and often, for example, are subject to review in ways that arbitrations usually are not.

[21] "Liaison" refers to situations in which a special master is being used as go-between to provide information to the court while insulating it from matters such as settlement discussions or privileged information.

[22] *See* n.9 *supra*. Fed. R. Civ. P. 53(a)(2), and accompanying Advisory Committee Notes (2003). The considerations may be different in the discovery context. As the parties sort through discovery issues with the special master acting as an adjudicator, opportunities often arise for the parties and the master to discuss and explore together voluntary solutions to discovery disputes.

(5) Courts should choose special masters with due regard for the court's needs and the parties' preferences and in a manner that promotes confidence in the process and the choice by helping to ensure that qualified and appropriately skilled and experienced candidates are identified and chosen.

The choice of who is to serve as a special master, like the issue of what function and role the special master is to perform, requires careful consideration. Courts need to ensure that the selection and use of special masters is fair.

Courts should afford parties the opportunity to propose acceptable special master candidates.[23] As discussed below, *see* Point 7, by maintaining rosters, courts can assist the parties and identify a pool of candidates who bring a diverse range of experience. Courts should always give serious consideration to any candidate identified by the parties, although the court should also always vet candidates to ensure that they have the time, qualifications, and independence to discharge their special-master duties. Involving the parties in the selection process should minimize the parties' perception that a candidate was forced upon them by the court and should eliminate any possible concern of bias.

(6) The referral order appointing the special master should describe the scope of the engagement, including, but not limited to, the special master's duties and powers, the roles the special master may serve, the rates and manner in which the special master will be compensated, power to conduct hearings or to facilitate settlement, requirements for issuing decisions and reporting to the court, and the extent of permissible ex parte contact with the court and the parties. Any changes to the scope of the referral should be made by a modification to the referral order.

Federal Rule of Civil Procedure 53(b)(2) and similar state rules require that the appointing order "direct the master to proceed with all reasonable diligence" and state:

> (A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);
>
> (B) the circumstances, if any, in which the master may communicate *ex parte* with the court or a party;
>
> (C) the nature of the materials to be preserved and filed as the record of the master's activities;
>
> (D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and
>
> (E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(g).

[23] *See* Fed. R. Civ. P. 53(b)(1) ("Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment").

The Court should consider adapting these terms (or adding others) consistent with the special master's role in the case. For example, the Court is empowered to align the incentives with the process, for example, by making compensation in a particular case hourly, fixed or a mixture of both and providing for review of billing afterwards.[24]

(7) Courts should develop local rules and practices for selecting, training and evaluating special masters, including rules designed to facilitate the selection of special masters from a diverse pool of potential candidates.

Few courts have adopted a system for the selection, vetting, or training of special masters. As a consequence, court decisions and available relevant literature do not extensively examine special masters' qualifications or how those qualifications should vary depending upon the role the special master is performing.[25]

Depending on the appointing court's circumstances, local custom, and preferences, courts may wish to consider and adapt the following processes:

- Develop a list of the roles special masters will be expected to perform.
- Adopt and notify the bar of the considerations for selection of special masters, including a commitment to diversity and inclusivity.
- Sponsor interactive discussions on the use of special masters.
- Adopt a method to ensure confidentiality during the appointment process.
- Develop a public (or, if the court prefers, an internal) database/list of qualified, screened individuals who meet basic criteria for consideration as special masters.
- Create an application and confidential vetting process that recognizes the needed functions and ensures that that a diverse spectrum of qualified candidates (including first-time special master candidates) may be included.
- Designate administrators to be responsible for implementing the program and assisting judges and/or parties in identifying matches for particular cases.
- Develop methods for evaluation, feedback and discipline.[26]

[24] The website of the Academy of Court[-]Appointed Masters [now the Academy of Court-Appointed Neutrals] includes a Bench Book with guidance and examples of form orders that address additional issues raised by the appointment of special masters. *See* [*https://www.courtappointedneutrals.org/benchbook/appointing-neutrals-handbook/*] . *See also* Advisory Committee Notes to Fed. R. Civ. P. 53(b) (discussing ethical issues in appointing special masters).

[25] The Indiana Commercial Courts Pilot Project and the Western District of Pennsylvania E-Discovery Special Masters Pilot Program are exceptions that offer guidance on developing rules. The United States District Court for the District of Delaware has a standing order under which special masters serve 4-year terms at the pleasure of the judges of the Court. The Court notifies the Bar when it is considering appointing new Panel members, allowing bar members to submit background information.
http://www.ded.uscourts.gov/sites/default/files/forms/SpecialMastersOrder2014.pdf *See also*

https://www.discoverypilot.com/ (Seventh Circuit eDiscovery pilot program incorporating master mediation).

[26] For a discussion of how state and federal courts have enabled feedback, *see* Nancy A. Welsh, Magistrate Judges, Settlement and Procedural Justice, 16 NEVADA LAW JOURNAL 983 (2016) and Nancy A. Welsh, Donna Stienstra & Bobbi McAdoo, *The Application of Procedural Justice Research to Judicial Actions and Techniques in Settlement Sessions*, *in* THE MULTI-TASKING JUDGE: COMPARATIVE JUDICIAL DISPUTE RESOLUTION (Tania Sourdin and Archie Zariski, eds., 2013).

While exploring the different systems and structures for appointing and training special masters is beyond the scope of these Guidelines, some suggestions include: inviting applicants to self-nominate; creating and implementing qualifications criteria; establishing a diverse roster of approved masters; establishing a performance review component; and adopting training programs for masters.

Developing rosters of special master candidates could facilitate vetting, qualifying, and training candidates to help ensure quality and confidence in the legitimacy of the choice. Vetting could also recognize and assist in implementing existing ABA guidance on increasing diversity among those who serve as special masters.[27]

Whether in designing a roster system or in making individual selections, some factors the court should consider include:

- Developing a diverse pool of persons who qualify for appointment.
- Ensuring the process is properly calibrated to the functions and roles special masters perform.
- Ensuring candidates make appropriate disclosures and have no conflicts of interest with the parties or issues being addressed.
- Ensuring the process properly assesses candidates' talents and experience.
- Determining whether subject matter expertise is necessary.
- Ensuring the ability of the prospective master to be fair and impartial and to engage with the parties and others with courtesy and civility.

Courts and the bar should develop educational programs to increase awareness of the role of special masters and to promote the acquisition and dissemination of information concerning the effectiveness and appropriate use of special masters.

Because special masters are appointed infrequently, many counsel have had no experience working with a special master.[28] Promulgating local rules and procedures to systematize the consideration and use of special masters would assist in familiarizing practitioners with the appointment process and how masters are used. When parties are aware that courts intend to make more effective use of special masters, the parties will be more likely to inform themselves about the selection process, potential candidates, and the role the special masters will play in the process. It is also important that the legal community develop educational programs available to both bench and bar on the

use of special masters. Greater use of special masters will also assist the advancement of appropriate professional standards for the multiple roles they perform.

[27] *See* American Bar Association Resolution 17M (urging the United States Supreme Court to consider racial, ethnic, disability, sexual orientation, gender identity, and gender diversity in the process for selecting *amicus curiae*, special masters, and other counsel).
[28] *See, e.g.*, David R. Cohen, "The Judge, the Special Master, and You," LITIGATION v. 20, No. 1 (2015).

Courts should have regular mechanisms to monitor the quality of special masters' work. An appointing court could require that the master make periodic progress reports on issues that have been addressed and resolved, the procedural posture of the case, and when the case will be trial ready. Courts should also identify mechanisms that allow the parties to provide feedback and, if applicable, raise concerns regarding their experience with, and the performance of, the special master.[29]

Monitoring special master performance and stakeholder satisfaction will allow courts to identify and correct problems. If a special master proves inappropriate, the court can replace the special master with a more suitable candidate. If tasks are too much for one special master to handle, the court can consider dividing tasks among more than one master. If the process is ineffective, the court could consider vacating the appointment.

When cases conclude, it should be a regular practice for participants to complete a brief confidential survey concerning the special master's work. These surveys would provide, for the first time, a source of data researchers can use to assess the use of special masters and make recommendations for improvement.

(9) Courts and, where applicable, legislatures should make whatever modifications to laws, rules or practices that are necessary to effectuate these ends, including 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.

Federal Rule 53 and many state rules and authority on inherent judicial power, appear sufficiently flexible to allow for more effective use of special masters. However, depending on the jurisdiction, rule or statutory changes may be necessary or desirable.

In addition, where the rules of civil procedure permit, courts should consider whether it is appropriate to adopt local procedures calling for more extensive, flexible, and systematic vetting, selection, use and evaluation of special masters. Rule-making bodies should also consider whether particular aspects of existing rules, including terms used, should be modified to promote uniformity and the effective use of special master.

Bankruptcy Rule 9031 should 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.

Bankruptcy Rule 9031 states that Federal Rule of Civil Procedure 53 "does not apply in

cases under the [Bankruptcy] Code." This rule is confusing. The 1983 Advisory Committee comments state that Bankruptcy Rule 9031 "precludes the appointment of masters in cases and proceedings under the Code"; but the rule purports to instead preclude application of Federal Rule of Civil Procedure 53. Rule 53 is not the sole or ultimate source of authority for appointing special masters; it addresses the manner in which courts exercise their *inherent* power to appoint special masters as a part of case management.[30]

Moreover, if Rule 9031 actually precluded the use of special masters for cases "under the Code," it would not be limited to bankruptcy judges. It would operate on the inherent authority of Article III judges when they decide cases under the Bankruptcy Code, as opposed to any other statute.[31] However, the only other published official explanation for Rule 9031 says otherwise. The Advisory Committee on Bankruptcy Rules' preface to the then proposed Rules of Bankruptcy Procedure states that "[t]here does not appear to be any need for the appointment of special masters in bankruptcy cases *by bankruptcy judges*." (Emphasis added) [32]

In any event, there is no justification today for a rule that assumes that bankruptcy judges can never make effective use of special masters. Bankruptcy dockets include many especially complex cases in which special masters could be of great utility. Depriving court of equity of the ability to use special masters, disserves the goal of achieving a "just, speedy and inexpensive determination of every case and proceeding," which is the mandate of Bankruptcy Rule 1001, just as it is the mandate of Federal Rule 1.[33] Amending Rule 9031 to eliminate this confusing limitation serves this end.

