Book: Ethics in Complex Litigation

Chapter:
Court-Appointed Neutrals in Complex Litigation: Ethics Issues and Norms

by

Kristen Blankley and Irma S. Russell

I. Introduction

Complex litigation, including multidistrict litigation and class action suits, have grown in frequency, as has alternative dispute resolution in complex matters. This trend is notable, especially in a time when litigation in general is declining.[1] As a result of the growth of complex matters, courts are increasingly appointing neutral experts in these cases. Although the appointment of court-appointed neutrals is not "common" or "usual," the trend of increasing of appointment of a court-appointed neutral ("CAN") is likely to continue as matters become more complex in a complex and litigious world.

Ethics issues arise in the work of all professionals, and indeed they arise in all aspects of human endeavor. Because of the broad range of functions CANs serve, the ethics issues that arise in the appointment and work of CANs are wide-ranging. Moreover, different ethics rules may apply in different settings. While some ethics issue arise in predictable ways, others require careful analysis of various rules because the different roles a CAN may serve are in the judicial realm and have a different purpose than the rules applicable to lawyers or the rules applicable to other third-party neutrals. For example, when a CAN is serving in an adjudicatory role, the Code of Judicial Conduct rather than the Rules of Professional Conduct may apply and may even displace Rules of Professional Conduct. As this Chapter suggests, ethics rules should apply with regard to the services being performed by a CAN since no standalone code of ethics or professionalism exists for CANs.

Part I of this chapter provides basic information on CANs such as definitions and distinctions among different types of neutrals and CANs. Part II focuses on appointment of CANs, including the authority to appoint CANs under state and federal law and best practices of appointments. Part III identifies the sources of ethics rules and guidance on ethics for CANs because of the various "hats" worn by CANs. It also examines these different sources of ethics rules and application of the rules to issues that may arise in the context of appointment of CANs in complex litigation. Finally, this part provides examples of ethics issues and concerns that can arise in this context and considers the steps of analyzing such issues under applicable rules.

A. Who are Court Appointed Neutrals? Definitions and Background

[1] *See Marc Galanter, The Hundred-Year Decline of Trials and the Thirty Years War, 57 STAN. L. REV. 1255, 1255–74 (2005);* Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 J. EMPIRICAL LEGAL STUD. 459, 460 (2004).

Court-Appointed Neutrals (CANs) are officers and adjuncts to the judicial system. They serve in varying roles in both civil and criminal matters, and in all phases of the judicial process, including discovery, trial, settlement, and appellate matters. While scientific and specialized issues can arise in any type of matter, frequently CANs serve to fulfill tasks in complex litigation, such as multidistrict litigation, multi-party matters, class action suits, and other types of litigation.[2]

CANs, as officers of the court, generally serve a particular role in a matter under the jurisdiction of a court or agency.[3] Referred to as "special masters" by some courts and the Federal Rules of Civil Procedure, these adjuncts to the judicial process appear in both state and federal courts, including the Supreme Court of the United States.[4] They serve in a wide range of roles, working on tasks assigned by the tribunal that appointed them. Courts and agencies appoint neutrals to help at every stage of a trial or settlement and, sometimes, in non-litigation processes. For example, a court may appoint a CAN to serve as an auditor or expert, a claims administrator, a mediator, a facilitator, an arbitrator, a monitor, a receiver or a referee. In appointing CANs to identify terms for settlement or to oversee the administration of settlement agreements after a consent decree is entered, a court or agency empowers the neutral to fulfill the role required by the particular case. Courts and tribunals appoint neutrals under both rules of procedure and the inherent power of the tribunal.[5]

B. Purpose and Tasks of Court Appointed Neutrals in Complex Litigation

The purposes of an appointment of a CAN and the tasks CANs perform are so wide-ranging that their value to judiciary and our system of justice can be understood best by reference to the needs of a particular matter. The functions CANs accomplish are diverse because the needs of courts are diverse and changing in response to circumstances of individual actions. Many, but not all, CANs are lawyers. Some CANs are other professionals such as accountants or experts on scientific issues. Courts appoint CANs to support the work of the court. Accordingly, a wide variety of names identify the neutrals. For example, courts appoint allocators to differentiate among plaintiffs who suffered varying degrees of harm from a disaster. Today, wide-sweeping harm is becoming more likely, given natural causes such as the increasing number of extreme weather events, and manmade catastrophes such as the violation in water regulations that resulted in contaminants in the municipal drinking water of the City of Flint, Michigan.[6] One of the most well-known examples of appointing an allocator to differentiate among claimants is the appointment of Ken Feinberg to allocate funds to individuals who

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[2] For additional examples of the roles of neutrals courts appoint, see the Academy of Court-Appointed Neutrals at: https://www.courtappointedneutrals.org/using-neutrals/roles-of-neutrals/, visited 5/1/2023.

[3] In the rarest of cases, a neutral may perform the work of a CAN in a completely voluntary situation. For instance, Kenneth Feinberg administered a fund for victims of the shootings at the 2007 mass shooting at Virginia Tech. *See Introduction of the 2011 Commencement Speaker Kenneth R. Feinberg by Virginia Tech President Charles W. Steger*, https://history.unirel.vt.edu/instruction_degrees_commencement/speeches/2011_feinberg.html.

[4] 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, 628 (2002) (describing the Supreme Court's frequent use of "special masters" in cases falling under the Court's original jurisdiction).

[5] In re Peterson (State Rep. Title: Ex Parte Peterson), 253 U.S. 300, 314, 40 S. Ct. 543, 548, 64 L. Ed. 919 (1920) (holding that appointment of auditor was within the "inherent power of a federal court to invoke [] aid").

[6] Historic Flint Water Civil Settlement Approved by Genesee County Circuit Court, Michigan Department of Attorney General (March 21, 2023), available at: https://www.michigan.gov/ag/news/press-releases/2023/03/21/historic-flint-water-civil-settlement-approved-by-genesee-county-circuit-court (noting over $600 million settlement with the state of Michigan and additional funds from the city); *see also*, Notice of the Special Master Regarding Status of Claims Process Under the Amended Settlement Agreement, avaiable at: https://www.officialflintwatersettlement.com/_files/ugd/362210_5a37334710254573b1bb4bcf23f31bca.pdf (visited 7/31/2023).

suffered harm as a result of the September 11 World Trade Center attack.[7] The following is a non-exhaustive list of the duties that CANs may be assigned:

- Case management duties, including holding scheduling conferences
- Managing discovery disputes, including briefing schedules, as well as ruling on motions for discovery and sanctions
- Managing e-discovery disputes
- Performing settlement conferences
- Creating formulas to distribute a settlement fund
- Overseeing the distribution of a settlement fund
- Managing disputes over privilege
- Holding trials
- Monitoring consent decrees

Different cases likely require different services from CANs, and the position is purposefully flexible to accommodate parties and courts.

CANs are active representatives of courts in civil and criminal matters in all phases of the judicial process, including discovery, trial, settlement, and appeal. Indeed, some CANs serve even in non-litigation matters such as hearings for environmental justice communities and other stakeholders in environmental negotiations and other administrative proceedings.[8]

Because of its general nature, the term “neutral” captures the different categories within the categories of appointed adjuncts who serve different functions. However, as seen from the non-exhaustive description above, CANs perform both adjudicatory functions (i.e., with a decision by a neutral about the matter) and non-adjudicatory tasks or functions (i.e., without a decision by the neutral) depending on the case. Moreover, these categories are not exhaustive as CANs serve in functions by consent of the parties, and in managerial functions, such as establishing a schedule for production of discovery and other ministerial issues.[9]

On August 7, 2023, the American Bar Association House of Delegates adopted two resolutions co-sponsored by the ABA Judicial Division and Section of Dispute Resolution designed to make court-appointed neutrals a more effective tool for the administration of justice. Resolution 516 endorsed the name "Court-Appointed Neutrals," urges rulemakers and legislators to substitute the term "court-appointed neutrals" for "master" or "special master," amends the ABA's own 2019 Guidelines on the Appointment and Use of Special Masters in Federal and State Civil Litigation to substitute the new term, and assists the efforts to change a rule that limits

[7] *See September 11th Victim Compensation Fund (VCF), available at https://www.vcf.gov/.*
[8] *See, e.g., FACT SHEET: Inflation Reduction Act Advances Environmental Justice, The White House website (reporting that IRA advances "Justice40 Initiative, which will deliver 40 percent of the overall benefits of climate and clean energy investments to disadvantaged communities") (AUGUST 17, 2022), available at: https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/17/fact-sheet-inflation-reduction-act-advances-environmental-justice (visited 7/31/23).*
[9] *See* Fed. R. Civ. P. 53, Advisory Committee Notes (indicating that “matters of account and of difficult computation of damages” justify the use of a master without consent of the parties for “essentially ministerial determinations that require mastery of much detailed information but that do not require extensive determinations of credibility”).

courts' authority to appoint neutrals in bankruptcy proceedings.[10] Resolution 517 adopts a Model Rule on the appointment of court-appointed neutrals in state, local, territorial, and tribal courts. The model rule gives guidance to courts on the circumstances under which an appointment of a CAN might be beneficial, provides a non-exhaustive list of the duties that a CAN may perform, and gives guidance to the parties and the courts on the contents of an appointment order.[11]

C. Essential Attributes of CANs.

Successful CANs possess a number of traits and skills that help them perform the tasks assigned. Many of these attributes are similar to the traits and skills of other successful neutrals, such as mediators and arbitrators. Appointments of CANs based on friendship or a close association with the appointing judge is legitimately disfavored, and a growing practice in the judiciary is to avoid such appointments because of the perception or reality of bias. Judges disqualify themselves from cases in which their "impartiality might reasonably be questioned."[12] Because the CAN acts in place of the judge and under the auspices of the court, judges typically avoid appointing CANs who are friends or connected to the judge in a way that could "reasonably be questioned." The obvious problem of the appearance of impropriety of such appointments as well as actual problems motivate judges and courts to use objective sources for identifying CANs who have the credentials and experience needed in a case without the baggage of a relationship with the judge. CANs can be found on registries and other professional listings.[13]

"Neutrality" is defined as the "state of not supporting or helping either side in a conflict; impartiality." In the context of court appointed neutrals, "neutrality" refers to an impartial decision maker as a component of the legal system. "The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society."[14]

In *Commonwealth Coatings Corp. v. Cont'l Cas. Co*., the U.S. Supreme Court set aside the order of an arbitrator on the basis that the arbitrator had maintained a close financial relationship with one of the parties to the action for a period of years. [15] In explaining its decision to overturn the arbitrator's decision, the Court made clear that there had been no allegation of fraud or bias against the arbitrator. [16] It also recognized the reality of business connections between arbitrators and business interests, but emphasized that arbitrators must meet the same impartiality standards applicable to judges:

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[10] For the full text of Resolution 516, see https://www.courtappointedneutrals.org/acam/assets/file/public/resources/aba_resolution_516-annual-2023_amend_19m100_final.pdf

[11] For the full text of Resolution 517, see https://www.courtappointedneutrals.org/acam/assets/file/public/resources/resolution-517-annual_approval_copy_8_5_23.pdf.

[12] Model Code of Judicial Conduct, Rule 2.11 Disqualification, available at: https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_11disqualification.

[13] *See, e.g.*, Find Our Neutrals (memberclicks.net), available at: https://acan.memberclicks.net/find-our-neutrals#/

[14] Model Code of Judicial Conduct, Preamble para. [1], available at: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2011_mcjc_preamble_scope_terminology.pdf.

[15] Commonwealth Coatings Corp. v. Cont'l Cas. Co., 89 S. Ct. 337 (1968).

[16] Commonwealth Coatings Corp. v. Cont'l Cas. Co., 89 S. Ct. 337, 338 (1968).

