AMERICAN BAR ASSOCIATION

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H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Administrative Office of the United States Courts
One Columbus Circle, NE
Room 7-300
Washington, DC 20544

RulesCommittee_Secretary@ao.uscourts.gov

Re: Amendment of the Federal Rules of Bankruptcy Procedure to Permit the Use of the Phrase "Court-Appointed Neutrals" Rather Than "Court-Appointed Masters" in Bankruptcy Proceedings

Dear Mr. Byron:

The American Bar Association (ABA) respectfully requests that the Judicial Conference of the United States recommend that the Federal Rules of Bankruptcy Procedure be amended to permit the use of "court-appointed neutrals" (what Bankruptcy Rule 9031 and Fed. R. Civ. P. 53 currently call "court-appointed masters") in proceedings under the Bankruptcy Code.[1]

In submitting this request, the ABA supports the request made by Hon. Michael Kaplan (Chief Judge of the Bankruptcy Court for the District of New Jersey) on January 10, 2024, that Bankruptcy Rule 9031 be amended to permit the use of these neutrals, and also proposes additional language to facilitate that change.

Background

At its Midyear Meeting in January 2019, the ABA House of Delegates approved ABA Resolution 100.[2] This Resolution approved "Guidelines on the Appointment and Use of Special Masters in Federal and State Civil Litigation" (the "Guidelines") and urged that Bankruptcy Rule

[1] As explained below, the ABA also urges rule-makers to substitute the term "court-appointed neutral" for "master" and is seeking that change in both the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure. We explain the rationale for that change in a separate request that is attached. This letter will focus on their use in bankruptcy.

[2] www.americanbar.org/content/dam/aba/administrative/board_of_governors/greenbook/greenbook.pdf at 227. Under ABA Policy, ABA Resolutions themselves are official policies of the Association. Reports that accompany resolutions are not adopted as official policy and are treated as guidance provided by resolutions' drafters.

9031 be amended "to permit courts responsible for cases under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases."

This 2019 Resolution resulted from 18 months of effort by a working group that included representatives of the National Conference of Federal Trial Judges, the National Conference of State Trial Judges, the Lawyers Conference, the ABA Standing Committee on the American Judicial System, and the ABA's Litigation, Business Law, Dispute Resolution, Intellectual Property Law, Tort Trial and Insurance Practice, and Antitrust Sections on best practices concerning the use, selection, administration, and evaluation of "special masters."

The Working Group that drafted the 2019 Resolution included retired Southern District of New York Judge Shira Scheindlin, who chaired the Subcommittee of the Advisory Committee on the Federal Rules of Civil Procedure that drafted the 2003 version of Federal Rule of Civil Procedure 53; then District of South Carolina Federal District Court Judge (now District of Columbia Circuit Judge) J. Michelle Childs; a former chair of the ABA Business Law Section, the then chairs of the ABA Litigation and Intellectual Property Law Sections; two former chairs of the ABA Section on Dispute Resolution; two former chairs of the ABA Antitrust Section; one former, and one sitting state supreme court justice, and numerous other judges and practitioners.

The central principle of the Guidelines enunciated in Guideline 1 is that "[i]t should be an accepted part of judicial administration in complex litigation and in other cases that create particular needs that a special master might satisfy, for courts and the parties to consider using a special master and to consider using special masters not only after particular issues have developed, but at the outset of litigation."[3] Over the decades courts have become increasingly involved in case management. Expanding the understanding of how neutrals might assist with case management benefits both the courts and the parties.

While court-appointed neutrals may be appointed to serve quasi-adjudicative functions (e.g., discovery referees), they can also serve in non-adjudicative roles such as performance management (e.g., monitoring a decree), facilitation (e.g., working with the parties to resolve discovery disputes without motion), advisory (e.g., providing expertise to assist the court in assessing the adequacy of expert reports); information gathering (e.g., a forensic accountant, who reports to the court on where money went from a trust); or a liaison (e.g., providing a distillation of information to the court without exposing the court to settlement discussions or privileged material).[4]

In the three and one-half years following the adoption of Resolution 100, the ABA examined approaches to implementing these precepts. This process required thousands of hours of discussion, involving at least 14 of the ABA's sections, divisions and forums, and over 20 organizations outside of the ABA. It has resulted in two other resolutions co-sponsored by both the Judicial Division and the Section of Dispute Resolution and approved by the ABA House of Delegates in August 2023.