Conclusion

Courts should make more effective and systematic use of special masters to assist in civil litigation. The ABA is available to assist courts in implementing these recommendations.

[29] *See supra* n.26, supra for methods of feedback.

[30] It "is well-settled that" federal "courts have inherent authority to appoint Special Masters to assist in managing litigation." *United States v. Black*, No. 16-20032-JAR, 2016 WL 6967120, at *3 (D. Kan. Nov. 29, 2016) (*citing Schwimmer v. United States*, 232 F.2d 855, 865 (8th Cir. 1956) *(quoting In re: Peterson, 253 U.S. 300, 311 (1920)); see also, e.g., Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 746 (6th Cir. 1979) (the authority to appoint "expert advisors or consultants" derives from either Rule 53 or the Court's inherent power); *Regents of the Univ. of Cal. v. Micro Therapeutics, Inc.,* No. C 03-05669 JW, 2006 WL 1469698, at *1 (N.D. Cal. May 26, 2006) (to similar effect). Courts have relied on this authority, for example, to appoint special masters in criminal cases even though the Federal Rules of Criminal Procedure have no analog to Rule 53. Indeed, the power to appoint special masters has existed long before the Federal Rules (from at least eighteenth century in the United States and perhaps even in Roman law). Paulette J. Delk, "Special Masters in Bankruptcy: The Case Against Bankruptcy Rule 9031," 67 MO. L. REV. 29, 30-31 (Winter 2002). [31] *See* Paulette J. Delk, *supra.* n.30, 67 MO. L. REV. at 40-41 & nn.60-62.

[32] *See* Paulette J. Delk, *supra.*n.30, 67MO.L.REV. at 41-42 &nn.64-65.

[33] *See* Paulette J. Delk, *supra.*n.30, 67MO.L.REV. at 41-42 & nn.65-68.

Appendix C

Fed. R. Civ. P. 53

FEDERAL RULES OF CIVIL PROCEDURE
VI. TRIALS

Rule 53. Masters

(a) APPOINTMENT.

(1) *Scope.* Unless a statute provides otherwise, a court may appoint a neutral only to:

(A) perform duties consented to by the parties;

(B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by:

(i) some exceptional condition; or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.

(2) *Disqualification.* A master must not have a relationship to the parties, attorneys, action, or court that would require disqualification of a judge under 28 U.S.C. § 455, unless the parties, with the court's approval, consent to the appointment after the master discloses any potential grounds for disqualification.

(3) *Possible Expense or Delay.* In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

(b) ORDER APPOINTING MASTER.

(1) *Notice.* Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment.

(2) *Contents.* The appointing order must direct the master to proceed with all reasonable diligence and must state:

(A) The master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);

(B) the circumstances, if any, in which the master may communicate ex parte with the court or a party;

(C) the nature of the materials to be preserved and filed as the record of the master's activities;

(D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(g).

(3) *Issuing.* The court may issue the order only after:

(A) the master files an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455; and

(B) if a ground is disclosed, the parties, with the court's approval, waive the disqualification.

(4) *Amending.* The order may be amended at any time after notice to the parties and an opportunity to be heard.

(c) MASTER'S AUTHORITY.

(1) *In General.* Unless the appointing order directs otherwise, a master may:

(A) regulate all proceedings;

(B) take all appropriate measures to perform the assigned duties fairly and efficiently; and

(C) if conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence.

(2) *Sanctions.* The master may by order impose on 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.

(d) MASTER'S ORDERS. A master who issues an order must file it and promptly serve a copy on each party. The clerk must enter the order on the docket.

(e) MASTER'S REPORTS. A master must report to the court as required by the appointing order. The master must file the report and promptly serve a copy on each party, unless the court orders otherwise.

(f) ACTION ON THE MASTER'S ORDER, REPORT, OR RECOMMENDATIONS.

(1) *Opportunity for a Hearing; Action in General.* In acting on a master's order, report, or recommendations, the court must give the parties notice and an opportunity to be heard; may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions.

(2) *Time to Object or Move to Adopt or Modify.* A party may file objections to — or a motion to adopt or modify — the master's order, report, or recommendations no later than 21days after a copy is served, unless the court sets a different time.

(3) *Reviewing Factual Findings.* The court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval, stipulate that:

(A) the findings will be reviewed for clear error; or

(B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.

(4) *Reviewing Legal Conclusions.* The court must decide de novo all objections to conclusions of law made or recommended by a master.

(5) *Reviewing Procedural Matters.* Unless the appointing order establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

(g) COMPENSATION.

(1) *Fixing Compensation.* Before or after judgment, the court must fix the master's compensation on the basis and terms stated in the appointing order, but the court may set a new basis and terms after giving notice and an opportunity to be heard.

(2) *Payment.* The compensation must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

(3) *Allocating Payment.* The court must allocate payment among the parties after considering the nature and amount of the controversy, the parties' means, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

(h) APPOINTING A MAGISTRATE JUDGE. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge states that the reference is made under this rule.

HISTORY:

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Mar. 27, 2003, eff. Dec. 1, 2003; Apr. 30, 2007, eff. Dec. 1, 2007.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee on Rules. *Subdivision (a).* This is a modification of former Equity Rule 68 (Appointment and Compensation of Masters).

Subdivision (b). This is substantially the first sentence of former Equity Rule 59 Reference to Master—Exceptional, Not Usual) extended to actions formerly legal. See *Ex parte Peterson,* 253 US 300, 40 S Ct 543, 64 L Ed 919 (1920).

Subdivision (c). This is former Equity Rules 62 (Powers of Master) and 65 (Claimants before Master Examinable by Him) with slight modifications. Compare former Equity Rules 49 (Evidence Taken Before Examiners, Etc.) and 51 (Evidence Taken Before Examiners, Etc.).

Subdivision (d). (1) This is substantially a combination of the second sentence of former Equity Rule 59 (Reference to Master—Exceptional, Not Usual) and former Equity Rule 60 (Proceedings Before Master). Compare former Equity Rule 53 (Notice of Taking Testimony Before Examiner, Etc.).

(2) This is substantially former Equity Rule 52 (Attendance of Witnesses Before Commissioner, Master, or Examiner).

(3) This is substantially former Equity Rule 63 (Form of Accounts Before Master).

Subdivision (e). This contains the substance of former Equity Rules 61 (Master's Report--Documents Identified but not Set Forth), 61 1/2 (Master's Report--Presumption as to Correctness--Review), and 66 (Return of Master's Report--Exceptions--Hearing), with modifications as to the form and effect of the report and for inclusion of reports by auditors, referees, and examiners, and references in actions formerly legal. Compare former Equity Rules 49 (Evidence Taken Before Examiners, Etc.) and 67 (Costs on Exceptions to Master's Report). See *Camden v Stuart,* 144 US 104, 12 S Ct 585, 36 L Ed 363 (1892); *Ex parte Peterson,* 253 US 300, 40 S Ct 543, 64 L Ed 919 (1920).

Notes of Advisory Committee on 1966 amendments. These changes are designed to preserve the admiralty practice whereby difficult computations are referred to a commissioner or assessor, especially after an interlocutory judgment determining liability. As to separation of issues for trial see Rule 42(b).

Notes of Advisory Committee on 1983 amendments. *Subdivision (a).* The creation of full-time magistrates, who serve at government expense and have no nonjudicial duties

competing for their time, eliminates the need to appoint standing masters. Thus the prior provision in Rule 53(a) authorizing the appointment of standing masters is deleted. Additionally, the definition of "master" in subdivision (a) now eliminates the superseded office of commissioner.

The term "special master" is retained in Rule 53 in order to maintain conformity with *28 U.S.C. § 636(b)(2),* authorizing a judge to designate a magistrate "to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States District Courts." Obviously, when a magistrate serves as a special master, the provisions for compensation of masters are inapplicable, and the amendment to subdivision (a) so provides.

Although the existence of magistrates may make the appointment of outside masters unnecessary in many instances, see, e.g., *Gautreaux v. Chicago Housing Authority,* 384 F. Supp. 37 (N.D. Ill. 1974), mandamus denied sub nom., *Chicago Housing Authority v. Austin,* 511 F.2d 82 (7th Cir. 1975); *Avco Corp. v. American Tel. & Tel. Co.,* 68 F.R.D. 532 (S.D. Ohio 1975), such masters may prove useful when some special expertise is desired or when a magistrate is unavailable for lengthy and detailed supervision of a case.

Subdivision (b). The provisions of 28 U.S.C. § 636(6)(2) not only permit magistrates to serve as masters under Rule 53(b) but also eliminate the exceptional condition requirement of Rule 53(b) when the reference is made with the consent of the parties. The amendment to subdivision (b) brings Rule 53 into harmony with the statute by exempting magistrates, appointed with the consent of the parties, from the general requirement that some exceptional condition requires the reference. It should be noted that subdivision (b) does not address the question, raised in recent decisional law and commentary, as to whether the exceptional condition requirement is applicable when private masters who are not magistrates are appointed with the consent of the parties. See Silberman, Masters and Magistrates Part II: The American Analogue, 50 N.Y.U. L.Rev. 1297, 1354 (1975).

Subdivision (c). The amendment recognizes the abrogation of Federal Rule 43(c) by the Federal Rules of Evidence.

Subdivision (f). The new subdivision responds to confusion flowing from the dual authority for references of pretrial matters to magistrates. Such references can be made, with or without the consent of the parties, pursuant to Rule 53 or under *28 U.S.C. § 636(b)(I)(A)* and (b)(1)(B). There are a number of distinctions between references made under the statute and under the rule. For example, under the statute nondispositive pretrial matters may be referred to a magistrate, without consent, for final determination with reconsideration by the district judge if the magistrate's order is clearly erroneous or contrary to law. Under the rule, however, the appointment of a master, without consent of the parties, to supervise discovery would require some exceptional condition (Rule 53(b)) and would subject the proceedings to the report procedures of Rule 53(e). If an order of reference does not clearly articulate the source of the court's authority the resulting proceedings could be subject to attack on grounds of the magistrate's noncompliance with the provisions of Rule 53. This subdivision therefore establishes a presumption that the limitations of Rule 53 are not applicable unless the reference is specifically made subject to Rule 53.