> It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias. [17]

Perhaps the best reason for using the term "neutral" to identify CANs is that neutrality is the central attribute required of all appointed neutrals. While expertise and competence are essential for all neutrals, the competence and expertise needed in a particular appointment will vary. In fact, the variety of titles used to describe neutrals demonstrates this point of variability of expertise. The one unvarying attribute of a neutral is neutrality. The competence of an expert to be appointed must be established, of course, but expertise alone is not sufficient to justify an appointment. The essential attribute of neutrality must also be established. No matter what her field of expertise, the attribute of neutrality must be shown for an appointment. Taking a side, leaning toward a side, or presenting a basis that would justify a reasonable person to object to impartiality is a disqualifying defect. Neutrality is, thus, an apt term for such appointed adjuncts. Taking sides in conflict is a natural impulse. The use of the term in other areas, such as humanitarian aid societies provides a good comparison.[18]

For all types of neutrals, including courts[19] as well as mediators, arbitrators, and facilitators, neutrality is crucial to establishing trust in both the decision maker and the process.[20] The very fact that the neutral has no stake in the matter and is not advocating for any party should lead to buy-in and trust, similar to the trust in a judge. The competence and expertise needed in a particular appointment will vary. CANs appointed to manage e-discovery disputes will likely come from a different pool of people than CANs appointed to administer a class action settlement. No matter what her field of expertise, the attributes of neutrality and impartiality must be established to justify the appointment of a CAN. Neutrality is defeated when a CAN or other official takes a side or leans toward a side. If the facts indicate a basis that would justify a reasonable person to object to impartiality, this defect is a basis for disqualifying the CAN. Neutrality is, thus, an apt term for appointment of an adjunct. Taking sides in conflict is a natural impulse. The use of the term "neutral" in other areas, such as humanitarian aid societies shows the naturalness of the tendency and also shows the reason neutrality is necessary in our

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[17] Commonwealth Coatings Corp. v. Cont'l Cas. Co., 89 S. Ct. 337, 339 (1968).

[18] Mirjana Spoljaric, The World Needs Neutrals, The New York Times Opinion section, (May 30, 2023) (noting that "taking sides in conflict is a natural impulse," and emphasizing that the International Committee of the Red Cross does not take sides because its mission of providing "humanitarian assistance to people across the world's most contentious theaters of armed conflict" would be destroyed by following that natural impulse), available at: https://www.nytimes.com/2023/05/30/opinion/red-cross-ukraine-russia.html?campaign_id=2&emc=edit_th_20230531&instance_id=93863&nl=todaysheadlines&regi_id=51086901&segment_id=134310&user_id=8504adbfffd3068c41a4a7599eb03eb5

[19] An impartial decisionmaker is a basic tenet of law, guaranteed by the constitution statutes. *See* Second Ave. Restaurant v. New York State Liquor Authority, 75 N.Y.2d 158 (C.App.N.Y. 1990)

justice system.[21] No matter how natural this reaction may be, it is a fatal defect in a CAN and bars the appointment.

CANs should also be free from conflicts of interests. While conflicts checks are necessary and many conflicts may be a cause for disqualification, finding no conflicts does not necessarily mean that the inquiry of neutrality required of CANs is satisfied.

The standard set for disqualification of a CAN set in Rule 53 is the starting place for assessing the minimum requirements for a CAN in addition to the skills and capacities noted above. Rule 53 deals expressly with disqualification of a master. It states: "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."[22] The rule sets an objective legal standard for service of a CAN, giving allowance for the parties and the judge to waive a disqualifying factor. The essential attribute of a CAN under Rule 53 is closely analogous to the standard applied to judges.

The Advisory Committee Notes to Rule 53 relating to the disqualification provision suggest some leeway for appointment of a CAN despite circumstances that would result in disqualification of a judge. The Notes state: "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."[23] The law and concepts relating to conflicts and disqualification are discussed in more detail below.

The distinction between neutrality and conflicts of interest can be seen by comparing the role of CANs who serve as judicial adjuncts and conflict rules applicable to lawyers. While the concept of conflicts of interest applies to lawyers, lawyers are not neutrals. Indeed, lawyers necessarily have a non-neutral position in that they are fiduciaries to their clients. Lawyers owe clients the best efforts and dedication to legitimate client objectives. Conflicts of interests identified with respect to lawyers is also a disqualification for a representation. In the context of lawyer ethics rules, Model Rule 1.7 identifies situations in which conflicts of interest disqualify a lawyer from representing a client. The rule states that "lawyer shall not represent a client if the representation involves a concurrent conflict of interest." It defines such a conflict as one in which "the representation of one client will be directly adverse to another client" or one in which "a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."[24] The rule provides exceptions to allow a lawyer to enter a representation despite a concurrent conflict in limited settings, such as the lawyer's reasonable belief that she

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[21] Mirjana Spoljaric, The World Needs Neutrals, The New York Times Opinion section, (May 30, 2023) (noting that "taking sides in conflict is a natural impulse," and emphasizing that the International Committee of the Red Cross does not take sides because its mission of providing "humanitarian assistance to people across the world's most contentious theaters of armed conflict" would be destroyed by following that natural impulse), available at: https://www.nytimes.com/2023/05/30/opinion/red-cross-ukraine-russia.html?campaign_id=2&emc=edit_th_20230531&instance_id=93863&nl=todaysheadlines&regi_id=51086901&segment_id=134310&user_id=8504adbfffd3068c41a4a7599eb03eb5

[22] Fed. R. Civ. Pro. R. 53(a)(2).

[23] Fed. R. Civ. Pro. R. 53, 2023 Advisory Note.

[24] Model R. Prof'l Conduct R. 1.7.

can "provide competent and diligent representation to each affected client" combined with "informed consent, confirmed in writing" by the affected clients.

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Ethics issues arise in the work of all professionals, and indeed they arise in all aspects of human endeavor. Because of the wide range of functions CANs serve, the ethics issues that arise in the appointment and work of CANs are wide-ranging. Moreover, different ethics rules may apply in different settings. Understandably, many ethics issue arise routinely. For example, conflicts of interest are predictable when a CAN has served for many years in a specialized area such as labor disputes regarding union representations, it is not surprising that a CAN may have played a role in similar matters or even matters involving the same parties as a current dispute. Whether past work as a neutral is a disqualifying factor can be a complicated and layered question.

D. Distinction Between Court-Appointed Neutrals and Other Neutrals in Complex Litigation

The description of CANs may sound similar to other types of actors in the court system, such as magistrate judges, administrative law judges, arbitrators, and mediators. This section distinguishes the role of the CAN from these other third parties who have duties similar to those of the CAN. The neutrals that have an adjudicative role (i.e., a decision-making role) are discussed before the neutrals in a consensual role (i.e., non-decision-making role).

1. Magistrates

Magistrate judges are judicial officers who are court employees who can be tasked with a number of duties to help the judiciary manage their dockets and individual cases.[26] Federal magistrate judges are appointed for a term of years,[27] as opposed to a lifetime appointment, which is required by the US Constitution for Article IIII judges. Although they are not guaranteed a lifetime appointment, magistrate judges can be reappointed "indefinitely,"[28] and

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[25] For additional examples of the roles of neutrals courts appoint, see the Academy of Court-Appointed Neutrals at: https://www.courtappointedneutrals.org/using-neutrals/roles-of-neutrals/, visited 5/1/2023.

[26] 28 U.S.C. §636 (2022) (outlining duties of magistrate judges); *see also* Nancy A. Welsh, *Magistrate Judges, Settlement, and Procedural Justice*, 994-995 (2016) (describing the tasks commonly performed by magistrate judges as including case scheduling, motions, discovery disputes, e-discovery disputes, settlement discussion, and pre-trial conferences, including final pre-trial conferences). While most magistrate judges are appointed by a district court judge to administer specific cases, some federal districts assign cases directly to magistrate judges in the same manner that they would assign cases to Article III district court judges. These districts place the onus on the parties to opt out to the magistrate's jurisdiction, rather than opting into it. *Id.* at 995-96.

[27] 28 U.S.C. §631(e)(2022) (full time magistrate judges are appointed for eight years and part-time magistrate judges are appointed for four years).

[28] Elizabeth Chamblee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation*, 120 Colum. L. Rev. 2129, 2141 (2020).

they have security in the position in the sense that they can only be terminated for cause.[29] In civil cases, courts often appoint magistrate judges to manage discovery and pre-trial motions and hearings in cases when a district judge determines that additional resources than is possible with the sitting judge.[30] Magistrate judges often run hearings under Federal Civil Rule 16, giving them wide latitude to work with the parties on case management, settlement, and discovery issues.[31] Magistrate judges can also conduct civil trials with the consent of the parties.[32]

Of all the neutrals with duties similar to CANs, magistrate judges are closest, and they have an overlapping scope of potential duties. In addition to assisting on hearings, motions, and other adjudicative matters, magistrate judges often take a role facilitating settlement in civil cases. In this role, the magistrate judge works in a manner similar to a mediator. Between fiscal years 2020 and 2022, federal magistrate judges participated in roughly 18,000 to 22,000 settlement conferences per year.[33] Magistrate judges can draw from their judicial experience generally, as well as their experience in managing a specific case, to help the parties properly evaluate the value of the case.[34]

In addition to conducting settlement conferences and being personally involved in the settlement of a case, a magistrate judge may appoint a mediator or use another magistrate within the court in order to separate the roles of conciliation and adjudication.[35] The parties do not incur additional cost when a magistrate conducts hearings.[36] By contrast, using a private mediator or a CAN generally results in additional cost to the parties.

Magistrate judges can be appointed to perform the duties of a "special master" under 28 U.S.C. 636.[37] The statute cross-references Federal Rue 53 regarding special masters, thus bestowing on the magistrate judge in these instances all of the same powers and functions that a mediator from the private sector can provide.[38]

The primary difference between a CAN and a magistrate judge appointed as a "special master" is that the magistrate judge is a court officer and employee, while a CAN is a private practitioner who is hired to fulfill a particular task for the court. The magistrate judge does not cost the parties anything additional, but generally the CAN will charge for the services

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[29] 28 U.S.C.A. § 631(i) (stating that removal of a magistrate judge "during the term for which he is appointed shall be only for incompetency, misconduct, neglect of duty, or physical or mental disability," but noting that the office of magistrate judge "shall be terminated if the conference determines that the services performed by his office are no longer needed").
[30] United States Courts, *About Federal Judges*, at https://www.uscourts.gov/judges-judgeships/about-federal-judges (last visited May 3, 2023).
[31] Federal Rule of Civil Procedure 16(c)(2) (providing a list of items that the parties can discuss at a Rule 16 pre-trial conference).
[32] *Id*.; *see also* Federal Rule of Civil Procedure 73 (2002) (reiterating the ability for a magistrate judge to hold a hearing on the merits for the parties and defining the consent needed); *see also* Burch & Williams, *supra* note __, at 2143 (noting that magistrate judges can do "everything except dismiss cases without the parties' consent").
[33] Table S-17, *Matters Disposed of by U.S. Magistrate Judges for the 10-year Period Ended September 30, 2022* (2022), at https://www.uscourts.gov/statistics/table/s-17/judicial-business/2022/09/30 (last visited May 3, 2023).
[34] Welsh, *supra* note __, at 999-1000 (discussing an interview with a former magistrate judge and his views on the usefulness of magistrates in the settlement process).
[35] Welsh, *supra* note __, at 986 (discussing the role of mediators and others actively involved in settlement in cases before a magistrate judge).
[36] CITE.
[37] 28 U.S.C. §363(b)(2) ("A judge may designate a magistrate judge 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. A judge may designate a magistrate judge to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.").
[38] When asked whether CANs duplicate the work of magistrate judges, Merrill Hirsh responded: "The answer is "yes, no, and maybe so." Merril Hirsh, *A Revolution that Doesn't Offend Anyone*, 58 No. 4 Judges' J. 30, 33 (Fall 2019) (discussing the similarities and differences between magistrates and CANs).

performed. The well-cited treatise *Federal Practice and Procedure* suggests that litigants not be required to pay for a service that judges and magistrates "might easily hear and determine."[39] Appointing a CAN may be particularly helpful in cases in which all judicial resources – including magistrate resources – are stretched thin.

Arguably, CANs have more specialized expertise than magistrate judges. CANs might devote all of their practice to class actions, MDL practice, and other types of complex litigation. As a full-time employee of the judiciary, a magistrate judge can hear both civil and criminal matters and have a more generalized workload. On the other hand, magistrate judges may have more training in their role than CANs. Magistrates receive initial and continuing training in judicial theory, case management, neutrality, due process, complex litigation, and other relevant topics.[40] By contrast, CANs may or may not have special training, although organizations such as the Academy of Court-Appointed Neutrals are working to ensure that CANs receive training and mentorship.

2. Administrative Law Judges

Federal Administrative Law Judges (ALJs) are judges within agencies who administer cases involving public law, rather than private disputes.[41] They are "officers" subject to the Appointments Clause of the United States Constitution.[42] Unlike magistrate judges, ALJ's receive a "career appointment,"[43] as opposed to a temporary or term appointment. Like others within an agency, ALJs must have subject-matter expertise, as well as process expertise.[44] Some agencies must administer large numbers of claims, such as benefits claims at the Social Security Administration and the Department of Veterans Affairs.[45]

Under federal law, ALJs have an enumerated list of powers to run a hearing, much in the same way that magistrates have an enumerated list of powers. Lists of ALJ powers in many agencies are relatively similar to magistrates and include tasks such as administering oaths, issuing subpoenas, regulating hearings, and making or recommending decisions, as authorized or permitted by law.[46] ALJs also have the ability to "hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution."[47]

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[39] 12 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2603 (3d ed. 2014); *see also* Hon. George C. Hanks, Jr., *Searching from Within: The Role of Magistrate Judges in Federal Multi-District Litigation*, 8 Fed. Cts. L. Rev. 35, 38 (2015) (characterizing magistrate judges as "virtually cost-free to the parties").
[40] Hanks, *supra* note __, at 42.
[41] Carstens, *supra* note __, at 678 ("ALJs are seen as Article I adjudicators vested with authority under the executive, rather than the judicial, branch. ALJs decide matters affecting rights under regulatory schemes enacted by Congress, or 'public rights,' rather than matters affecting private rights that stem from other sources of law" such as the common law.); *see also* 5 U.S.C. §3105 (2023) ("Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title.").
[42] Lucia v. S.E.C., 585 U.S. __; 138 S.Ct. 2044, 2055 (2018) (holding that ALJ's must be appointed in accordance with the Constitution's Appointment Clause).
[43] 5 C.F.R. §930.204(a) (2023).
[44] Carstens, *supra* note __, at 679 (noting that ALJs develop expertise within their area).
[45] Adam S. Zimmerman, *Surges and Delays in Mass Adjudication*, 53 Ga. L. Rev. 1335, 1341-42 (2019) (discussing issues of delay in processing large numbers of claims).
[46] 5 U.S.C. § 556(c) (2023).
[47] 5 U.S.C. § 556 (c)(6).

When federal agencies have backlog issues, they have the opportunity to create new rules and regulations to deal with claim management.[48] These types of case management techniques, however, can be burdensome and require time up front to resolve a high volume of cases by individual ALJs. To allow for flexibility, some ALJs hire CANs to create a more workable process.[49] CANs, however, have the flexibility to create case management on an ad hoc basis, without the need for the strictures of formal rulemaking.[50]

ALJs and CANs have some overlap in their duties, but some key distinctions exist. Like magistrate judges, ALJs are public employees (and do not incur extra cost to the parties). By contrast, employing private practitioners such as CANs results in additional costs to the parties. ALJs also have career appointments, while CANs are appointed on a case-by-case basis. The routine ALJ, however, would not see a significant number of complex cases. The CAN, by contrast, has significant expertise in complex litigation, which is the expertise sought in individual appointments.

3. Arbitrators

Arbitrators are third parties with parties who serve as independent decision-makers empowered to settle a dispute between parties. The parties to a dispute voluntarily submit to the jurisdiction of the arbitrator in that they contractually agree to the arbitration. The system of arbitration is a private (i.e., non-public) "quasi-judicial system of adjudication."[51] The decisions of arbitrators, called "awards," are largely final, subject to limited judicial review under the Federal Arbitration Act.[52] Arbitrators derive their authority from an agreement to arbitrate, which must be in a written contract to be specifically enforceable by the parties.[53]

In the usual case, arbitrators hear a case from beginning to end, rather than dealing with a concrete issue or task. Arbitration begins with a "demand," similar to a litigation complaint, and other introductory pleadings.[54] Early in the life of the case, arbitrators meet with the parties and their counsel in a pre-hearing conference. This conference bears some similarity to a Rule 16 conference[55] in that it determines a progression schedule. The parties and their counsel generally conduct discovery on their own, only invoking the arbitrators in the event of irresolvable differences.[56] Ultimately, arbitrators preside over hearings on the merits of the dispute, and they issue final judgments, known as "awards."[57]

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[48] Zimmerman, *supra* note ___, at 1357-58 (discussing how the Department of Education halted claims regarding defunct online institutions of higher education while the agency promulgated new rules to create a more efficient process).
[49] *Id.* at 1161-62 (discussing the use of CANs in cases involving student loan dept relief and a vaccine mass action).
[50] Although less often utilized, agencies can create ad hoc rules for a set of claims. *See* Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 Yale L.J. 1634, 1653 (2017) ("Moreover, agencies may exercise their discretion over procedures by promulgating general rules or by tailoring ad hoc rules to specific cases as needed.").
[51] MAUREEN A WESTON ET AL., ARBITRATION: LAW, POLICY & PRACTICE 1 (2017).
[52] 9 U.S.C. §10(a) (2022) (providing vacatur of arbitration awards in four circumstances: 1) misconduct on the part of arbitrators or other participants, 2) "evident partiality" of the arbitrators, 3) violations of certain procedural safeguards, and 4) exceeding the scope of the arbitrators' authority).
[53] 9 U.S.C. §2 (2002) (
[54] Weston, *supra* note __, at (Chapter 5, page 1). The authors describe arbitration as a process of ten concrete steps, beginning with the "initiation of the claim" which involves all early pleadings. Importantly, pleadings in arbitration have no pleading requirements, and the well established standards from *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2006), do not apply.
[55] Federal R. Civ. Pro. R. 16 (Pretrial Conferences; Scheduling; Management).
[56] Weston, *supra* note __ (Chapter 5, discovery section).
[57] *Id.* at __; *see also* 5 U.S.C. §579(b) (2023) (describing elements of an arbitration hearing that occurs before an administrative agency).

Binding arbitration is unique in that courts are not permitted to order parties to participate against their objection (in the absence of a valid arbitration agreement). To do so would violate the Seventh Amendment's right to a jury trial.[58] Thus, parties may only be compelled to arbitrate if they voluntarily agree or if the parties have a valid contract to arbitrate future disputes.

Many CANs have arbitration experience, and the processes have much in common. In both situations, the neutrals are non-governmental actors. Most CANs and arbitrators are attorneys in private practice. As Justice White noted, arbitrators (as well as CANs) are professionals "of affairs, not apart from, but of, the marketplace that they are effective" in their work.[59] CANs likely have expertise in the areas in which they receive their appointments, whether that be experience as an attorney in complex litigation or experience in the underlying subject matter of the litigation.

Arbitrators, like CANs, are asked to manage complex litigation. Both types of neutrals are responsible for keeping cases on schedule and moving toward some type of disposition. Arbitrators must decide matters in awards, and CANs may be tasked by the court with making important decisions that are binding on the parties. Both arbitrators and CANs have authority delegated to them through the use of a document. Arbitrators derive all of their authority from the agreement of the parties to arbitrate, which delegates the scope of authority to the arbitrator.[60] CANs, likewise, derive their authority from an originating document. In the case of a CAN, this document is the order of appointment by the judge.[61] Although judges cannot order a case to binding arbitration, a court can appoint a CAN over the objection of one or more parties without violating the Seventh Amendment.

Unlike arbitrators, CANs ordinarily do not resolve the merits of the case – the sitting judge retains that authority. The work of the CAN does not abrogate the duties of the judge. If the parties cannot settle a case, they will ultimately need a trial on the merits. Instead, the CAN has authority to administer and decide the tasks that are specifically delegated to the neutral. Many CANs have the authority to make rulings, particularly on issues of discovery and sanctions.[62] CANs may also have the authority to make final determinations regarding distribution of settlements in class actions and mass tort cases.[63]

As discussed below, because CANs make binding rulings on important issues from discovery to post-settlement distributions, they share important functionality with arbitrators.

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[58] *See, e.g.*, BiotechPharma, LLC v. Ludwig & Robinson, LLP, 98 A.3d 986, 996 (D.C. Ct. App. 2014) (noting that the D.C. bar's mandatory fee arbitration program does not violate the Seventh Amendment); Central States, Southeast & Southwest Areas Pension Fund v. Brumm, 264 F. Supp. 2d 697, 699 (N.D. Ill. 2003) (discussing the ability of parties to waive Seventh Amendment rights in ERISA cases). In cases before administrative agencies, the Administrative Dispute Resolution Act (ADRA) of 1996 permits the use of arbitration "whenever all parties consent." 5 U.S.C. §575(a) . ADRA does not abrogate the parties' ability to enter into agreements to arbitrate. 5 U.S.C. §576.

[59] Commonwealth Coatings v. Continental Cas., 393 U.S. 145, 150 (1968) (White, J. concurring).

[60] *See* 9 U.S.C. §10(a)(4) (providing that an arbitration award can be abrogated for exceeding the authority provided to the arbitrators under the agreement to arbitrate); *see also* United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960) (noting that a labor arbitrator's award will not be overturned if it "draws its essence from the collective bargaining agreement").

[61] Fed. R. Civ. Pro. 53(b)(2) (limiting the scope of a CAN to specific duties specified in the order).

[62] Federal Judicial Center, *Special Masters' Incidence and Activity: Report to the Judicial Conference's Advisory Committee on Civil Rules and Its Subcommittee on Special Masters* 22-24 (2000) [hereinafter *Special Masters' Incidence*], at https://www.uscourts.gov/sites/default/files/specmast.pdf (describing the typical activity of CANs to include ruling on discovery issues, including highly technical issues).

[63] *See, e.g.*, Kenneth R. Feinberg, Who Gets What: Fair Compensation after Tragedy and Financial Upheaval xv (2011) (describing his role in the 9/11 settlement as follows: "The law required me, and me alone, to make the tough decisions" regarding compensation to individuals).

The ethics governing arbitrators, explored in more detail below, may help inform CAN practice when the neutral is engaging in an adjudicatory function.

4. Mediators

Unlike magistrates, administrative law judges, and arbitrators, mediators are neutral third parties. They have no power to make decisions on behalf of their parties. Mediation is a consensual, as opposed to an adjudicative, process where the parties maintain the power to decide whether they settle and on what terms.[64] Mediation is essentially a system of facilitated negotiation,[65] and the process of mediation is more similar to negotiation than any other process.

Mediators have a relatively limited engagement with the parties, compared to the work of an arbitrator. Mediators in litigated cases are retained to conduct a specific task – a mediation. Mediators do not see a case through from beginning to end, although a successful mediation would lead to a swift end to the dispute. Scholars often describe mediation as a series of stages, usually between three and fifteen distinct stages, phases, or steps.[66] A typical four-step model consists of: 1) intake and preparation, 2) information gathering, 3) problem solving, and 4) closure.[67]

During the intake and preparation phase, the mediator works with the parties and their counsel to plan logistical matters, as well as to prepare and digest any pre-mediation written materials. The second and third phases happen at the mediation itself. Before the parties can work to resolve their dispute, the mediator and the parties must engage in information-gathering so the parties can make informed decisions.[68] During this stage, the mediator and parties will ask questions and facilitate the flow of missing information. Once the parties and their attorneys have discussed the facts and the legal matters, they will be ready to start working on solving the problem at hand.[69] The problem-solving phase often involves traditional negotiation techniques, such as creating and exchanging proposals (offers and demands), refining ideas, and even haggling. The mediation concludes when the parties have either reached an agreement or an impasse that cannot be overcome through good mediator techniques.

Many CANs have a mediation background (as well as an arbitration background). While the process of mediation is often different than the process of being a CAN, a CAN is sometimes asked to take on the role of the mediator, among other duties. Kenneth Feinberg's role in mass tort cases often involves mediation or the use of mediation within his work as a CAN.[70] CANs can use mediation skills to settle both big and small issues, from the overall settlement amount of class action litigation to discovery disputes. Mediation skills and techniques can be

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[64] SARAH R. COLE ET. AL., MEDIATION: LAW, POLICY AND PRACTICE §1.1 (2022)

[65] Model Standards of Conduct for Mediators, Preamble (2005) ("Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.").