A magistrate serving as a special master under 28 U.S.C. § 636(b)(2) is governed by the provisions of Rule 53, with the exceptional condition requirement lifted in the case of a consensual reference.

Notes of Advisory Committee on 1987 amendments. The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 1991 amendment. The purpose of the revision is to expedite proceedings before a master. The former rule required only a filing of the master's report, with the clerk then notifying the parties of the filing. To receive a copy, a party would then be required to secure it from the clerk. By transmitting directly to the parties, the master can save some efforts of counsel. Some local rules have previously required such action by the master.

Notes of Advisory Committee on 1993 amendments. This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.

Notes of Advisory Committee on 2003 amendments. Rule 53 is revised extensively to reflect changing practices in using masters. From the beginning in 1938, Rule 53 focused primarily on special masters who perform trial functions. Since then, however, courts have gained experience with masters appointed to perform a variety of pretrial and post-trial functions. See Winging, Hooper, Leary, Miletich, Reagan, & Shapard, Special Masters' Incidence and Activity (FJC 2000). This revised Rule 53 recognizes that in appropriate circumstances masters may properly be appointed to perform these functions and regulates such appointments. Rule 53 continues to address trial masters as well, but permits appointment of a trial master in an action to be tried to a jury only if the parties consent. The new rule clarifies the provisions that govern the appointment and function of masters for all purposes. Rule 53(g) also changes the standard of review for findings of fact made or recommended by a master. The core of the original Rule 53 remains, including its prescription that appointment of a master must be the exception and not the rule.

Special masters are appointed in many circumstances outside the Civil Rules. Rule 53 applies only to proceedings that Rule 1 brings within its reach.

Subdivision (a)(1). District judges bear primary responsibility for the work of their courts. A master should be appointed only in limited circumstances. Subdivision (a)(1) describes three different standards, relating to appointments by consent of the parties, appointments for trial duties, and appointments for pretrial or posttrial duties.

Consent Masters. Subparagraph (a)(1)(A) authorizes appointment of a master with the parties' consent. Party consent does not require that the court make the appointment; the court retains unfettered discretion to refuse appointment.

Trial Masters. Use of masters for the core functions of trial has been progressively limited. These limits are reflected in the provisions of subparagraph (a)(1)(B) that restrict appointments to exercise trial functions. The Supreme Court gave clear direction to this trend in *La Buy v. Howes Leather Co.,* 352 U.S. 249 (1957); earlier roots are sketched in *Los Angeles Brush Mfg. Corp. v. James,* 272 U.S. 701 [1 L. Ed. 2d 290] (1927). As to nonjury trials, this trend has developed through elaboration of the "exceptional condition" requirement in present Rule 53(b). This phrase is retained, and will continue to have the same force as it has developed. Although the provision that a reference "shall be the exception and not the rule" is deleted, its meaning is embraced for this setting by the exceptional condition requirement.

Subparagraph (a)(1)(B)(ii) carries forward the approach of present Rule 53(b), which exempts from the "exceptional condition" requirement "matters of account and of difficult computation of damages." This approach is justified only as to essentially ministerial determinations that require mastery of much detailed information but that do not require

extensive determinations of credibility. Evaluations of witness credibility should only be assigned to a trial master when justified by an exceptional condition.

The use of a trial master without party consent is abolished as to matters to be decided by a jury unless a statute provides for this practice.

Abolition of the direct power to appoint a trial master as to issues to be decided by a jury leaves the way free to appoint a trial master with the consent of all parties. A trial master should be appointed in a jury case, with consent of the parties and concurrence of the court, only if the parties waive jury trial with respect to the issues submitted to the master or if the master's findings are to be submitted to the jury as evidence in the manner provided by former Rule 53(e)(3). In no circumstance may a master be appointed to preside at a jury trial.

The central function of a trial master is to preside over an evidentiary hearing on the merits of the claims or defenses in the action. This function distinguishes the trial master from most functions of pretrial and post-trial masters. If any master is to be used for such matters as a preliminary injunction hearing or a determination of complex damages issues, for example, the master should be a trial master. The line, however, is not distinct. A pretrial master might well conduct an evidentiary hearing on a discovery dispute, and a post-trial master might conduct evidentiary hearings on questions of compliance.

Rule 53 has long provided authority to report the evidence without recommendations in nonjury trials. This authority is omitted from Rule 53(a)(1)(B). In some circumstances a master may be appointed under Rule 53(a)(1)(A) or (C) to take evidence and report without recommendations.

For nonjury cases, a master also may be appointed to assist the court in discharging trial duties other than conducting an evidentiary hearing.

Pretrial and Post-Trial Masters. Subparagraph (a)(1)(C) authorizes appointment of a master to address pretrial or post-trial matters. Appointment is limited to matters that cannot be addressed effectively and in a timely fashion by an available district judge or magistrate judge of the district. A master's pretrial or posttrial duties may include matters that could be addressed by a judge, such as reviewing discovery documents for privilege, or duties that might not be suitable for a judge. Some forms of settlement negotiations, investigations, or administration of an organization are familiar examples of duties that a judge might not feel free to undertake.

Magistrate Judges. Particular attention should be paid to the prospect that a magistrate judge may be available for special assignments. United States magistrate judges are authorized by statute to perform many pretrial functions in civil actions. 28 U.S.C. § 636(6)(1). Ordinarily a district judge who delegates these functions should refer them to a magistrate judge acting as magistrate judge.

There is statutory authority to appoint a magistrate judge as special master. 28 U.S.C. § 636(b)(2). In special circumstances, or when expressly authorized by a statute other than § 636(b)(2), it may be appropriate to appoint a magistrate judge as a master when needed to perform functions outside those listed in § 636(b)(1). There is no apparent reason to appoint a magistrate judge to perform as master duties that could be performed in the role of magistrate judge. Party consent is required for trial before a magistrate judge, moreover, and this requirement should not be undercut by resort to Rule 53 unless specifically authorized by statute; see 42 U.S.C. § 2000e-5(f)(5).

Pretrial Masters. The appointment of masters to participate in pretrial proceedings has developed extensively over the last two decades as some district courts have felt the need for additional help in managing complex litigation. This practice is not well regulated by present

Rule 53, which focuses on masters as trial participants. Rule 53 is amended to confirm the authority to appoint and to regulate the use of pretrial masters.

A pretrial master should be appointed only when the need is clear. Direct judicial performance of judicial functions may be particularly important in cases that involve important public issues or many parties. At the extreme, a broad delegation of pretrial responsibility as well as a delegation of trial responsibilities can run afoul of Article III.

A master also may be appointed to address matters that blur the divide between pretrial and trial functions. The court's responsibility to interpret patent claims as a matter of law, for example, may be greatly assisted by appointing a master who has expert knowledge of the field in which the patent operates. Review of the master's findings will be de novo under Rule 53(g)(4), but the advantages of initial determination by a master may make the process more effective and timely than disposition by the judge acting alone. Determination of foreign law may present comparable difficulties. The decision whether to appoint a master to address such matters is governed by subdivision (a)(1)(C), not the trial-master provisions of subdivision (a)(1)(B).

Post-Trial Masters. Courts have come to rely on masters to assist in framing and enforcing complex decrees. Present Rule 53 does not directly address this practice. Amended Rule 53 authorizes appointment of post-trial masters for these and similar purposes. The constraint of subdivision (a)(l)(C) limits this practice to cases in which the master's duties cannot be performed effectively and in a timely fashion by an available district judge or magistrate judge of the district.

Reliance on a master is appropriate when a complex decree requires complex policing, particularly when a party has proved resistant or intransigent. This practice has been recognized by the Supreme Court, see *Local 28, Sheet Metal Workers' Internat. Assn. v. EEOC,* 478 U.S. 421, 481-482 [92 L. Ed. 2d 344, 391-392] (1986). The master's role in enforcement may extend to investigation in ways that are quite unlike the traditional role of judicial officers in an adversary system.

Expert Witness Overlap. This rule does not address the difficulties that arise when a single person is appointed to perform overlapping roles as master and as court appointed expert witness under Evidence Rule 706. Whatever combination of functions is involved, the Rule 53(a)(1)(B) limit that confines trial masters to issues to be decided by the court does not apply to a person who also is appointed as an expert witness under Evidence Rule 706.

Subdivision (a)(2), and (3). Masters are subject to the Code of Conduct for United States Judges, with exceptions spelled out in the Code. Special care must be taken to ensure that there is no actual or apparent conflict of interest involving a master. The standard of disqualification is established by 28 U.S.C. § 455. The affidavit required by Rule 53(b)(3) provides an important source of information about possible grounds for disqualification, but careful inquiry should be made at the time of making the initial appointment. The disqualification standards established by § 455 are strict. Because a master is not a public judicial officer, it may be appropriate to permit the parties to consent to appointment of a particular person as master in circumstances that would require disqualification of a judge. The judge must be careful to ensure that no party feels any pressure to consent, but with such assurances and with the judge's own determination that there is no troubling conflict of interests or disquieting appearance of impropriety-consent may justify an otherwise barred appointment.

One potential disqualification issue is peculiar to the master's role. It may happen that a master who is an attorney represents a client whose litigation is assigned to the judge who

appointed the attorney as master. Other parties to the litigation may fear that the attorney-master will gain special respect from the judge. A flat prohibition on appearance before the appointing judge during the time of service as master, however, might in some circumstances unduly limit the opportunity to make a desirable appointment. These matters may be regulated to some extent by state rules of professional responsibility. The question of present conflicts, and the possibility of future conflicts, can be considered at the time of appointment. Depending on the circumstances, the judge may consider it appropriate to impose a non-appearance condition on the lawyer master, and perhaps on the master's firm as well.