[66] *See e.g.*, Jennifer E. Beer & Caroline C. Packard, *The Mediator's Handbook* (New Society Publishers, 2013); Prudence B. Kestner & Larry Ray, *The Conflict Resolution Training Program* (Wiley, 2002); Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (2nd E., Wiley, 1996).

[67] KRISTEN M. BLANKLEY & MAUREEN A. WESTON, UNDERSTANDING ALTERNATIVE DISPUTE RESOLUTION §4.05 (2017).

[68] Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 Harv. Negot. L. Rev. 145, 176-77 (2001) (discussing the information-gathering phase of a mediation).

[69] Harold Abramson, *Problem-Solving Advocacy in Mediations: A Model of Client Representation*, 10 Harv. Negot. L. Rev. 103, 122 (2005) (discussing lacking information, or "data impediments" as a key source of impasse).

[70] *See* Kenneth Feinberg, *Reporting from the Front Line – One Mediator's Experience with Mass Torts*, 31 Loy. L.A. L. Rev. 359, 360 (1998) (describing himself as a mediator and as a mediator within the CAN role).

extraordinarily useful for a CAN to the extent that part of the work is helping maintain cooperation and civility between the parties, the CAN, additional outside resources, and the court.

Unlike the work of a CAN, the work of a true mediator is limited in time and not usually an ongoing appointment. Mediators are often appointed by a court, but a court appointment is not necessary if the parties voluntarily agree to mediation. The work of the mediator is less time intensive – a handful of pre-mediation communications and prep time, a session that might last from a few hours to a few days (at most), and potentially some post-mediation work involving contract drafting. The mediator does not have continuing duties in the way that a CAN appointment might entail.

Because CANs often engage in the process of mediation, they share important functionality with mediators. The ethics governing mediators, explored in more detail below, may help inform CAN practice when the neutral is engaging in the function of mediation.

5. Others Involved in Complex Litigation

Finally, this section considers a number of other types of support roles involved in complex litigation that have duties similar or complementary to those of a CAN. Many of these types of neutrals are used in conjunction with and under the supervision of a CAN. Some of those roles include:

- **Claims Administrators** are hired in order to conduct many of the technical aspects of the claims process in cases such as class actions. Claims administrators perform duties such as sending notices, reviewing claims, and paying eligible participants.[71] Claims administrators often work closely with CANs. Claims administrators implement the systems that are put in place by CANs and the parties,[72] and CANs may need to provide input on claims falling at the margins.

- **Monitors** are appointed to report their observations about the ongoing nature of an order, such as consent decree.[73] Monitors are often appointed in complex civil rights litigation, such as litigation involving prisons, schools, nursing homes, or public housing, to ensure that the parties are complying with their obligations.[74] The role of the monitor is often performed by a CAN, but some cases involve both a CAN and a monitor, with the monitor having this more limited role.

- **Neutral Independent Experts** can be appointed by judges to assist in a matter. Federal Rule of Evidence 706 gives the court authority to appoint an expert

[71] Jessica Erickson, *Automating Securities Class Action Settlements*, 72 VAND. L. REV. 1817, 1825-27 (2019) (discussing the traditional roles of claims administrators).
[72] Francis E. McGovern, *Distribution of Funds in Class Actions – Claims Administration*, 25 J. Corp. L. 123, 128 (2009) (describing the intersection of a CAN with claims administrators to assist in the notice process in the *In re Foreign Currency Exchange* case).
[73] Lance Wilfred Shoemaker, *The Use of Equitable Tools in Freeway Construction Litigation*, 28 Transp. L.J. 15, 19 (2000) ("The main difference between special masters and monitors is that monitors frequently do not have any powers to affect the behavior of the monitored. Instead, monitors typically report observations and/or findings to the supervising judge.").
[74] Mark A. Fellows & Roger S. Haydock, *Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation*, 31 Wm. & Mary L. Rev. 1269, 1278-79 (2005) (discussing the types of cases involving monitors).

separate and apart from the ability of the parties to retain and call their own experts.[75] Court appointed experts are rare,[76] and appear most often in highly technical areas of the law, including intellectual property and environmental cases.

- **Receivers** are charged with preserving and liquidating assets in appropriate cases. Federal Rule of Civil Procedure 66 provides the court with authority to make such appointments.[77]

II. Appointment of Court-Appointed Neutrals by Judges

Court-Appointed Neutrals must be appointed by a court in order to serve on a case. This section considers the authority that courts have to appoint CANs as well as best practices. This section also provides resources for litigants and judges, including a template for an appointment order.

On August 7, 2023, the American Bar Association House of Delegates adopted two resolutions co-sponsored by the ABA Judicial Division and Section of Dispute Resolution designed to make court-appointed neutrals a more effective tool for the administration of justice. Resolution 517, urges states, localities, territories and tribal courts to adopt a new Model Rule of Civil Procedure on the Appointment and Use of Court-Appointed Neutrals. This resolution and the Model Rule would harmonize the existing myriad of state rules and provide guidance by incorporating the experience gained from operation of Federal Rule 53 and Guidelines the ABA adopted in January 2019.

A. Authority to Appoint Neutrals

The authority to appoint a CAN usually falls under the Rules of Civil Procedure, but not all adjudicative proceedings fall under these rules. Additionally, courts exercise inherent authority to appoint neutrals in some cases. This section considers the authority to appoint a CAN under federal law and state law. This section also considers when the appointment of a CAN is not only authorized and also appropriate and even crucial to management of a case.

1. Authority Federal Rule of Civil Procedure 53

In federal cases, courts have authority to appoint a "special master" under Federal Rule of Civil Procedure 53. Rule 53 governs both with procedure and ethics. Regarding procedure, Rule 53 sets forth when a court may appoint a CAN, the method of appointment, and the powers of the CAN. The portions of Rule 53 regarding authority for appointment are as follows:

> (a) Appointment.
>
> (1) Scope. Unless a statute provides otherwise, a court may appoint a master only to:

[75] Fed. R. Evid. R. 706 (2023) (providing authority for a court to retain an expert, as well as guidelines for the retention of the expert).
[76] *See* Ellen E. Deason, *Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference*, 77 OR. L. REV. 59, 78 (1998) (describing the contours of Rule 706 and its limitations).
[77] Federal R. Civ. Pro. R. 66 (2023).

> (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
> > (iii) address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.[78]

Under Rule 53, judges may appoint a CAN under three circumstances. First, if the parties agree to the appointment.[79] Second, to hold proceedings and recommend findings of fact if there exists an "exceptional condition" or if needed to perform an accounting or other "difficult computation of damages."[80] Third, a CAN may address pre-trial and post-trial matters for a judge if such matters cannot be "effectively and timely addressed" by the district court.[81]

Appointments under Rule 53 should be made carefully, and such appointments are always within the discretion of the trial court.[82] Appointments are often made liberally with the consent of the parties. However, courts are not required to appoint CANs, even when the parties jointly request such an appointment.[83] When one or more parties does not consent, the courts should exercise more care. "The use of masters is to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause."[84] The Ninth Circuit held that appointment of a CAN "shall be the exception and not the rule" in complex cases or in other circumstances requiring such appointment.[85]

In federal cases, Rule 53 is the most explicit authority for appointing a CAN, and this Rule is often cited in appointment orders and opinions regarding neutrals.

2. Authority Under Other Federal Law

Courts can also appoint special masters under other authority, with inherent powers, as the source most often invoked.[86] In certain special federal programs, court rules may also govern

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[78] Fed. R. Civ. Pro. 53(A).
[79] Fed. R. Civ. Pro. 53(A)(1)(a).
[80] Fed. R. Civ. Pro. 53(A)(1)(b); *see, e.g.*, Wright v. Elton Corp., 2023 WL 2603767, *1 (D. Del. Mar. 6, 2023) (appointing CAN to resolve complicated damages issue).
[81] Fed. R. Civ. Pro. 53(A)(1)(c); *see, e.g.*, Global Tubing, LLC v. Tenaris Coiled Tubes, LLC, 621 F. Supp. 3d 757, 766 (S.D. Tex. 2022) (denying motion for appointment of a CAN because the court found that it could manage the discovery issues in the case); Pemberton v. Wardrop, 2023 WL 315032, *2 (D. Kan. Jan 19, 2023) (denying motion for appointment of a CAN because the district could effectively handle the pre-trial and post-trial matters in the case).
[82] *See* McCarthy Improvement Co. v. Blythe Dev't Co., 2022 WL 4295399, *1 (W.D.N.C. Sept. 16, 2022) ("A decision whether to appoint a special master is within a court's sound discretion..").
[83] *McCarthy Improvement*, 2022 WL 4295399 at *2 (denying a joint motion to appoint a CAN because the case did not appear "overly complex" and because the ordinary litigation process should be able to meet the needs of the parties).
[84] La Buy v. Howes Leather Co., 352 U.S. 249, 256 (1957).
[85] Burlington Northern R. Co. v. Dept. of Revenue of St. of Wash.., 934 F.2d 1064, 1071 (9th Cir. 1991) (citing language from an earlier version of Rule 53).
[86] *See, e.g.*, Gulino v. Bd. of Ed. of City School Dist. Of City of N.Y., 2023 WL 3229951, *1 (S.D.N.Y. May 3, 2023) (adopting proposed findings of fact and conclusions of law of court-appointed neutral who was appointed under Rule 53 and "this Court's inherent equitable powers

procedures for a CAN. Finally, this section provides a note on the status of CANs in the bankruptcy courts.

When a court appoints a CAN under its inherent powers, consent of the parties is not necessarily required.[87] In one of the highest profile cases involving a CAN, the Southern District of Florida appointed a "special master" to complete a privilege review of documents seized from the Mar-a-Lago residence of former President Donald Trump.[88] This case considered a request for a "special master" before any trial was to commence, explaining perhaps why the courts' decisions on such matters fall under the inherent powers of courts, rather than under Rule 53. When the Eleventh Circuit largely overruled the district court's decision, it held that the district court exceeded its equitable jurisdiction.[89] In so holding, the circuit court did not question that courts have inherent authority to appoint a CAN; deciding only that the appointment was inappropriate given the circumstances of the case.

Certain federal programs regularly utilize CANs, and so include rules regarding their appointment and use.[90] In other cases, such as in the federal courts of appeals or within the military tribunals, a CAN may be appointed in much of the same way as in federal court.[91] In other cases, the use of a CAN is specifically prohibited. The most prominent example of a prohibition against appointment of a CAN appears in Federal Bankruptcy Rule 9031, which states: "Rule 53 F.R.Civ.P. does not apply in cases under the Code."[92] More recently, scholars and practitioners have advocated change of the bankruptcy rules to allow the appointment of a CAN in appropriate circumstances.[93]

3. Authority Under State Law

Like federal law, state law provides the authority for judicial appointment of a CAN. Many states have general rules that allow for the appointment of a CAN within their rules of civil procedure or in statutes regarding court procedure.[94] In addition, some states provide for the

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and authority"); Al Otro Lado, Inc. v. Mayorkas, 2022 WL 3142610, *11 (S.D. Cal. Aug. 5, 2022) (noting that appointment of a CAN is "within both the inherent equitable powers of the court" and Rule 53).

[87] *See, e.g.*, W.V. Highlands Conservancy, Inc. v. ERP Environmental Fund, Inc., 2022 WL 5226026 (S.D.W.Va. Oct. 5, 2022) ("Pursuant to its inherent authority to develop post-verdict relief, a court can appoint a special master to enforce a judicial decree, even when the parties do not consent to it.").

[88] Trump v. United States, 2022 WL 4366684, *3 (11th Cir. Sept. 21, 2022) (describing the procedural history of the case at the district court).

[89] Id. at *9 (finding that the government had a substantial likelihood of succeeding on the merits of showing that the district court exceeded its powers).

[90] For example, the National Childhood Vaccine Injury Act of 1986 created a compensation program injuries relating to certain vaccines. This program utilizes "special masters" to conduct proceedings on individual claims under the act. Rules of the Fed. Ct. of Claims, App. B, Rule 3 (2023) (providing that each claim be referred to a "special master" upon the filing of a claim).

[91] *See, e.g.*, Fed. R. App. Pro. R. 48 (2023) (providing for the appointment of "masters"); Third Circuit Local App. Rule 48.0 (2023) (providing for appointment of a "special master" in certain appeals); Ct. of Appeal for the Tenth Circuit, Addendum III, §8 (2023) (allowing for the appointment of a "special master" in cases involving attorney discipline); Ct. of App. For the Armed Forces, R. 29(d) (allowing for the appointment of a "special master" who may be either a military judge or "other person" to investigate a matter, take evidence, and make recommendations as appropriate).

[92] Fed. R. Bankr. P. 9031 (2023).

[93] *See, e.g.*, Merril Hirsh & Sylvia Mayer, *It is Way Past Time to All Bankruptcy Judges to Use Court-Appointed "Masters*," Judges Journal (Nov. 30, 2022), at https://www.americanbar.org/groups/judicial/publications/judges_journal/2022/fall/it-way-past-time-allow-bankruptcy-judges-use-courtappointed-masters/?login; R. Spenser Clift, III, *Should the Federal Rules of Bankruptcy Procedure Be Amended to Expressly Authorize United State District and Bankruptcy Court to Appoint a Special Master in an Appropriate and Rare Bankruptcy Case or Proceeding?*, 31 U. Mem. L. Rev. 353 (2001) (arguing for the courts to reconsider the bankruptcy rules prohibiting the appointment of "special masters").

[94] *See, e.g.*, Ala. R. Civ. Pro. 53(a)(2023) (providing for the appointment of a "special master"); Minn. R. Civ. Pro. 53(a) (2023) (providing for appointment of court-appointed neutrals); Tenn. R. Civ. Pro. R. 53.01 (2023) (providing for appointment of a court-appointed neutral); Tex. R. Civ. Pro. 171 (2023) (allowing the appointment of a "master in chancery" to perform duties under an appointing order); Nev. R. Civ. Pro. 53 (2023) (rule substantially similar to Federal Rule 23); New Mex. R. Civ. Pro. Art. VI, 1-053 (2023) ("The court in which any action is pending

appointment of CAN within specialty courts or cases, including family courts[95] and matters involving attorney discipline.[96]

Recently, the American Bar Association has begun studies to offer a new model to states to modernize state versions of Rule 53. The proposed model rule would change the name of the position from "special master" to "court-appointed neutral," and it would encourage the appointment of CANs in appropriate cases. Further, the rule specifies in additional detail the CANs ability to provide ADR services, such as mediation and facilitation.

4. Authority by Legislators and Non-Court Appointments

In rare cases, authority to appoint a CAN might originate from non-judicial sources. The most well-known federal program involving a special master is the September 11 Victim Compensation Fund. This fund, and its administration, was originally created by Congress in 2001, and the fund was reopened and reauthorized in 2011, 2015, and 2019.[97] As noted above, Congress created the National Vaccine Injury Compensation Program in 1986 to administer claims regarding injuries from common vaccines through a program run by a "special master."[98] These programs are few and far between, but they demonstrate that Congress understands the rule of a CAN and the benefits a CAN provides in special cases, particularly in the administration of a large compensation fund.

B. Best Practices for an Appointing Order

Under Rule 53, the appointment order must include, at a minimum, the duties to be performed by the CAN. These duties may include all of the examples noted above, including ruling on decisions, helping parties reach settlement, managerial duties, and administrative duties. The order should also detail communication expectations, notably ex parte communication expectations between the CAN and the parties and the appointing judge. The order should be clear about fees, as well as the expectation on how fees will be paid. The Academy to Court Appointed Neutrals (ACAN) has many resources freely available on its website to support both judges appointing CANs as well as CANs.[99]

With the permission of ACAN, this chapter shares a sample appointment order that could be used in most (if not all) jurisdictions. The sample appointment order includes multiple options to fit the parties' needs within brackets. The sample order also indicates the role of the neutral in brackets. Parties should simply include the paragraphs specific to the needs of the case.

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may appoint a special master therein."); Fl. R. Civ. Pro. 1.201(b)(1)(K) (2023) (including the appointment of a "master" as a topic for discussion in a case management hearing in complex litigation); La. Rev. Stat. 13:4165 (2023) (providing the power for a court to appoint a CAN under the powers of the court); Ga. Unif. Bus. R. 22-2 (2021) (providing for the appointment of a CAN in cases in Georgia's business courts); N.Y. Ct. Rules §202.14 (2023) (authorizing a program for the appointment of "special masters").

[95] *See, e.g.*, N.M. R. Child Ct. R. 10-196 (2023) (providing for the appointment of a "special master" in cases in children's court); Ohio Rev. Code Ann. §2101.06 (2023) (providing for an appointment of a "master" in appropriate case involving juveniles).

[96] *See, e.g.*, R of St. Bar of Calif., Special Master Program Rules and Regulations, R. 7.100 (providing for the appointment of "special masters" for investigatory purposes in case involving discipline or attorney criminal conduct); Ga. St. Bar R. & Reg., R. 4-209.1 (2023) (creating a pool of "special masters" to serve on lawyer disciplinary cases).

[97] September 11th Victims Compensation Fund, *About the Victim Compensation Fund*, https://www.vcf.gov/about (establishing timeline of the fund and the legislation supporting the program).

[98] 42 U.S.C. §300aa-13 (2023) (proving that a "special master" makes an initial determination of an individual claim).

[99] Academy of Court Appointed Neutrals, https://www.courtappointedneutrals.org/. The ACAN benchbook, in particular, provides helpful resources for both judges and neutrals.

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_____

III. Ethics for Court Appointed Neutrals

As described above, CANs provide a myriad of potential functions and they have the potential to wear many different hats. Because of these various roles, the question of ethics for CANs can be a difficult one.

This section proceeds in two parts. First, it discusses the sources of ethics that might be either binding or persuasive on the conduct of CANs. Second, this section discusses ethical concepts that might apply to CANs and how the identified sources might apply to their practice.

A. Sources

This part identifies sources of ethics that may be applicable to CANs. Some apply to CANs explicitly and others serve as persuasive authority. In some circumstances, the common law and the inherent power of the judiciary may be the source of relevant authority.

The foundation of legal and ethics requirements relating courts is the constitutional requirement of due process for disputants.[100] In some circumstances, the common law and the inherent power of the judiciary may be the source of relevant authority. Requirements relating to recusal and judicial conduct are generally resolved by rules set by courts and legislatures,[101] meaning that policing such matters rarely rise to constitutional level.[102]

The Supreme Court decided such a rare case in 2009 in *Caperton v. A.T. Massey Coal Co.* The *Caperton* case involved a challenge to a refusal by West Virginia Supreme Court Justice Benjamin to recuse from a case in which the Massey Corporation and Don Blankenship, who was President, Chair of the Board, and CEO of Massey helped elect him to the high court by contributing $3 million to his election campaign. That judicial election followed a trial court's entry of judgment of $50 million against the Massey Corporation. Applying an objective standard of the "probability of actual bias on the part of the judge or decisionmaker," the Supreme Court found held that Justice Benjamin should have recused himself because the probability of actual bias was "too high to be constitutionally tolerable."[103]

The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification. Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution.[104]

The following discussion presents the most common authorities for appointments of CANs. These are Civil Rule 53, judicial ethics, lawyer ethics, and ADR ethics.

1. Federal Rule of Civil Procedure 53

[100] Murchison, 75 S.Ct. 623 (stating it is axiomatic that constitutional due process requires "[a] fair trial in a fair tribunal")
[101] Tumey v. State of Ohio, 273 U.S. 510, 523, 47 S. Ct. 437, 441, 71 L. Ed. 749 (1927).
[102] FTC v. Cement Institute,333 U.S. 683, 702, 68 S.Ct. 793, 92 L.Ed. 1010 (1948).

[103] Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 884 (2009).

[104] Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009).

Federal Rule of Civil Procedure 53 and its state-law counterparts are the most logical starting point for a discussion on ethics. In addition to providing for appointment, Rule 53 also governs certain ethical considerations for CANs. Although Rule 53 does not contain a comprehensive set of ethics for CANs, the Rule covers the ethical responsibilities regarding conflicts of interest,[105] fair compensation,[106] and issues of fairness in executing the CAN's duties.[107]

The Advisory Committee Notes to Rule 53 reference the default for conduct rules applicable to CANs is found in the judicial code of conduct. The Notes states: "Masters are subject to the Code of Conduct for United States Judges, with exceptions spelled out in the Code."[108]

Rule 53 is binding authority on CANs appointed under the Rule. State statutory laws regarding appointment of CANs are generally modeled on Rule 53 and include the same requirements found in the federal rule. CANs appointed in state courts are bound by the ethical components in the state laws, including the state version of Rule 53.

2. ABA Model Code of Judicial Conduct

The American Bar Association (ABA) produced the first Model Code of Judicial Conduct in the 1920s. The current Model Code is the "authoritative and practical analysis" of judicial ethics. It serves as a template for state adoption of rules applicable to the courts of the states.[109] Like other model codes, it is applicable to a judge only when adopted by the state. The structure of the Code comprises four stated canons along with rules and comments accompanying each canon. The Scope section of the Model Code identifies these different components of the code. It states that the four canons "state overarching principles of judicial ethics that all judges *must* observe."[110] Despite this mandatory statement, the Scope states that a "judge may be disciplined only for violating a Rule," and indicates that "the Canons provide important guidance in interpreting the Rules."[111] Most states have adopted all or parts of the Model Code of Judicial Conduct.[112] Study, debate, and amendments to the codes adopted by the states is ongoing.[113] Portions of the Model Code of Judicial Conduct may apply specifically to CANs and serve as mandatory authority governing their actions.

3. Code of Conduct for United States Judges

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[105] Rule 53(a)(2) (requiring certain disclosures for CANs at the time of appointment).
[106] Rule 53(g) (discussing limitations on CAN compensation).
[107] Rule 53(c)(1)(B) (requiring a CAN to work "fairly and efficiently").
[108] *See* Fed. R. Civ. P. 53, Advisory Committee Notes to Subdivision (a)(2) and (3).
[109] ABA Model Code of Judicial Conduct, Preamble para. [1]; available at: *https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/*
[110] ABA Model Code of Judicial Conduct, Scope para. [1]; available at: *https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/*
[111] ABA Model Code of Judicial Conduct, Scope para. [1]; available at: *https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/*
[112] Jurisdictional Adoption of Revised Model Code of Judicial Conduct (americanbar.org), available at: Jurisdictional Adoption of Revised Model Code of Judicial Conduct (americanbar.org)
[113] *See, e.g.*, Codes and Canons of Judicial Conduct - Ballotpedia, available at: https://ballotpedia.org/Codes_and_Canons_of_Judicial_Conduct.

The Code of Conduct for United States Judges was adopted by the Judicial Conference in 1973. It tracks the ABA Model Code of Judicial Conduct in large part.[114] It presents five canons rather than the four of the ABA Code because it splits the first canon into two separate canons. The code includes the ethical canons and guidance for most federal judges. The judges listed as subject to the code are "circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges."[115] The Introduction to the Code expressly notes that the Code is applicable to special masters in some situations.[116] Thus, it is beyond question that CANs are subject to some standards of the Code of Judicial Conduct. Whether a situation involves judicial or non-judicial tasks may be subject to dispute and, thus, individual cases demand case-specific analysis. More stringent rules may apply to CANs with repeating appointments ("Periodic Part-Time Judge) compared with those with one-time or sporadic appointments ("Pro Tempore Part-Time Judge"). Likewise, the influence of both the Code of Conduct for United States Judges and the ABA Model Code can be seen in the Code of Conduct for Judicial Employees.

4. Model Rules of Professional Conduct for Lawyers

The Model Rules of Professional Conduct for Lawyers ("Rules" or "Model Rules") are norms for professional conduct created by the ABA, the world's largest voluntary organization. Like other model or uniform legislation, the Model Rules have no force until adopted by a state. Accordingly, the Model Rules apply to a lawyer once the lawyer's jurisdiction of licensure adopt the rule. Today all states have adopted the template of the Model Rules although some have amended the language or effect of some of the rules. All lawyers should be knowledgeable about the specific rules of lawyer conduct adopted by his or her state of licensure.

The Preamble to the Model Rules identifies lawyer roles in this tradition. "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[117] The Model Rules deal with each of the roles noted in the Preamble, although the focus is on the lawyer as a representative of a client.