Subdivision (b). The order appointing a pretrial master is vitally important in informing the master and the parties about the nature and extent of the master's duties and authority. Care must be taken to make the order as precise as possible. The parties must be given notice and opportunity to be heard on the question whether a master should be appointed and on the terms of the appointment. To the extent possible, the notice should describe the master's proposed duties, time to complete the duties, standards of review, and compensation. Often it will be useful to engage the parties in the process of identifying the master, inviting nominations, and reviewing potential candidates. Party involvement may be particularly useful if a pretrial master is expected to promote settlement.

The hearing requirement of Rule 53(b)(1) can be satisfied by an opportunity to make written submissions unless the circumstances require live testimony.

Rule 53(b)(2) requires precise designation of the master's duties and authority. Clear identification of any investigating or enforcement duties is particularly important. Clear delineation of topics for any reports or recommendations is also an important part of this process. And it is important to protect against delay by establishing a time schedule for performing the assigned duties. Early designation of the procedure for fixing the master's compensation also may provide useful guidance to the parties.

Ex parte communications between a master and the court present troubling questions. Ordinarily the order should prohibit such communications, assuring that the parties know where authority is lodged at each step of the proceedings. Prohibiting ex parte communications between master and court also can enhance the role of a settlement master by assuring the parties that settlement can be fostered by confidential revelations that will not be shared with the court. Yet there may be circumstances in which the master's role is enhanced by the opportunity for ex parte communications with the court. A master assigned to help coordinate multiple proceedings, for example, may benefit from off-the-record exchanges with the court about logistical matters. The rule does not directly regulate these matters. It requires only that the court exercise its discretion and address the topic in the order of appointment.

Similarly difficult questions surround ex parte communications between a master and the parties. Ex parte communications may be essential in seeking to advance settlement. Ex parte communications also may prove useful in other settings, as with in camera review of documents to resolve privilege questions. In most settings, however, ex parte communications with the parties should be discouraged or prohibited. The rule requires that the court address the topic in the order of appointment.

Subdivision (b)(2)(C) provides that the appointment order must state the nature of the materials to be preserved and filed as the record of the master's activities, and (b)(2)(D) requires that the order state the method of filing the record. It is not feasible to prescribe the nature of the record without regard to the nature of the master's duties. The records appropriate to discovery duties may be different from those appropriate to encouraging settlement, investigating possible

violations of a complex decree, or making recommendations for trial findings. A basic requirement, however, is that the master must make and file a complete record of the evidence considered in making or recommending findings of fact on the basis of evidence. The order of appointment should routinely include this requirement unless the nature of the appointment precludes any prospect that the master will make or recommend evidence-based findings of fact. In some circumstances it may be appropriate for a party to file materials directly with the court as provided by Rule 5(e), but in many circumstances filing with the court may be inappropriate. Confidentiality is important with respect to many materials that may properly be considered by a master. Materials in the record can be transmitted to the court, and filed, in connection with review of a master's order, report, or recommendations under subdivisions (f) and (g). Independently of review proceedings, the court may direct filing of any materials that it wishes to make part of the public record.

The provision in subdivision (b)(2)(D) that the order must state the standards for reviewing the master's orders, findings, and recommendations is a reminder of the provisions of subdivision (g)(3) that recognize stipulations for review less searching than the presumptive requirement of de novo decision by the court. Subdivision (b)(2)(D) does not authorize the court to supersede the limits of subdivision (g)(3).

In setting the procedure for fixing the master's compensation, it is useful at the outset to establish specific guidelines to control total expense. The court has power under subdivision (h) to change the basis and terms for determining compensation after notice to the parties.

Subdivision (b)(3) permits entry of the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 *U.S.C.* § *455.* If the affidavit discloses a possible ground for disqualification, the order can enter only if the court determines that there is no ground for disqualification or if the parties, knowing of the ground for disqualification, consent with the court's approval to waive the disqualification.

The provision in Rule 53(b)(4) for amending the order of appointment is as important as the provisions for the initial order. Anything that could be done in the initial order can be done by amendment. The hearing requirement can be satisfied by an opportunity to make written submissions unless the circumstances require live testimony.

Subdivision (c). Subdivision (c) is a simplification of the provisions scattered throughout present Rule 53. It is intended to provide the broad and flexible authority necessary to discharge the master's responsibilities. The most important delineation of a master's authority and duties is provided by the Rule 53(b) appointing order.

Subdivision (d). The subdivision (d) provisions for evidentiary hearings are reduced from the extensive provisions in current Rule 53. This simplification of the rule is not intended to diminish the authority that may be delegated to a master. Reliance is placed on the broad and general terms of subdivision (c).

Subdivision (e). Subdivision (e) provides that a master's order must be filed and entered on the docket. It must be promptly served on the parties, a task ordinarily accomplished by mailing or other means as permitted by Rule 5(b). In some circumstances it may be appropriate to have the clerk's office assist the master in mailing the order to the parties.

Subdivision (f). Subdivision (f) restates some of the provisions of present Rule 53(e)(1). The report is the master's primary means of communication with the court. The materials to be provided to support review of the report will depend on the nature of the report. The master should provide all portions of the record preserved under Rule 53(b)(2)(C) that the master deems relevant to the report. The parties may designate additional materials from the record, and may

seek permission to supplement the record with evidence. The court may direct that additional materials from the record be provided and filed. Given the wide array of tasks that may be assigned to a pretrial master, there may be circumstances that justify sealing a report or review record against public access—a report on continuing or failed settlement efforts is the most likely example. A post-trial master may be assigned duties in formulating a decree that deserve similar protection. Such circumstances may even justify denying access to the report or review materials by the parties, although this step should be taken only for the most compelling reasons. Sealing is much less likely to be appropriate with respect to a trial master's report.

Before formally making an order, report, or recommendations, a master may find it helpful to circulate a draft to the parties for review and comment. The usefulness of this practice depends on the nature of the master's proposed action.

Subdivision (g). The provisions of subdivision (g)(1), describing the court's powers to afford a hearing, take evidence, and act on a master's order, report, or recommendations are drawn from present Rule 53(e)(2), but are not limited, as present Rule 53(e)(2) is limited, to the report of a trial master in a nonjury action. The requirement that the court must afford an opportunity to be heard can be satisfied by taking written submissions when the court acts on the report without taking live testimony.

The subdivision (g)(2) time limits for objecting to- or seeking adoption or modification of—a master's order, report, or recommendations, are important. They are not jurisdictional. Although a court may properly refuse to entertain untimely review proceedings, the court may excuse the failure to seek timely review. The basic time period is lengthened to 20 days because the present 10-day period may be too short to permit thorough study and response to a complex report dealing with complex litigation. If no party asks the court to act on a master's report, the court is free to adopt the master's action or to disregard it at any relevant point in the proceedings.

Subdivision (g)(3) establishes the standards of review for a master's findings of fact or recommended findings of fact. The court must decide de novo all objections to findings of fact made or recommended by the master unless the parties stipulate, with the court's consent, that the findings will be reviewed for clear error or—with respect to a master appointed on the parties' consent or appointed to address pretrial or post-trial matters that the findings will be final. Clear-error review is more likely to be appropriate with respect to findings that do not go to the merits of the underlying claims or defenses, such as findings of fact bearing on a privilege objection to a discovery request. Even if no objection is made, the court is free to decide the facts de novo; to review for clear error if an earlier approved stipulation provided clear-error review; or to withdraw its consent to a stipulation for clear-error review or finality, and then to decide de novo. If the court withdraws its consent to a stipulation for finality or clear-error review, it may or reopen the opportunity to object.

Under Rule 53(g)(4), the court must decide de novo all objections to conclusions of law made or recommended by a master. As with findings of fact, the court also may decide conclusions of law de novo when no objection is made.

Apart from factual and legal questions, masters often make determinations that, when made by a trial court, would be treated as matters of procedural discretion. The court may set a standard for review of such matters in the order of appointment, and may amend the order to establish the standard. If no standard is set by the original or amended order appointing the master, review of procedural matters is for abuse of discretion. The subordinate role of the

master means that the trial court's review for abuse of discretion may be more searching than the review that an appellate court makes of a trial court.

If a master makes a recommendation on any matter that does not fall within Rule 53(g)(3), (4), or (5), the court may act on the recommendation under Rule 53(g)(1).

Subdivision (h). The need to pay compensation is a substantial reason for care in appointing private persons as masters.

Payment of the master's fees must be allocated among the parties and any property or subject-matter within the court's control. The amount in controversy and the means of the parties may provide some guidance in making the allocation. The nature of the dispute also may be important--parties pursuing matters of public interest, for example, may deserve special protection. A party whose unreasonable behavior has occasioned the need to appoint a master, on the other hand, may properly be charged all or a major portion of the master's fees. It may be proper to revise an interim allocation after decision on the merits. The revision need not await a decision that is final for purposes of appeal, but may be made to reflect disposition of a substantial portion of the case.

The basis and terms for fixing compensation should be stated in the order of appointment. The court retains power to alter the initial basis and terms, after notice and an opportunity to be heard, but should protect the parties against unfair surprise.

The provision of former Rule 53(a) that the "provision for compensation shall not apply when a United States Magistrate Judge is designated to serve as a master" is deleted as unnecessary. Other provisions of law preclude compensation.

Subdivision (i). Rule 53(i) carries forward unchanged former Rule 53(f).

NOTES:

Related Statutes & Rules:

Clerks of courts being ineligible to appointment as masters, 28 USCS § 957.

Appointment of master by single judge in three judge court, 28 USCS § 2284.

Pretrial determination as to preliminary reference, USCS Federal Rules of Civil Procedure, Rule 16.

Adoption of master's findings by court, USCS Federal Rules of Civil Procedure, Rule 52(a).

Judgment not being required to recite report, USCS Federal Rules of Civil Procedure, Rule 54(a).

Appendix D

28 U.S.C. § 455
Disqualification of Justice, Judge, or Magistrate Judge

Section 455. Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

Appendix E

Model Rule of Professional Conduct
Rule 1.12

CLIENT-LAWYER RELATIONSHIP
RULE 1.12 FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY MASTER

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party master, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party master. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Appendix F

Code of Conduct for United States Judge

CODE OF CONDUCT
FOR UNITED STATES JUDGES[1]
(Effective July 1, 2009)

Introduction

This Code applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges. Certain provisions of this Code apply to special masters and commissioners as indicated in the "Compliance" section. The Tax Court, Court of Appeals for Veterans Claims, and Court of Appeals for the Armed Forces have adopted this Code.

The Judicial Conference has authorized its Committee on Codes of Conduct to render advisory opinions about this Code only when requested by a judge to whom this Code applies. Requests for opinions and other questions[2] concerning this Code and its applicability should be addressed to the Chair of the Committee on Codes of Conduct by email or as follows:

Chair, Committee on Codes of Conduct
c/o General Counsel
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

202-502-1100

[1] The Code of Conduct for United States Judges was initially adopted by the Judicial Conference on April 5, 1973, and was known as the "Code of Judicial Conduct for United States Judges." Since then, the Judicial Conference has made the following changes to the Code:

March 1987: deleted the word "Judicial" from the name of the Code;
September 1992: adopted substantial revisions to the Code;
March 1996: revised part C of the Compliance section, immediately following the Code;
September 1996: revised Canons 3C(3)(a) and 5C(4);
September 1999: revised Canon 3C(1)(c);
September 2000: clarified the Compliance section;
March 2009: adopted substantial revisions to the Code

[2] Procedural questions may be addressed to: Office of the General Counsel, Administrative Office of the United States Courts, Thurgood Marshall Federal Judiciary Building, Washington, D.C., 20544, 202-502-1100.

CANON 1: A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

COMMENTARY

Deference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn on their acting without fear or favor. Although judges should be independent, they must comply with the law and should comply with this Code. Adherence to this responsibility helps to maintain public confidence in the impartiality of the judiciary. Conversely, violation of this Code diminishes public confidence in the judiciary and injures our system of government under law.

The Canons are rules of reason. They should be applied consistently with constitutional requirements, statutes, other court rules and decisional law, and in the context of all relevant circumstances. The Code is to be construed so it does not impinge on the essential independence of judges in making judicial decisions.

The Code is designed to provide guidance to judges and nominees for judicial office. It may also provide standards of conduct for application in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (28 U.S.C. §§ 332(d)(1), 351-364). Not every violation of the Code should lead to disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the improper activity, the intent of the judge, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system. Many of the restrictions in the Code are necessarily cast in general terms, and judges may reasonably differ in their interpretation. Furthermore, the Code is not designed or intended as a basis for civil liability or criminal prosecution. Finally, the Code is not intended to be used for tactical advantage.

CANON 2: A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES

A. *Respect for Law.* A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. *Outside Influence.* A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge. A judge should not testify voluntarily as a character witness.

C. *Nondiscriminatory Membership.* A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.

COMMENTARY

Canon 2A. An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. This prohibition applies to both professional and personal conduct. A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen. Because it is not practicable to list all prohibited acts, the prohibition is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code.

Canon 2B. Testimony as a character witness injects the prestige of the judicial office into the proceeding in which the judge testifies and may be perceived as an official testimonial. A judge should discourage a party from requiring the judge to testify as a character witness except in unusual circumstances when the demands of justice require. This Canon does not create a privilege against testifying in response to an official summons.

A judge should avoid lending the prestige of judicial office to advance the private interests of the judge or others. For example, a judge should not use the judge's judicial position or title to gain advantage in litigation involving a friend or a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office.

A judge should be sensitive to possible abuse of the prestige of office. A judge should not initiate communications to a sentencing judge or a probation or corrections officer but may provide information to such persons in response to a formal request. Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration and by responding to official inquiries concerning a person being considered for a judgeship.

Canon 2C. Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Canon 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely

private organization whose membership limitations could not be constitutionally prohibited. *See New York State Club Ass'n. Inc. v. City of New York*, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). Other relevant factors include the size and nature of the organization and the diversity of persons in the locale who might reasonably be considered potential members. Thus the mere absence of diverse membership does not by itself demonstrate a violation unless reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex, or national origin persons who would otherwise be admitted to membership.

Although Canon 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion or national origin, a judge's membership in an organization that engages in any invidiously discriminatory membership practices prohibited by applicable law violates Canons 2 and 2A and gives the appearance of impropriety. In addition, it would be a violation of Canons 2 and 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion, or national origin in its membership or other policies, or for the judge to use such a club regularly. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Canon 2A.

When a judge determines that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Canon 2C or under Canons 2 and 2A, the judge is permitted, in lieu of resigning, to make immediate and continuous efforts to have the organization discontinue its invidiously discriminatory practices. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within two years of the judge's first learning of the practices), the judge should resign immediately from the organization.

CANON 3: A JUDGE SHOULD PERFORM THE DUTIES OF THE OFFICE FAIRLY, IMPARTIALLY, AND DILIGENTLY

The duties of judicial office take precedence over all other activities. In performing the duties prescribed by law, the judge should adhere to the following standards:

A. *Adjudicative Responsibilities.*

(1) A judge should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings.

(3) A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. A judge should require similar conduct of those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.

(4) A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law. Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. A judge may:

(a) initiate, permit, or consider ex parte communications as authorized by law;

(b) when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication;

(c) obtain the written advice of a disinterested expert on the law, but only after giving advance notice to the parties of the person to be consulted and the subject matter of the advice and affording the parties reasonable opportunity to object and respond to the notice and to the advice received; or

(d) with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should not make public comment on the merits of a matter pending or impending in any court. A judge should require similar restraint by court personnel subject to the judge's direction and control. The prohibition on public comment on the merits does not extend to public statements made in the course of the judge's official duties, to explanations of court procedures, or to scholarly presentations made for purposes of legal education.

B. *Administrative Responsibilities.*

(1) A judge should diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court personnel.

(2) A judge should not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when that conduct would contravene the Code if undertaken by the judge.

(3) A judge should exercise the power of appointment fairly and only on the basis of merit, avoiding unnecessary appointments, nepotism, and favoritism. A judge should not approve compensation of appointees beyond the fair value of services rendered.

(4) A judge with supervisory authority over other judges should take reasonable measures to ensure that they perform their duties timely and effectively.

(5) A judge should take appropriate action upon learning of reliable evidence indicating the likelihood that a judge's conduct contravened this Code or a lawyer violated applicable rules of professional conduct.

C. *Disqualification.*

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or lawyer has been a material witness;

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding;

(d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person is:

(i) a party to the proceeding, or an officer, director, or trustee of a party;

(ii) acting as a lawyer in the proceeding;

(iii) known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or

(iv) to the judge's knowledge likely to be a material witness in the proceeding;

(e) the judge has served in governmental employment and in that capacity participated as a judge (in a previous judicial position), counsel, advisor, or material

witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

(2) A judge should keep informed about the judge's personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system; the following relatives are within the third degree of relationship: parent, child, grandparent, grandchild, great grandparent, great grandchild, sister, brother, aunt, uncle, niece, and nephew; the listed relatives include whole and half blood relatives and most step relatives;

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;

(d) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation.

(4) Notwithstanding the preceding provisions of this Canon, if a judge would be disqualified because of a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the judge (or the judge's spouse or minor child) divests the interest that provides the grounds for disqualification.

D. *Remittal of Disqualification.* Instead of withdrawing from the proceeding, a judge disqualified by Canon 3C(1) may, except in the circumstances specifically set out in subsections (a) through (e), disclose on the record the basis of disqualification. The judge may participate in the proceeding if, after that disclosure, the parties and their lawyers have an opportunity to confer outside the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate. The agreement should be incorporated in the record of the proceeding.

COMMENTARY

Canon 3A(3). The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and businesslike while being patient and deliberate.

The duty under Canon 2 to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary applies to all the judge's activities, including the discharge of the judge's adjudicative and administrative responsibilities. The duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias.

Canon 3A(4). The restriction on ex parte communications concerning a proceeding includes communications from lawyers, law teachers, and others who are not participants in the proceeding. A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out adjudicative responsibilities. A judge should make reasonable efforts to ensure that law clerks and other court personnel comply with this provision.

A judge may encourage and seek to facilitate settlement but should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the courts.

Canon 3A(5). In disposing of matters promptly, efficiently, and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to take reasonable measures to ensure that court personnel, litigants, and their lawyers cooperate with the judge to that end.

Canon 3A(6). The admonition against public comment about the merits of a pending or impending matter continues until the appellate process is complete. If the public comment involves a case from the judge's own court, the judge should take particular care so that the comment does not denigrate public confidence in the judiciary's integrity and impartiality, which would violate Canon 2A. A judge may comment publicly on proceedings in which the judge is a

litigant in a personal capacity, but not on mandamus proceedings when the judge is a litigant in an official capacity (but the judge may respond in accordance with Fed. R. App. P. 21(b)).

Canon 3B(3). A judge's appointees include assigned counsel, officials such as referees, commissioners, special masters, receivers, guardians, and personnel such as law clerks, secretaries, and judicial assistants. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection.

Canon 3B(5). Appropriate action may include direct communication with the judge or lawyer, other direct action if available, reporting the conduct to the appropriate authorities, or, when the judge believes that a judge's or lawyer's conduct is caused by drugs, alcohol, or a medical condition, making a confidential referral to an assistance program. Appropriate action may also include responding to a subpoena to testify or otherwise participating in judicial or lawyer disciplinary proceedings; a judge should be candid and honest with disciplinary authorities.

Canon 3C. Recusal considerations applicable to a judge's spouse should also be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship.

Canon 3C(1)(c). In a criminal proceeding, a victim entitled to restitution is not, within the meaning of this Canon, a party to the proceeding or the subject matter in controversy. A judge who has a financial interest in the victim of a crime is not required by Canon 3C(1)(c) to disqualify from the criminal proceeding, but the judge must do so if the judge's impartiality might reasonably be questioned under Canon 3C(1) or if the judge has an interest that could be substantially affected by the outcome of the proceeding under Canon 3C(1)(d)(iii).

Canon 3C(1)(d)(ii). The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. However, if "the judge's impartiality might reasonably be questioned" under Canon 3C(1), or the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii), the judge's disqualification is required.