The Rules are the most recent iteration of the tradition of lawyer codes. In contrast to the earlier codes for lawyer conduct, the Rules use a statutory approach, which may lead some lawyers to assume that the Rules answer all questions about the responsibilities of lawyers without considering the common law. The Rules do not displace the common law, however. Lawyers are generally subject to liability like other individuals.[118] Thus, lawyers need to be aware of their duties under the law as well as the professional norms set forth in the Rules. The Preamble to the Model Rules states that lawyers have an "obligation zealously to protect and pursue a client's *legitimate* interests, *within the bounds of the law*."[119] Similarly, the Preamble

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[114] *See* Code of Conduct for United States Judges | United States Courts (uscourts.gov), available at: https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges.

[115] Code of Conduct for United States Judges | United States Courts (uscourts.gov), available at: https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf

[116] *Id. (noting that "*[c]ertain provisions of this Code apply to special masters and commissioners as indicated in the "Compliance" section").

[117] MODEL RULES OF PROF'L CONDUCT, Preamble, para. [1] (AM. BAR ASS'N 2020).

[118] Some exceptions such as the litigation privilege provide immunity to lawyers, but these narrow exceptions really underscore the applicability of the law to lawyers in most cases. *See* Restatement (Third) of the Law Governing Lawyers § 56-57, Restatement (Second) of Torts § 587.

[119] MODEL RULES OF PROF'L CONDUCT, Preamble para. [9] (2006) (emphasis added).

notes the scope of the lawyer's roles "depend on law and the legitimate purposes of legal representation,"[120] limiting the role of lawyers to serving only *legitimate* client interests. The first rule, Model Rule 1.1, states the foundational duty of lawyer competence.[121] The lawyer must serve the client's legitimate interests within this representation competently and diligently.[122] The Model Rules contextualize the general and ancient law of agency[123] to the specific relationship of lawyers and clients.[124] Based on these durable principles, clients should have confidence that their lawyer has the education and preparation necessary to serve their legitimate interest and that the lawyer will act with competence and diligence to advance their legitimate objectives without violating the law.[125]

In addition to concern about the common law, in some cases, the Model Rules impose higher duties on lawyers in some circumstances.[126] For example, the duties of candor and truthfulness stated in the Rules impose higher standards on lawyers than would otherwise apply.[15] Similarly, the Model Rules prohibitions on lawyers against stating or implying "an ability to influence improperly a government agency or official or to achieve results by means that violate the rules."[16] Such rules emphasize the duty of lawyers to uphold the legal system and to foster public respect and confidence in the legal system.[127] Under the Rules, sanctionable lawyer misconduct includes the failure to "inform the appropriate professional authority" of instances of "professional misconduct" by another lawyer.[18] Thus, boards and courts may discipline lawyers for a failure to live up to high standards of honesty[128] and may impose sanctions on lawyers for the lawyer's conduct in her personal life.[129]

5. The ADR Code of Ethics

Within the scope of their assignments, CANs may perform functions that are similar to – or the equivalent of – ADR services, such as mediation and arbitration. Within their role as CAN, a neutral may not be strictly bound by the ADR codes of ethics, but understanding those ethics provides important guidance for neutrals to conform to best practices within a given role. Further, parties reasonably expect a CAN to observe well-established ADR ethics when in those

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[120] MODEL RULES OF PROF'L CONDUCT, Preamble & Scope, para. [14] (AM. BAR ASS'N 2020). For example, Model Rule 1.6(b)(5) states the duty of lawyers to reveal information to comply with law or a court. The duty exists by virtue of the law or court order rather than by virtue the ethics rule.

[121] MODEL RULES OF PROF'L CONDUCT R. 1.1.

[122] MODEL RULES OF PROF'L CONDUCT R. 1.1 and 1.2.

[123] "Agency encompasses a wide and diverse range of relationships and circumstances. The elements of common-law agency are present in the relationships between employer and employee, corporation and officer, client and lawyer, and partnership and general partner." https://www.ali.org/publications/show/agency (visited

[124] *See, e.g.,* Community for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989).

[125] *See, e.g.,* MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (stating lawyer's duty not to counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent).

[126] *See, e.g.,* MODEL RULES OF PROF'L CONDUCT R. 8.4 (d) (engaging in conduct "prejudicial to the administration of justice" is misconduct) and R. 8.4 (e) suggesting that the lawyer has the "ability to influence improperly a government agency or official"). [15] *See* Model Rules 3.3 (candor to tribunals) and 4.1 (Truthfulness in Statements to Others). [16] MODEL RULES OF PROF'L CONDUCT R 8.4(e).

[127] *See, e.g.,* MODEL RULES OF PROF'L CONDUCT R. 8.3, 8.4, 3.4, 3.5, 1.2(d), 3.3, 4.1 and 4.3.

[18] *Id.* Model Rule 8.4 recognizes types of misconduct beyond violations of law.

[128] Sanctionable conduct includes "dishonesty in the lawyer's personal dealings unconnected to a representation." *See, e.g.,* MODEL RULES OF PROF'L CONDUCT R. 8.4 (c).

[129] *See, e.g.,* MODEL RULES OF PROF'L CONDUCT R. 8.4 and comments (noting personal acts not involving a representation of a client can be sanctionable under the rules).

roles. This section outlines the sources of ethics for mediator and arbitrators. The content of the obligations are discussed more fully in the next section.

Unlike Rule 53 and codes of judicial and lawyer conduct, the ADR guidelines are persuasive and best practices to those working in the role of a CAN. These codes of ethics inform a CANs work when the CAN engages in mediation or arbitration roles.

a. Arbitrator Ethics

Generally, arbitration is an unregulated profession. However, arbitrators who serve on professional rosters are bound by codes of professional conduct adopted by the organization. The most cited code of ethics for arbitrators is the Code of Ethics for Arbitrators in Commercial Disputes (Arbitrator Code), adopted by the American Arbitration Association (AAA) and the American Bar Association (ABA).[130] Some other provider organizations have explicitly adopted the Arbitrator Code in lieu of developing another code.[131] Although not strictly binding, the Ethics Code has been cited as persuasive authority by five federal circuit courts.[132] JAMS, another leading provider organization, has its own code of ethics, but the JAMS code is substantially similar to the Ethics Code.[133]

A handful of states created ethics codes for arbitrators working within those jurisdictions. California has the most extensive code, particularly as it relates to required disclosures of conflicts of interest.[134] The California rules apply to all arbitrations within the state, including private arbitrations. That state of Florida and New York City also have ethics rules for arbitrators, but only for cases involving court-annexed arbitration.[135] Although arbitration standards created by governmental entities are rare, they may be influential on arbitration practice beyond the jurisdiction at issue. The California rules, in particular, have proved influential on arbitration practice in the United States.[136]

Like other areas of ethics norms, there are no universal standards for arbitration ethics across the United States. Nevertheless, important norms do exist. The Revised Uniform Arbitration Act (RUAA), does not focus exclusively on ethics; nevertheless, it has significant provisions about ethics.[137] The RUAA has provisions focused on arbitrator disclosures[138] and

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[130] Code of Ethics for Arbitrators in Commercial Disputes, at https://www.adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14.pdf. The Arbitrator Code was initially promulgated in 1977. The code was most recently revised in 2003.
[131] The Financial Industry Regulatory Authority (FINRA) requires it arbitrators to read and comply with the Arbitrator Code and has not developed its own code.
[132] *See* Raymond James & Assoc., Inc. v. Terran Orbital Corp., 839 Fed. Appx. 171, 172 (9th Cir. 2021); ANR Coal Co., Inc. v. Concentrix of N.C., Inc., 173 F.3d 493, 497 n.2 (4th Cir. 1999); Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 678 (7th Cir. 1983); Jenkins v. Sterlacci, 948 F.2d 627, 633 (D.C. Cir. 1988); Nat'l Bulk Carriers, Inc. v. Princess Mgmt. Co., Ltd., 597 F.2d 819, 824 (2d Cir. 1979).
[133] JAMS, *Arbitration Ethics Guidelines*, at https://www.jamsadr.com/arbitrators-ethics/.
[134] California Rules of Court, Ethics Standard for Neutral Arbitrators in Contractual Arbitration, Standard 7 (2023) (requiring disclosure of conflicts not only of the arbitrator but also the arbitrator's immediate family).
[135] *See* Florida Rules for Court-Appointed Arbitrators (2017), at https://www.flcourts.gov/content/download/216764/file/2017ArbitratorRules.pdf; New York Commercial Division – New York County / Manhattan, *Ethical Standards for Arbitrators & Neutral Evaluators*, and https://ww2.nycourts.gov/courts/comdiv/ny/ADR_ethicsforarbitrators.shtml.
[136] *See, e.g.* Merrick T. Rossein & Jennifer Hope, *Disclosure and Disqualification Standards for Neutral Arbitrators: How Far to Cast the Net and What is Sufficient to Vacate an Award*, 81 St. John's L. Rev. 203, 235-40 (2007) (discussing California disclosure rules).
[137] Revised Uniform Arbitration Act (2000) [hereinafter RUAA].
[138] RUAA §12.

running a fair hearing,[139] among others. As of 2023, twenty-three jurisdictions enacted the RUAA.[140] Despite the lack of a single, unform standard, the various standards created by provider organizations, legislatures, and other entities creates a web of guidance for arbitrators across the United States.

Arbitration codes of ethics cover important topics like neutrality, conflicts of interest, confidentiality, and fair process. These standards are built around protecting an arbitrator's independent decision-making. In addition, these codes discuss certain elements of business ethics, such as guidance on fees and advertising.

b. Mediator Ethics

Ethics for mediators in the United States is similarly a patchwork of guides from provider organizations, legislatures, and courts. Compared to arbitration ethics, the number of mediation standards is more voluminous. Similar to arbitration standards, the multitude of guidance documents have many common themes such that national standards can be articulated when reading them together.

The most well-known set of standards for mediators are set forth in a document approved by both the ABA and the AAA. The Model Standards of Conduct for Mediators (Model Standards), promulgated in 2005, were jointly approved by the ABA, AAA, and the Association for Conflict Resolution (ACR).[141] These standards are cited with regularity by scholars.[142] Some provider organizations, such as the American Arbitration Association and JAMS, created ethics standards for the mediators on their rosters.[143]

State and local mediation programs often have articulated standards of ethics for their mediators.[144] Likewise, courts instituted rules of ethics for mediation within their specific court, whether those courts are federal or state, at the trial level or appellate level. Certain types of specialty mediations have their own codes of ethics, such as mediation of family law disputes.[145] Although the number of ethical codes for mediators is high, they are similar enough to be able to draw out the most important concepts.

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[139] RUAA §§15, 17.

[140] Uniform Law Commission, *Arbitration Act*, at https://www.uniformlaws.org/committees/community-home?communitykey=a0ad71d6-085f-4648-857a-e9e893ae2736.

[141] Model Standards of Conduct for Mediators (2005).

[142] *See, e.g.*, Erin R. Archerd, *Online Mediation and the Opportunity to Rethink Safety in Mediation*, 52 Stetson L. Rev. 307, 325 (2022) (discussing the use of the mediation standards in application to mediation safety); Sarah R. Cole, *The Case for Mediation in Title IX Regulations*, 40 Alt. to the High Cost of Litig. 111, 112 (2022) (discussing confidentiality under the Model Standards); Isabella R. Gunning, *Justice for All in Mediation: What the Pandemic, Racial Justice Movement, and the Recognition of Structural Racism Call Us to Do as Mediators*, 68 Wash U. J.L. & Pol'y 35, 47 (2022) (using the concept of self-autonomy from the Model Standards).

[143] *See* JAMS, *Mediators Ethics Guidelines*, at https://www.jamsadr.com/mediators-ethics/;

[144] *See, e.g.*, Texas Ethical Guidelines for Mediators (2011), at https://www.txcourts.gov/media/514701/Eth-Guideline-Amended-Order.pdf (applying to mediators in court-annexed cases); Fl. R. for Certified & Court-Appointed Mediators (2021), at https://supremecourt.flcourts.gov/content/download/216759/file/rules-certified-court-appointed-mediators.pdf (applying to court-annexed mediations in Florida); Calif. R. Ct. R. 3.835 et seq. (2012) (creating ethics code to govern "all court mediation programs").