CANON 4: A JUDGE MAY ENGAGE IN EXTRAJUDICIAL ACTIVITIES THAT ARE CONSISTENT WITH THE OBLIGATIONS OF JUDICIAL OFFICE

A judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects. However, a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, lead to frequent disqualification, or violate the limitations set forth below.

A. *Law-related Activities.*

(1) *Speaking, Writing, and Teaching.* A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

(2) *Consultation.* A judge may consult with or appear at a public hearing before an executive or legislative body or official:

(a) on matters concerning the law, the legal system, or the administration of justice;

(b) to the extent that it would generally be perceived that a judge's judicial experience provides special expertise in the area; or

(c) when the judge is acting pro se in a matter involving the judge or the judge's interest.

(3) *Organizations.* A judge may participate in and serve as a member, officer, director, trustee, or nonlegal advisor of a nonprofit organization devoted to the law, the legal system, or the administration of justice and may assist such an organization in the management and investment of funds. A judge may make recommendations to public and private fund-granting agencies about projects and programs concerning the law, the legal system, and the administration of justice.

(4) *Arbitration and Mediation.* A judge should not act as an arbitrator or mediator or otherwise perform judicial functions apart from the judge's official duties unless expressly authorized by law.

(5) *Practice of Law.* A judge should not practice law and should not serve as a family member's lawyer in any forum. A judge may, however, act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

B. *Civic and Charitable Activities.* A judge may participate in and serve as an officer, director, trustee, or nonlegal advisor of a nonprofit civic, charitable, educational, religious, or social organization, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will either be engaged in proceedings that would ordinarily come before the judge or be regularly engaged in adversary proceedings in any court.

(2) A judge should not give investment advice to such an organization but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

C. *Fund Raising.* A judge may assist nonprofit law-related, civic, charitable, educational, religious, or social organizations in planning fund-raising activities and may be listed as an officer, director, or trustee. A judge may solicit funds for such an organization from judges over whom the judge does not exercise supervisory or appellate authority and from members of the judge's family. Otherwise, a judge should not personally participate in fund-raising activities, solicit funds for any organization, or use or permit the use of the prestige of judicial office for that purpose. A judge should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.

D. *Financial Activities.*

(1) A judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should refrain from financial and business dealings that exploit the judicial position or involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves.

(2) A judge may serve as an officer, director, active partner, manager, advisor, or employee of a business only if the business is closely held and controlled by members of the judge's family. For this purpose, "members of the judge's family" means persons related to the judge or the judge's spouse within the third degree of relationship as defined in Canon 3C(3)(a), any other relative with whom the judge or the judge's spouse maintains a close familial relationship, and the spouse of any of the foregoing.

(3) As soon as the judge can do so without serious financial detriment, the judge should divest investments and other financial interests that might require frequent disqualification.

(4) A judge should comply with the restrictions on acceptance of gifts and the prohibition on solicitation of gifts set forth in the Judicial Conference Gift Regulations. A judge should endeavor to prevent any member of the judge's family residing in the household from soliciting or accepting a gift except to the extent that a judge would be permitted to do so by the Judicial Conference Gift Regulations. A "member of the judge's family" means any relative of a judge by blood, adoption, or marriage, or any person treated by a judge as a member of the judge's family.

(5) A judge should not disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's official duties.

E. *Fiduciary Activities.* A judge may serve as the executor, administrator, trustee, guardian, or other fiduciary only for the estate, trust, or person of a member of the judge's family as defined in Canon 4D(4). As a family fiduciary a judge is subject to the following restrictions:

(1) The judge should not serve if it is likely that as a fiduciary the judge would be engaged in proceedings that would ordinarily come before the judge or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary, a judge is subject to the same restrictions on financial activities that apply to the judge in a personal capacity.

F. *Governmental Appointments.* A judge may accept appointment to a governmental committee, commission, or other position only if it is one that concerns the law, the legal system, or the administration of justice, or if appointment of a judge is required by federal statute. A judge should not, in any event, accept such an appointment if the judge's governmental duties would tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary. A judge may represent the judge's country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

G. *Chambers, Resources, and Staff.* A judge should not to any substantial degree use judicial chambers, resources, or staff to engage in extrajudicial activities permitted by this Canon.

H. *Compensation, Reimbursement, and Financial Reporting.* A judge may accept compensation and reimbursement of expenses for the law-related and extrajudicial activities permitted by this Code if the source of the payments does not give the appearance of influencing the judge in the judge's judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

(1) Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.

(2) Expense reimbursement should be limited to the actual costs of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or relative. Any additional payment is compensation.

(3) A judge should make required financial disclosures, including disclosures of gifts and other things of value, in compliance with applicable statutes and Judicial Conference regulations and directives.

COMMENTARY

Canon 4. Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives. As a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice. To the extent that the judge's time permits and impartiality is not compromised, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization

dedicated to the law. Subject to the same limitations, judges may also engage in a wide range of non-law-related activities.

Within the boundaries of applicable law (*see, e.g.*, 18 U.S.C. § 953) a judge may express opposition to the persecution of lawyers and judges anywhere in the world if the judge has ascertained, after reasonable inquiry, that the persecution is occasioned by conflict between the professional responsibilities of the persecuted judge or lawyer and the policies or practices of the relevant government.

A person other than a spouse with whom the judge maintains both a household and an intimate relationship should be considered a member of the judge's family for purposes of legal assistance under Canon 4A(5), fund raising under Canon 4C, and family business activities under Canon 4D(2).

Canon 4A. Teaching and serving on the board of a law school are permissible, but in the case of a for-profit law school, board service is limited to a nongoverning advisory board. Consistent with this Canon, a judge may encourage lawyers to provide pro bono legal services.

Canon 4A(4). This Canon generally prohibits a judge from mediating a state court matter, except in unusual circumstances (*e.g.*, when a judge is mediating a federal matter that cannot be resolved effectively without addressing the related state court matter).

Canon 4A(5). A judge may act pro se in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with governmental bodies. In so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family.

Canon 4B. The changing nature of some organizations and their exposure to litigation make it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if the judge's continued association is appropriate. For example, in many jurisdictions, charitable hospitals are in court more often now than in the past.

Canon 4C. A judge may attend fund-raising events of law-related and other organizations although the judge may not be a speaker, a guest of honor, or featured on the program of such an event. Use of a judge's name, position in the organization, and judicial designation on an organization's letterhead, including when used for fund raising or soliciting members, does not violate Canon 4C if comparable information and designations are listed for others.

Canon 4D(1), (2), and (3). Canon 3 requires disqualification of a judge in any proceeding in which the judge has a financial interest, however small. Canon 4D requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of the judge's judicial duties. Canon 4H requires a judge to report compensation received for activities outside the judicial office. A judge has the rights of an ordinary citizen with respect to financial affairs, except for limitations required to safeguard the proper performance of the judge's duties. A judge's participation in a closely held family

business, while generally permissible, may be prohibited if it takes too much time or involves misuse of judicial prestige or if the business is likely to come before the court on which the judge serves. Owning and receiving income from investments do not as such affect the performance of a judge's duties.

Canon 4D(5). The restriction on using nonpublic information is not intended to affect a judge's ability to act on information as necessary to protect the health or safety of the judge or a member of a judge's family, court personnel, or other judicial officers if consistent with other provisions of this Code.

Canon 4E. Mere residence in the judge's household does not by itself make a person a member of the judge's family for purposes of this Canon. The person must be treated by the judge as a member of the judge's family.

The Applicable Date of Compliance provision of this Code addresses continued service as a fiduciary.

A judge's obligation under this Code and the judge's obligation as a fiduciary may come into conflict. For example, a judge should resign as a trustee if it would result in detriment to the trust to divest holdings whose retention would require frequent disqualification of the judge in violation of Canon 4D(3).

Canon 4F. The appropriateness of accepting extrajudicial assignments must be assessed in light of the demands on judicial resources and the need to protect the courts from involvement in matters that may prove to be controversial. Judges should not accept governmental appointments that could interfere with the effectiveness and independence of the judiciary, interfere with the performance of the judge's judicial responsibilities, or tend to undermine public confidence in the judiciary.

Canon 4H. A judge is not required by this Code to disclose income, debts, or investments, except as provided in this Canon. The Ethics Reform Act of 1989 and implementing regulations promulgated by the Judicial Conference impose additional restrictions on judges' receipt of compensation. That Act and those regulations should be consulted before a judge enters into any arrangement involving the receipt of compensation. The restrictions so imposed include but are not limited to: (1) a prohibition against receiving "honoraria" (defined as anything of value received for a speech, appearance, or article), (2) a prohibition against receiving compensation for service as a director, trustee, or officer of a profit or nonprofit organization, (3) a requirement that compensated teaching activities receive prior approval, and (4) a limitation on the receipt of "outside earned income."

CANON 5: A JUDGE SHOULD REFRAIN FROM POLITICAL ACTIVITY

A. *General Prohibitions.* A judge should not:

(1) act as a leader or hold any office in a political organization;

(2) make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office; or

(3) solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or attend or purchase a ticket for a dinner or other event sponsored by a political organization or candidate.

B. *Resignation upon Candidacy.* A judge should resign the judicial office if the judge becomes a candidate in a primary or general election for any office.

C. *Other Political Activity.* A judge should not engage in any other political activity. This provision does not prevent a judge from engaging in activities described in Canon 4.

COMMENTARY

The term "political organization" refers to a political party, a group affiliated with a political party or candidate for public office, or an entity whose principal purpose is to advocate for or against political candidates or parties in connection with elections for public office.

COMPLIANCE WITH THE CODE OF CONDUCT

Anyone who is an officer of the federal judicial system authorized to perform judicial functions is a judge for the purpose of this Code. All judges should comply with this Code except as provided below.

A. *Part-time Judge.* A part-time judge is a judge who serves part-time, whether continuously or periodically, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge. A part-time judge:

(1) is not required to comply with Canons 4A(4), 4A(5), 4D(2), 4E, 4F, or 4H(3);

(2) except as provided in the Conflict-of-Interest Rules for Part-time Magistrate Judges, should not practice law in the court on which the judge serves or in any court subject to that court's appellate jurisdiction, or act as a lawyer in a proceeding in which the judge has served as a judge or in any related proceeding.

B. *Judge Pro Tempore.* A judge pro tempore is a person who is appointed to act temporarily as a judge or as a special master.

(1) While acting in this capacity, a judge pro tempore is not required to comply with Canons 4A(4), 4A(5), 4D(2), 4D(3), 4E, 4F, or 4H(3); further, one who acts solely as a special master is not required to comply with Canons 4A(3), 4B, 4C, 4D(4), or 5.

(2) A person who has been a judge pro tempore should not act as a lawyer in a proceeding in which the judge has served as a judge or in any related proceeding.

C. *Retired Judge.* A judge who is retired under 28 U.S.C. § 371(b) or § 372(a), or who is subject to recall under § 178(d), or who is recalled to judicial service, should comply with all the provisions of this Code except Canon 4F, but the judge should refrain from judicial service during the period of an extrajudicial appointment not sanctioned by Canon 4F. All other retired judges who are eligible for recall to judicial service (except those in U.S. territories and possessions) should comply with the provisions of this Code governing part-time judges. A senior judge in the territories and possessions must comply with this Code as prescribed by 28 U.S.C. §§ 373(c)(5) and (d).

APPLICABLE DATE OF COMPLIANCE

Persons to whom this Code applies should arrange their financial and fiduciary affairs as soon as reasonably possible to comply with it and should do so in any event within one year after appointment. If, however, the demands on the person's time and the possibility of conflicts of interest are not substantial, such a person may continue to act, without compensation, as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of the person's family if terminating the relationship would unnecessarily jeopardize any substantial interest of the estate or person and if the judicial council of the circuit approves.

Appendix G

Code of Conduct for Judicial Employees*

CHAPTER II. CODES OF CONDUCT FOR JUDICIAL EMPLOYEES

A. Code of Conduct for Judicial Employees.

Introduction

This Code of Conduct applies to all employees of the Judicial Branch except Justices; judges; and employees of the United States Supreme Court, the Administrative Office of the United States Courts, the Federal Judicial Center, the Sentencing Commission, and Federal Public Defender offices.[1] As used in this code in canons 3F(2)(b), 3F(5), 4B(2), 4C(l), and 5B, a member of a judge's personal staff means a judge's secretary, a judge's law clerk, and a courtroom deputy clerk or court reporter whose assignment with a particular judge is reasonably perceived as being comparable to a member of the judge's personal staff.[2]

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.

The Judicial Conference has authorized its Committee on Codes of Conduct to render advisory opinions concerning the application and interpretation of this code. Employees should consult with their supervisor and/or appointing authority for guidance on questions concerning this code and its applicability before a request for an advisory opinion is made to the Committee on Codes of Conduct. In assessing the propriety of one's proposed conduct, a judicial employee should take care to consider all relevant canons in this code, the Ethics Reform Act, and other applicable statutes and regulations[3] (e.g., receipt of a gift may implicate canon 2 as well as canon 4C(2) and the Ethics Reform Act gift regulations). Should a question remain after this consultation, the affected judicial employee, or the chief judge, supervisor, or appointing authority of such employee, may request an advisory opinion from the Committee. Requests for advisory opinions may be addressed to the Chairman of the Committee on Codes of Conduct in care of the General Counsel, Administrative Office of the United States Courts, One Columbus Circle, N.E., Washington, D.C. 20544.

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* U.S. Courts, http://www.uscourts.gov/guide/vol2/ch2a.html.

1 Justices and employees of the Supreme Court are subject to standards established by the Justices of that Court. Judges are subject to the Code of Conduct for United States Judges. Employees of the AO and the FJC are subject to their respective agency codes. Employees of the Sentencing Commission are subject to standards established by the Commission. Federal public defender employees are subject to the Code of Conduct for Federal Public Defender Employees. When Actually Employed (WAE) employees are subject to canons 1, 2, and 3 and such other provisions of this code as may be determined by the appointing authority.

2 Employees who occupy positions with functions and responsibilities similar to those for a particular position identified in this code should be guided by the standards applicable to that position, even if the position title differs. When in doubt, employees may seek an advisory opinion as to the applicability of specific code provisions.

3 *See Guide to Judiciary Policies and Procedures,* Volume II, Chapter VI, Statutory and Regulatory Provisions Relating to the Conduct of Judges and Judicial Employees.

Adopted September 19, 1995
by the Judicial Conference of the United States
Effective January 1, 1996[4]

CANON 1 A JUDICIAL EMPLOYEE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY AND OF THE JUDICIAL EMPLOYEE'S OFFICE

An independent and honorable Judiciary is indispensable to justice in our society. A judicial employee should personally observe high standards of conduct so that the integrity and independence of the Judiciary are preserved and the judicial employee's office reflects a devotion to serving the public. Judicial employees should require adherence to such standards by personnel subject to their direction and control. The provisions of this code should be construed and applied to further these objectives. The standards of this code shall not affect or preclude other more stringent standards required by law, by court order, or by the appointing authority.

CANON 2: A JUDICIAL EMPLOYEE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES

A judicial employee should not engage in any activities that would put into question the propriety of the judicial employee's conduct in carrying out the duties of the office. A judicial employee should not allow family, social, or other relationships to influence official conduct or judgment. A judicial employee should not lend the prestige of the office to advance or to appear to advance the private interests of others. A judicial employee should not use public office for private gain.

CANON 3: A JUDICIAL EMPLOYEE SHOULD ADHERE TO APPROPRIATE STANDARDS IN PERFORMING THE DUTIES OF THE OFFICE

In performing the duties prescribed by law, by resolution of the Judicial Conference of the United States, by court order, or by the judicial employee's appointing authority, the following standards apply:

A. A judicial employee should respect and comply with the law and these canons. A judicial employee should report to the appropriate supervising authority any attempt to induce the judicial employee to violate these canons.

Note: A number of criminal statutes of general applicability govern federal employees' performance of official duties. These include:

18 U.S.C. § 201 (bribery of public officials and witnesses);
18 U.S.C. § 211 (acceptance or solicitation to obtain appointive public office);
18 U.S.C. § 285 (taking or using papers relating to government claims);
18 U.S.C. § 287 (false, fictitious, or fraudulent claims against the government);
18 U.S.C. § 508 (counterfeiting or forging transportation requests);
18 U.S.C. § 641 (embezzlement or conversion of government money, property, or records);
18 U.S.C. § 643 (failing to account for public money);
18 U.S.C. § 798 and 50 U.S.C. § 783 (disclosure of classified information);

[4] Canon 3F(4) was revised at the March 2001 Judicial Conference.

18 U.S.C. § 1001 (fraud or false statements in a government matter);
18 U.S.C. § 1719 (misuse of franking privilege);
18 U.S.C. § 2071 (concealing, removing, or mutilating a public record);
31 U.S.C.§ 1344 (misuse of government vehicle);
31 U.S.C. § 3729 (false claims against the government).

In addition, provisions of specific applicability to court officers include:
18 U.S.C. §§ 153, 154 (court officers embezzling or purchasing property from bankruptcy estate);

18 U.S.C. § 645 (embezzlement and theft by court officers);
18 U.S.C. § 646 (court officers failing to deposit registry moneys);
18 U.S.C. § 647 (receiving loans from registry moneys from court officer).

This is not a comprehensive listing but sets forth some of the more significant provisions with which judicial employees should be familiar.

B. A judicial employee should be faithful to professional standards and maintain competence in the judicial employee's profession.

C. A judicial employee should be patient, dignified, respectful, and courteous to all persons with whom the judicial employee deals in an official capacity, including the general public, and should require similar conduct of personnel subject to the judicial employee's direction and control. A judicial employee should diligently discharge the responsibilities of the office in a prompt, efficient, nondiscriminatory, fair, and professional manner. A judicial employee should never influence or attempt to influence the assignment of cases, or perform any discretionary or ministerial function of the court in a manner that improperly favors any litigant or attorney, nor should a judicial employee imply that he or she is in a position to do so.

D. A judicial employee should avoid making public comment on the merits of a pending or impending action and should require similar restraint by personnel subject to the judicial employee's direction and control. This proscription does not extend to public statements made in the course of official duties or to the explanation of court procedures. A judicial employee should never disclose any confidential information received in the course of official duties except as required in the performance of such duties, nor should a judicial employee employ such information for personal gain. A former judicial employee should observe the same restrictions on disclosure of confidential information that apply to a current judicial employee, except as modified by the appointing authority.

E. A judicial employee should not engage in nepotism prohibited by law.

Note: See also 5 U.S.C. § 3110 (employment of relatives); 28 U.S.C. § 458 (employment of judges' relatives).

F. Conflicts of Interest.

(1) A judicial employee should avoid conflicts of interest in the performance of official duties. A conflict of interest arises when a judicial employee knows that he or she (or the spouse, minor child residing in the judicial employee's household, or other close relative of the judicial employee) might be so personally or financially affected by a matter that a reasonable person with knowledge of the relevant facts would question the judicial employee's ability properly to perform official duties in an impartial manner.

(2) Certain judicial employees, because of their relationship to a judge or the nature of their duties, are subject to the following additional restrictions:

(a) A staff attorney or law clerk should not perform any official duties in any matter with respect to which such staff attorney or law clerk knows that:

(i) he or she has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(ii) he or she served as lawyer in the matter in controversy, or a lawyer with whom he or she previously practiced law had served (during such association) as a lawyer concerning the matter, or he, she, or such lawyer has been a material witness;

(iii) he or she, individually or as a fiduciary, or the spouse or minor child residing in his or her household, has a financial interest in the subject matter in controversy or in a party to the proceeding;

(iv) he or she, a spouse, or a person related to either within the third degree of relationship,[5] or the spouse of such person (A) is a party to the proceeding, or an officer, director, or trustee of a party; (B) is acting as a lawyer in the proceeding; (C) has an interest that could be substantially affected by the outcome of the proceeding; or (D) is likely to be a material witness in the proceeding;

(v) he or she has served in governmental employment and in such capacity participated as counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

(b) A secretary to a judge, or a courtroom deputy or court reporter whose assignment with a particular judge is reasonably perceived as being comparable to a member of the judge's personal staff, should not perform any official duties in any matter with respect to which such secretary, courtroom deputy, or court reporter knows that he or she, a spouse, or a person related to either within the third degree of relationship, or the spouse of such person (i) is a party to the proceeding, or an officer, director, or trustee of a party; (ii) is acting as a lawyer in the proceeding; (iii) has an interest that could be substantially affected by the outcome of the proceeding; or (iv) is likely to be a material witness in the proceeding; provided, however, that when the foregoing restriction presents undue hardship, the judge may authorize the secretary, courtroom deputy, or court reporter to participate in the matter if no reasonable alternative exists and adequate safeguards are in place to ensure that official duties are properly performed. In the event the secretary, courtroom deputy, or court reporter possesses any of the foregoing characteristics and so advises the judge, the judge should also consider whether the Code of Conduct for United States Judges may require the judge to recuse.