[145] In 2001, the ABA Family Section, the Academy of Family Mediators, and the Association of Family Courts and Community Professionals created the Model Standards of Family and Divorce Mediation. These standards are similar to the Model Standards of Conduct for Mediators, but it includes additional standards applicable in family cases, such as screening for intimate partner violence and considering the interests of children in the mediation. Model Standards of Practice for Family and Divorce Mediators, at https://cdn.ymaws.com/acrnet.org/resource/resmgr/docs/Model_Standards_of_Practice_.pdf.

The mediation codes of ethics – like arbitration codes – govern significant topics. The overarching policy governing mediation is not the neutral's independent decision-making. Rather, the policies center on insuring the autonomy of the parties and creating a space for the parties to reach their own decisions. Party autonomy is specifically mentioned in most mediation rules of ethics, in addition to the mediator's neutrality and freedom from conflicts. These codes also contain elements relating to business ethics such as fees and advertising.

B. Ethical Concepts

With the sources of ethical concepts identified, this section seeks to synthesize ethical boundaries applicable to CANs from all of these sources. This discussion of includes both mandatory and persuasive authority. Persuasive sources are used to supplement and define best practices when a CAN performs a specific role within the assignment.

As indicated by the Advisory Committee Notes to Rule 53, the starting place for considering rules applicable to CANs is the Code of Conduct for United States Judges. Despite the fact that the Advisory Committee Notes state that exceptions to the Code "are spelled out in the Code,"[146] debate on the applicable standard can arise.

1. Neutrality and Impartiality

A court-appointed *neutral*, i.e., a CAN, is held to the standards of neutrality and impartiality applicable to judges. The ethical duty of neutrality is commonly found among codes of conduct for third parties, including judges, mediators, and arbitrators. Neutrality and impartiality are essential attributes of decision makers to ensure not only actual fairness but also the perception of fairness. The essential concepts of neutrality and impartiality relate to positive and negative feelings and tendencies. They also speak to divided loyalties Often, the focus is on a potential negative sway by the neutral towards a party, but the opposite can also be true. Neutrals should act without favoritism towards or prejudice against any party to a matter. Impartiality and neutrality (stated another way, a lack of bias) bestow legitimacy in both the process and the third party conducting the process. This section considers both binding and persuasive authority for CANs regarding neutrality.

a. Binding Authority regarding Neutrality

Rule 53 deals with issues of neutrality and impartiality as a requirement. Rule 53 seeks to insure neutrality and impartiality by the master or CAN. For example, disclosure requirements under Rule 53[147] (discussed in the next section) seek to ensure that favoritism and prejudice play no role in the process. It allows parties to consent to an appointment of a CAN after a CAN discloses associations or potential conflicts only when the court approves the consent. Similarly, Rule 53 requires a CAN to "take all appropriate measures to perform the assigned duties fairly and efficiently."[148] While this section does not speak to impartiality per se, neutrality and impartiality are presumed to be essential to a fair and efficient process.

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[146] *See* Fed. R. Civ. P. 53, Advisory Committee Notes to Subdivision (a)(2) and (3).
[147] Model R. Civ. Pro. 53(a)(2) (requiring disclosure of conflicts of interest and potential disqualification after such disclosures are made).
[148] Model R. Civ. Pro. 53(c)(1)(B).

Canon 1 of the Model Code of Judicial Conduct speaks directly to impartiality. That Canon states: "A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[149] Rule 1.2 further elaborates: "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[150] Both the Canon and the Rule stress the importance of working free from bias or partiality to ensure not only that justice can be done but also that the public can trust the system.

Under Canon 2, a judge must perform the duties of a judge "impartially." Rule 2.2 states that a judge must "perform all duties of judicial office fairly and impartially."[151] Further, Rule 2.3 notes that a judicial officer must perform the office "without bias or prejudice."[152] The rule specifically prohibits "bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation."[153] The Judicial Code also prohibits a judge from allowing any "family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment."[154] All of these considerations aim to preserve neutrality and confidence in the judiciary.

In federal cases, Canons 1 and 2 apply explicitly to all CANs. The "Application" section of the Judicial Code divides CANs into two categories, depending on whether their appointment are "repeat[ed]" or "sporadic[]."[155] No matter which category the CAN falls in, they are both required to follow Canon 1 and the neutrality espoused therein. Rule 53 does not contain explicit requirements of independence and impartiality. Rather, it relies on the Judicial Code to incorporate those standards. . [cite. Is there reference to the code? Check]

b. Persuasive Authority Regarding Neutrality

Although not binding on CANs in the same way as the Judicial Code of Conduct, arbitrator and mediation ethics both explicitly cover the concept of neutrality. Similar to the Judicial Code, Canon I of the Arbitration Code requires arbitrators to "uphold the integrity and fairness" of the process.[156] The Code further notes that an arbitrator should only accept an appointment if that person can "serve impartially" and "independently."[157] In this sense the Arbitration Code and the Judicial Code are similar not only in the content of this ethical requirement, but also in their treatment of the topic within the first Canon of their respective codes.

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[149] Model Code of Judicial Conduct Canon 1.
[150] Model Code of Judicial Conduct Rule 1.2.
[151] Model Code of Judicial Conduct Rule 2.2.
[152] Model Code of Judicial Conduct Rule 2.3(a).
[153] Model Code of Judicial Conduct, 2.3(B)
[154] Model Code of Judicial Conduct R. 2.4 (B).
[155] Model Code of Judicial Conduct, Application § IV & V.
[156] Arbitration Code Canon I.
[157] Arbitration Code Canon I(B)(1) & (2).

To maintain impartiality through an appointment, the Arbitration Code prohibits an arbitrator from "entering into any business, professional, or personal relationship or acquiring any financial or personal interest, which is likely to affect impartiality" or the appearance thereof.[158] The provision regarding continually maintaining neutrality is particularly important in the arbitration context because arbitrators, like CANs, work primarily in the private sector and have significantly broader ability to engage in the world of business than judges.[159] This provision is not binding on CANs, even when they perform adjudicatory roles. Nevertheless, CANs are well-advised to maintain neutrality throughout the proceedings.

A final statement regarding neutrality for arbitrators can be found in the standards under allowing a vacation of an arbitration award. Under the Federal Arbitration Act (FAA), an arbitration award may be vacated for "evident partiality" by the arbitrator.[160] Similarly, the RUAA provides for the ability to vacate an award for "evident partiality by an arbitrator appointed as a neutral arbitrator."[161] These rules apply to a challenge to an arbitration award (and not in a proceeding against an arbitrator). Nevertheless, this standard is an important policing mechanism during mediation because arbitrators realize that any award rendered is subject to this standard on appeal.

The Model Code for mediators also considers neutrality, in a somewhat different way and for a different purpose. In the adjudicatory processes of litigation and arbitration, neutrality ensures confidence in any ultimate outcome. In mediation, neutrality signals to the parties that the process is one in which the parties can feel secure in obtaining an agreement on their own.

Under the Model Standards, "Impartiality" is placed as Standard II, following mediation's duty to ensure party autonomy and self-determination. Unlike the other rules mentioned thus far, the Model Standards not only require neutrality but also define the term: "A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice."[162] The Model Standards prohibit a mediator from conducting a process that would give rise to the "appearance of partiality."[163] These standards specifically prohibit a mediator from acting in a biased way based on the characteristics of any participant, including "background, values and beliefs."[164] They also bar mediators from receiving gifts from the parties during the process.[165]

Of the codes discussed, the Model Standards is the only document explicitly including a continuing duty to remain impartial. The Model Standards state: "If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw."[166] Neutrality should be considered a continuing duty for any neutral, including a CAN, and a CAN should guard against not only actions signifying bias but also actual bias within the neutral's own head and heart.

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[158] Arbitration Code Canon I(B)(C).
[159] CITE CORTEZ BYRD CONCURRENCe.
[160] 9 U.S.C. §10(a)(2).
[161] RUAA §23(a)(2).
[162] Model Standards II (A).
[163] Model Standards II (B).
[164] Model Standards II (B)(1).
[165] Model Standards II (B)(2).
[166] Model Standards II (C).

2. Conflicts of Interest

The ethical obligation to be free from conflicts of interest flows from, but is not synonymous with neutrality and impartiality. While neutrality and impartiality deal with biases and internal feelings or persuasions in favor of or against a party or side, conflicts of interest are centered primarily on external relationships. Conflicts of interest usually govern three types of situations – family relationships, financial relationships, and professional and social relationships.

A conflict of interest is an identifiable relationship that might be an indicator of bias, though it does not establish actual bias in and of itself. For example, if a CAN is a former law partner of one of the firms representing the client in a case, a conflict of interest is present. Whether the conflict of interest leads to actual bias or partiality is an entirely different question. Both binding authority and discretionary authority cover disclosures of conflicts of interest.

a. Binding Authority Regarding Conflicts and Disqualification

Multiple sources of authority require CANs to disclose conflicts of interest. Rule 53 states: "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."[167] The Rule, thus, requires disclosure and disqualification in the circumstances identified. As with many conflicts in other contexts, parties may consent to the appointment of a master despite a conflict.

The statute governs judicial disqualification, requiring disqualification when "impartiality might be reasonably questioned."[168] Additionally, the law prohibits the work as a judge in the following circumstances: 1) when the judge has personal knowledge of the situation, 2) when the judge worked on the matter as a lawyer, 3) when the judge, if a government employee, worked on or publicly commented on a matter, 4) when the judge has a financial interest in the matter, or 5) when a relative (to the third degree) of the judge is a party, lawyer, or has an interest in a matter.[169]

In addition to the disclosure and disqualification requirements, both the statute and ethics rules require a judge to make a reasonable inquiry to determine whether a conflict exists.[170] Under the Judicial Code, the parties may agree for a judge to serve after disclosure is made,[171] which is similar to the provision in Rule 53.

As an aside, the Model Rules of Professional Conduct for lawyers also governs conflicts of interest, but those rules do not govern conflicts when the lawyer acts *as a neutral*. Comment 2

[167] Federal R. Civ. Pro. 53(a)(2)
[168] 28 U.S.C. §455(a).
[169] 28 U.S.C. §455 (b).
[170] 28 U.S.C. §455(c) (including a duty to stay informed of possible conflicts); Code of Judicial Conduct Rule 2.11(B)(imposing a requirement to stay reasonably informed).
[171] Code of Judicial Conduct Rule 2.11(C) (allowing for continuing service provided the parties consent to the judge's jurisdiction).

to Rule 2.4 governing the lawyer's role as a third-party neutral notes that the lawyer "may be subject to court rules or other law that apply" to neutrals "may also be subject to various codes of ethics."[172] Thus, the CAN is subject to ethics regarding CANs while in that role. Once the appointment is complete and the CAN returns to private engagements, the CAN and the CAN's firm are subject to Rule 1.12 regarding conflicts for former third-party neutrals.[173]

b. Persuasive Authority Regarding Conflicts

Arbitration and mediation ethics both govern conflicts of interest. As a general matter, both arbitrators and mediators are required to disclose any conflicts of interest and then allow the parties to decide whether to proceed with the neutral. The ADR codes also require the neutral to use diligence to determine whether a conflict exists. The ADR codes all explicitly state that the duty to disclose is a continuing duty throughout the appointment.

Under the Code of Ethics for Arbitrators, Canon II requires an arbitrator to disclose any personal, financial, social, or professional relationship between the arbitrator and an arbitration participant (including parties, lawyers, witnesses, and others).[174] The arbitrator must undertake a reasonable examination to determine if a conflict exists and disclose conflicts prior to accepting an appointment.[175] This duty continues throughout the appointment and requires disclosure "as soon as practicable, at any stage of the arbitration."[176] Arbitrators in California must comply with an extensive set of disclosures under state law, and the arbitrator must make disclosures that apply not only to the arbitrator but also the arbitrator's family.[177]

Arbitrators and courts take the disclosure requirements seriously, and failure to disclose is a clear ground for overturning an arbitration award. In *Commonwealth Coatings Corp. v. Continental Casualty*, the United States Supreme Court overturned an arbitration award after a party discovered an undisclosed conflict of interest.[178] Today, many courts consider an undisclosed conflict the primarily evidence of "evident partiality" under the FAA.[179]

Mediation standards also require disclosures of conflicts of interest. Standard III of the Model Standards of Conduct for Mediators requires a mediator to disclose "actual and potential" conflicts of interest.[180] Parties may choose to proceed with the mediation despite a conflict.[181] Similar to arbitrators, mediators have a duty to conduct a reasonable inquiry to determine if a conflict exists.[182] Mediators working in a jurisdiction that enacted the Uniform Mediation Act will also have a statutory obligation to determine if a conflict exists as well as to disclose

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[172] Model R. of Prof'l Conduct 2.4 cmt. 2.
[173] Model R. of Prof'l Conduct 1.12 (governing conflicts of interest following an appointment as a neutral for both the neutral and the neutral's firm).
[174] Arbitrator Code Canon II(A).
[175] Arbitrator Code Canon II (A) and (B).
[176] Arbitrator Code Canon II (C).
[177] *See* Calif. Ethics Standards for Neutrals Arbitrators in Contract Cases, Standard 7 (Disclosures).
[178] Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 150 (1968).
[179] *See*, *e.g.*, Monster Energy Co. v. City Beverages, 940 F.3d 1130, 1132 (9th Cir. 2019) (vacating arbitration award based on arbitrator's failure to disclose ownership interest in the provider organization as well as failure to disclose prior cases with one of the parties).
[180] Model Standards of Conduct for Mediators, Standard III (C) (requiring disclosure).
[181] Id.
[182] Model Standards of Conduct for Mediators, Standard III (B) (requiring the mediator to conduct a reasonable inquiry).

conflicts.[183] Further, the mediator must disclose conflicts when they become known to the mediator, even if that is after the mediation has started.[184]

Overall, the rules regarding conflicts of interest appear more robust for ADR neutrals compared to judges. Because ADR neutrals are individuals working in private practice, they likely have significantly more contacts with the parties they are serving. Ethics for CANs could benefit from the lessons of arbitrators and mediators to include more stringent conflicts reporting, as well as a continuing duty to disclose conflicts of interest.

3. Communication with Parties and the Appointing Authority

Prompt communication regarding problems or changes of circumstances is essential for a workable appointment of a CAN. Communication by the CAN with the appointing judge is necessary for fairness and accountability. While this requirement has similarities to lawyer's duty to report promptly to the client, it includes a larger scope of responsibility in the CAN context.

Rule 53 expressly addresses the issue of ex parte communications by the CAN ("master"). It states that the order of appointment must speak to ex parte communications of the CAN with the appointing court and parties: "the appointing order must direct the master to proceed with all reasonable diligence and must state . . . the circumstances, if any, in which the master may communicate ex parte with the court or a party."[185] The Advisory Committee Notes to Rule 53 on this point discuss the rationale supporting the requirement that the appointment order state the circumstances in which a master may engage in an ex parte communication with the court or a party. The Committee Notes indicate that such communications can be problematic: "Ex parte communications between a master and the court present troubling questions."

The Advisory Committee Notes to Rule 53 suggest that the order of appointment should ordinarily prohibit ex parte communications "between a master and the court" to assure "that the parties know where authority is lodged."[186] On the other hand, the Notes suggest that communication with the court may be beneficial. It states: '[T]here may be circumstances in which the master's role is enhanced by the opportunity for ex parte communications with the court."[187] The example the Notes provide for this beneficial kind of communication relates to circumstances in which a CAN is assigned to "coordinate multiple proceedings" and "off-the-record exchanges with the court about logistical matters" would be helpful."[188]

The Notes also suggest that ex parte communications between the CAN and the parties also involves "difficult questions."[189] The Notes recognize that ex parte communications may be

[183] Uniform Mediation Act §9 (requiring the mediator to make a "reasonable inquiry" regarding conflicts of interest and disclosure "as soon as practical").
[184] Model Standards of Conduct for Mediators, Standard III (D) (continuing disclosure requirement).
[185] Fed. R. Civ. P. 53 (b)(2)(B).
[186] Fed. R. Civ. P. 53, Committee Notes on 2003 Amendment to Subdivision (b).
[187] *Id.*
[188] *Id.*
[189] *Id.*

"essential" to the CANs role in advancing settlement.[190] Although not stated explicitly, the Notes suggest that the general use of ex parte communications in mediation might be particularly helpful during settlement conversations. As a general rule, however, the Notes state that 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.[191]

Similar to ethics regarding lawyers and judges, arbitration codes generally prohibit ex parte communications. The Code of Ethics for Arbitrators includes a robust rule prohibiting ex parte communications under Canon III.[192] This rule, however, does not apply to "party-appointed" (or "partisan" arbitrators under the lawyer ethical rules) who are not expected to be neutral.[193] Party-appointed arbitrators may have ex parte communications with the attorneys and clients who appointed them, but the rule governing impermissible communications still applies to the neutral arbitrator.[194] Mediation practice does not have any rules prohibiting ex parte communications. In fact, such rule would inhibit one of the most powerful mediation techniques, i.e., the caucus. Whether CANs should be bound by ex parte rules when working as a mediator is an important question because the CAN could learn information that is otherwise confidential to a party.

4. Advancement of the Profession

This last section governing ethical content considers the advancement of the CAN as a profession. Nothing in Rule 53 touches on this topic, so this section draws from other codes of ethics to serve as examples. This section considers training, diversity, education, and pro bono service.

a. Training

Although most CANs are trained as lawyers, they may not have any particular training or expertise in working as a neutral. Unlike judges, who receive initial and continuing training on how to serve in the role of a judicial officer, nothing in Rule 53 requires that a CAN have any particular competency or expertise. CANs could benefit from training in a number of different areas, including handing complex litigation, working with large groups, conflict management, mediation, or arbitration, among other necessary skills. At worst, CANs are appointed because they know the appointing judge, not because of any particular skill set.

The Model Standards of Conduct for Mediators explicitly note the importance of training prior to serving as a neutral. Standard IV, on competence, recognizes that training, "experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence."[195] The Model Standards further encourage seasoned mediators to give back to the

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[190] *Id.*
[191] Fed. R. Civ. P. 53 (b)(2)(B).
[192] Code of Ethics for Arbitrators, Canon III(B) (prohibiting ex parte communications in most circumstances).
[193] Code of Ethics for Arbitrators, Canon III(B)(2) (allowing an exception for party-appointed arbitrators).
[194] Code of Ethics for Arbitrators, Canon X(C) (modifying ex parte rules such that they generally do not apply to party-appointed arbitrators but still apply to the neutral arbitrator).
[195] Model Standards of Conduct for Mediators, Standard IV(A)(1). The mediator standards also note that a mediator be ready to describe their training to parties who have questions about it. Model Standards of Conduct for Mediators, Standard IV (A)(3).

profession through "training, mentoring, and networking."[196] These guidelines emphasize the importance of training.

Today, training exists for CANs. The Academy of Court-Appointed Neutrals (ACAN) currently leads the nation in providing training opportunities for CANs. In 2023, ACAN began an "incubator program" to train new neutrals and provide mentoring and networking.[197] ACAN even provides free training modules on its website.[198] As training becomes more available, judges will be able to know the training of individual CANs and who have training, facilitating the choices courts make as to the best CAN to appoint for a particular matter. Training could also be a prerequisite to appear on a roster of CANs, either for a court or within a professional organization.

b. Diversity

Our country is home to a diverse population. The population includes numerous diversity of attributes such as race, ethnicity, gender, sexual orientation, religion, and neurodiversity, to name only a few. Such diversity is the inevitable result of our history, which included settlement from many countries. The country's history includes open immigration and even forced immigration under laws that allowed the importation of enslaved people. Through this factual lens, diversity is simply a fact of life rather than a value or principle. Over time, however, it has developed become an integral value of our diverse democracy.

A new focus on principles of diversity and inclusion establish a foundation for a just society. The principles of diversity, equity, inclusion, and belonging (DEIB) have developed as an important part of a constitutional democracy. With a history that brought together a diverse population, these values play an essential role in a just and equitable society. Many entities, in business, government, organizations and societies now accept these fundamental values of DEIB. . Recognizing the duty to promote diversity, equity and inclusion in society and governance inspired the United Nations to articulate the Sustainable Development Goals.[199] In the fall of 2022, the ABA adopted Accreditation Standard 303, which requires all law schools to provide learning opportunities for all students on professional identity, bias, cultural competency and humility, and the reality of racism.

Diversity among neutrals may be particularly important. The ADR community suffers from some of the lowest rates of diversity within the legal profession. In 2018, rapper Jay-Z publicly exposed the lack of arbitrator diversity when he alleged in court that he was not offered a single black arbitrator on the more than 200 arbitrators offered by AAA for his case.[200] The training developed by ACAN and noted in the section above serves to enhance opportunities for diverse CANs and to help diverse candidates who wish to join the ranks of CANs.

c. Education

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[196] Model Standards of Conduct for Mediators, Standard IX (A)(5).
[197] ACAN, *2023 Incubator Program*, at https://www.courtappointedneutrals.org/events/incubator-program/.
[198] ACAN, *Curricula Programs and Materials*, at https://www.courtappointedneutrals.org/resource-center/acan-training-modules/.
[199] *See* Home - United Nations Sustainable Development, available at: https://www.un.org/sustainabledevelopment/.
[200] *See* Michael Z. Green, *Arbitrarily Selecting Black Arbitrators*, 88 Fordham L. Rev. 2255, 2256 (2020) (discussing Jay-Z case in detail).

The duty of the legal profession to further the law and promote legal education is central to the lawyer's role. "As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession."[201]

Recognizing the duty to promote diversity, equity and inclusion in society and the legal profession inspired the United Nations to articulate the Sustainable Development Goals. In the fall of 2022, the ABA adopted Accreditation Standard 303, which requires all law schools to provide learning opportunities for all students on professional identity, bias, cultural competency and humility, and the reality of racism.

d. Pro Bono Service

Pro bono service is an important part of the legal profession. Under the Model Rules of Professional Conduct for attorneys, "[e]very lawyer has a professional responsibility to provide legal services to those unable to pay."[202] Lawyers have an aspirational goal of providing fifty hours of free legal services each year to those who cannot afford to pay.[203] Additionally, both the Arbitration Standards and the Model Standards of Conduct for Mediators encourage the pro bono service as a neutral.[204]

Some cases might be particularly ripe for pro bono services by CANs, including cases involving civil rights. Cases regarding the conditions of institutions under Section 1983 and other statutes may benefit from a CAN at various points in time. Courts are reluctant to appoint a CAN when a party proceeds *in forma paupris.*[205] Such reluctance on the part of courts would diminish in most cases in which a CANs is willing to perform some tasks pro bono. Moreover, such work by CANs would benefit our system of justice and lead to respect for the CANs who fulfill such a commitment.

C. Conclusion

Standardization of guidelines and standards could help clarify decision-making for CANs and enhance the ability of CANs to serve the interests of fairness and accountability. The issue of standardization or harmonization of the law has a long history in our country. The American Law Institute, the National Conference of Commissioners on Uniform State Laws, and other organizations have sought to make the law of the country more consistent by drafting Restatements of various areas of law, model legislation and uniform laws, Principles of the Law and other work to encourage greater consistency in the laws. Variations in state law will continue to limit movements toward uniformity.

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[201] MODEL RULES OF PROF'L CONDUCT, Preamble, para. [6] (AM. BAR ASS'N 2020).
[202] Model R. Prof'l Conduct R. 6.1.
[203] Model R. Prof'l Conduct R. 6.1(a).
[204] *See* Arbitration Code Canon I(A) ("Accordingly, an arbitrator should recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding. This responsibility may include pro bono service as an arbitrator where appropriate."); Model Standards of Conduct for Mediators Standard IX (A)(2) (mediators should strive to "make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.").
[205] *See, e.g.*, Hill v. Payne, 2023 WL 2342892, *3 (W.D.N.Y. Mar. 3, 2023) (declining to appoint a CAN under Rule 53 for a deposition monitor when the plaintiff was proceeding *in forma pauperis*).

Standardization for CANs may be particularly useful given the variety of roles they perform. Drawing from ethical standards across different types of neutrals could provide a useful starting point for CAN-specific rules of professionalism.