(c) A probation or pretrial services officer should not perform any official duties in any matter with respect to which the probation or pretrial services officer knows that:

(i) he or she has a personal bias or prejudice concerning a party;

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[5] As used in this code, the third degree of relationship is calculated according to the civil law system to include the following relatives: parent, child, grandparent, grandchild, great grandparent, great grandchild, brother, sister, aunt, uncle, niece and nephew.

(ii) he or she is related within the third degree of relationship to a party to the proceeding, or to an officer, director, or trustee of a party, or to a lawyer in the proceeding;

(iii) he or she, or a relative within the third degree of relationship, has an interest that could be substantially affected by the outcome of the proceeding.

(3) When a judicial employee knows that a conflict of interest may be presented, the judicial employee should promptly inform his or her appointing authority. The appointing authority, after determining that a conflict or the appearance of a conflict of interest exists, should take appropriate steps to restrict the judicial employee's performance of official duties in such matter so as to avoid a conflict or the appearance of a conflict of interest. A judicial employee should observe any restrictions imposed by his or her appointing authority in this regard.

(4) A judicial employee who is subject to canon 3F(2) should keep informed about his or her personal, financial and fiduciary interests and make a reasonable effort to keep informed about such interests of a spouse or minor child residing in the judicial employee's household. For purposes of this canon, "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the employee participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policy holder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(5) A member of a judge's personal staff should inform the appointing judge of any circumstance or activity of the staff member that might serve as a basis for disqualification of either the staff member or the judge, in a matter pending before the judge.

CANON 4: IN ENGAGING IN OUTSIDE ACTIVITIES, A JUDICIAL EMPLOYEE SHOULD AVOID THE RISK OF CONFLICT WITH OFFICIAL DUTIES, SHOULD AVOID THE APPEARANCE OF IMPROPRIETY, AND SHOULD COMPLY WITH DISCLOSURE REQUIREMENTS

A. Outside Activities. A judicial employee's activities outside of official duties should not detract from the dignity of the court, interfere with the performance of official duties, or adversely reflect on the operation and dignity of the court or office the judicial employee serves. Subject to the foregoing standards and the other provisions of this code, a judicial employee may engage in such activities as civic, charitable, religious, professional, educational, cultural, avocational, social, fraternal, and recreational activities, and may speak, write, lecture, and teach. If such outside activities concern the law, the legal system, or the administration of justice, the

judicial employee should first consult with the appointing authority to determine whether the proposed activities are consistent with the foregoing standards and the other provisions of this code.

B. Solicitation of Funds. A judicial employee may solicit funds in connection with outside activities, subject to the following limitations:

(1) A judicial employee should not use or permit the use of the prestige of the office in the solicitation of funds.

(2) A judicial employee should not solicit subordinates to contribute funds to any such activity but may provide information to them about a general fund-raising campaign. A member of a judge's personal staff should not solicit any court personnel to contribute funds to any such activity under circumstances where the staff member's close relationship to the judge could reasonably be construed to give undue weight to the solicitation.

(3) A judicial employee should not solicit or accept funds from lawyers or other persons likely to come before the judicial employee or the court or office the judicial employee serves, except as an incident to a general fund-raising activity.

C. Financial Activities.

(1) A judicial employee should refrain from outside financial and business dealings that tend to detract from the dignity of the court, interfere with the proper performance of official duties, exploit the position, or associate the judicial employee in a substantial financial manner with lawyers or other persons likely to come before the judicial employee or the court or office the judicial employee serves, provided, however, that court reporters are not prohibited from providing reporting services for compensation to the extent permitted by statute and by the court. A member of a judge's personal staff should consult with the appointing judge concerning any financial and business activities that might reasonably be interpreted as violating this code and should refrain from any activities that fail to conform to the foregoing standards or that the judge concludes may otherwise give rise to an appearance of impropriety.

(2) A judicial employee should not solicit or accept a gift from anyone seeking official action from or doing business with the court or other entity served by the judicial employee, or from anyone whose interests may be substantially affected by the performance or nonperformance of official duties; except that a judicial employee may accept a gift as permitted by the Ethics Reform Act of 1989 and the Judicial Conference regulations thereunder. A judicial employee should endeavor to prevent a member of a judicial employee's family residing in the household from soliciting or accepting any such gift except to the extent that a judicial employee would be permitted to do so by the Ethics Reform Act of 1989 and the Judicial Conference regulations thereunder.

Note: See 5 U.S.C. § 7353 (gifts to federal employees). See also 5 U.S.C. § 7342 (foreign gifts); 5 U.S.C. § 7351 (gifts to superiors).

(3) A judicial employee should report the value of gifts to the extent a report is required by the Ethics Reform Act, other applicable law, or the Judicial Conference of the United States.

Note: See 5 U.S.C. App. §§ 101 to 111 (Ethics Reform Act financial disclosure provisions).

(4) During judicial employment, a law clerk or staff attorney may seek and obtain employment to commence after the completion of the judicial employment. However, the law clerk or staff attorney should first consult with the appointing authority and observe any restrictions imposed by the appointing authority. If any law firm, lawyer, or entity with whom a law clerk or staff attorney has been employed or is seeking or has obtained future employment appears in any matter pending before the appointing authority, the law clerk or staff attorney should promptly bring this fact to the attention of the appointing authority.

D. Practice of Law. A judicial employee should not engage in the practice of law except that a judicial employee may act pro se, may perform routine legal work incident to the management of the personal affairs of the judicial employee or a member of the judicial employee's family, and may provide pro bono legal services in civil matters, so long as such pro se, family, or pro bono legal work does not present an appearance of impropriety, does not take place while on duty or in the judicial employee's workplace, and does not interfere with the judicial employee's primary responsibility to the office in which the judicial employee serves, and further provided that:

(1) in the case of pro se legal work, such work is done without compensation (other than such compensation as may be allowed by statute or court rule in probate proceedings);

(2) in the case of family legal work, such work is done without compensation (other than such compensation as may be allowed by statute or court rule in probate proceedings) and does not involve the entry of an appearance in a federal court;

(3) in the case of pro bono legal services, such work (a) is done without compensation; (b) does not involve the entry of an appearance in any federal, state, or local court or administrative agency; (c) does not involve a matter of public controversy, an issue likely to come before the judicial employee's court, or litigation against federal, state or local government; and (d) is reviewed in advance with the appointing authority to determine whether the proposed services are consistent with the foregoing standards and the other provisions of this code.

Judicial employees may also serve as uncompensated mediators or arbitrators for nonprofit organizations, subject to the standards applicable to pro bono practice of law, as set forth above, and the other provisions of this code.

A judicial employee should ascertain any limitations imposed by the appointing judge or the court on which the appointing judge serves concerning the practice of law by a former judicial employee before the judge or the court and should observe such limitations after leaving such employment.

Note: See also 18 U.S.C. § 203 (representation in matters involving the United States); 18 U.S.C. § 205 (claims against the United States); 28 U.S.C. § 955 (restriction on clerks of court practicing law).

E. Compensation and Reimbursement. A judicial employee may receive compensation and reimbursement of expenses for outside activities provided that receipt of such compensation and reimbursement is not prohibited or restricted by this code, the Ethics Reform Act, and other applicable law, and provided that the source or amount of such payments does not influence or give the appearance of influencing the judicial employee in the performance of official duties or otherwise give the appearance of impropriety. Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incur[r]ed by a judicial employee and, where

appropriate to the occasion, by the judicial employee's spouse or relative. Any payment in excess of such an amount is compensation.

A judicial employee should make and file reports of compensation and reimbursement for outside activities to the extent prescribed by the Ethics Reform Act, other applicable law, or the Judicial Conference of the United States.

Notwithstanding the above, a judicial employee should not receive any salary, or any supplementation of salary, as compensation for official government services from any source other than the United States, provided, however, that court reporters are not prohibited from receiving compensation for reporting services to the extent permitted by statute and by the court.

Note: See 5 U.S.C. App. §§ 101 to 111 (Ethics Reform Act financial disclosure provisions); 28 U.S.C. § 753 (court reporter compensation). See also 5 U.S.C. App. §§ 501 to 505 (outside earned income and employment).

CANON 5: A JUDICIAL EMPLOYEE SHOULD REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY

A. Partisan Political Activity. A judicial employee should refrain from partisan political activity; should not act as a leader or hold any office in a partisan political organization; should not make speeches for or publicly endorse or oppose a partisan political organization or candidate; should not solicit funds for or contribute to a partisan political organization, candidate, or event; should not become a candidate for partisan political office; and should not otherwise actively engage in partisan political activities.

B. Nonpartisan Political Activity. A member of a judge's personal staff, clerk of court, chief probation officer, chief pretrial services officer, circuit executive, and district court executive should refrain from nonpartisan political activity such as campaigning for or publicly endorsing or opposing a nonpartisan political candidate; soliciting funds for or contributing to a nonpartisan political candidate or event; and becoming a candidate for nonpartisan political office. Other judicial employees may engage in nonpartisan political activity only if such activity does not tend to reflect adversely on the dignity or impartiality of the court or office and does not interfere with the proper performance of official duties. A judicial employee may not engage in such activity while on duty or in the judicial employee's workplace and may not utilize any federal resources in connection with any such activity.

Note: See also 18 U.S.C. Chapter 29 (elections and political activities).

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