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[3] *See* ABA Resolution 100 Guideline 1.

[4] *See, id.* Guideline 4.

> Resolution 516, which is the focus of this request, provides:
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> RESOLVED, That the American Bar Association amends the *ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation* ("Guidelines"), adopted January 2019 (Resolution 100, 19M100), by retitling the Guidelines, "*ABA Guidelines for the Appointment and Use of Court-Appointed Neutrals in Federal and State Civil Litigation*" and replacing the terms "Special Master" and "Master" with "Court-Appointed Neutral;"
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> FURTHER RESOLVED, That the American Bar Association further amends ABA Resolution 100, 19M100, to urge that Bankruptcy Rule 9031 and other provisions of rules or law related to Bankruptcy be amended to permit courts responsible for cases under the Bankruptcy Code to use court-appointed neutrals (whether identified as "masters" or otherwise) in the same way as they are used in other federal cases; and
>
> FURTHER RESOLVED, That the American Bar Association supports rule and legislative changes designed to replace the term "master" or "special master" with "court-appointed neutral."[5]

In addition, Resolution 517 adopts and urges state, local, territorial and trial courts to adopt a Model Rule on the use of Court-Appointed Neutrals. (Although this resolution is not directed to amending federal rules, it may be helpful to have as background, particularly because it includes a definition of "court-appointed neutral.")[6]

This Request

This request seeks to implement changes to the Federal Rules of Bankruptcy Procedure to permit the use of "court-appointed neutrals" in proceedings under the Bankruptcy Code. The ABA proposes that Bankruptcy Rule 9031 should be amended in its entirety to read as follows:

> Rule 9031. Court-Appointed Neutrals Authorized
>
> In cases and proceedings under, and subject to the Code and Federal Rule of Bankruptcy Procedure 2016 and to the extent needed to facilitate the preservation of the estate, courts may order the appointment of neutrals in the same manner and subject to the same limitations and requirements as are set forth in F.R.Civ.P. Rule 53(a) through (g)(1).

[5] www.americanbar.org/content/dam/aba/directories/policy/annual-2023/516-annual-2023.pdf

[6] https://www.americanbar.org/content/dam/aba/directories/policy/annual-2023/517-annual-2023.pdf

Bankruptcy Rule 7053 shall be adopted as follows:

Rule 7053. Court-Appointed Neutrals.

In adversary proceedings under, and subject to the Code and Federal Rule of Bankruptcy Procedure 2016 and to the extent needed to facilitate the preservation of the estate, courts may order the appointment of neutrals in the same manner and subject to the same limitations and requirements as are set forth in F.R.Civ.P. Rule 53(a) through (g)(1).

Bankruptcy Rule 9014 shall be amended as follows:

Rule 9014. Contested Matters

(c) Application of Part VII Rules. Except as otherwise provided in this rule, and unless the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028–7037, 7041, 7042, 7052-7056~~, 7054–7056~~, 7064, 7069, and 7071.

By separate letter, the ABA also is requesting adoption of amendments necessary to replace the term "master" with "court-appointed neutral" in the Federal Rules of Civil Procedure. This rationale also applies to the Federal Rules of Bankruptcy Procedure. For convenience, a copy of that letter is also attached.[7]

Rationale for the Proposed Changes

Federal Rule of Bankruptcy Procedure 9031 was adopted in 1983. Much has changed in the administration of justice both generally and particularly in bankruptcy cases over the last 40 years. We have moved from a system in which case management was largely left to parties, who were expected to involve the court only through motion, to one in which our rules make it an active responsibility of the court to insist on case management.[8] We have moved from a judicial system in which the term "alternative dispute resolution" was genuinely used to describe an alternative the parties could choose on their own if they did not wish a judicial resolution, to an

[7] This letter also references a definition of "court-appointed neutral" ("a disinterested professional appointed as an adjunct special officer appointment to assist a court in its case-management, adjudicative or post-resolution responsibilities in accordance with the provisions of this Rule and any standards established by this Court for qualification to hold such an appointment") which would apply "[u]nless law or the court provides otherwise, and subject to any court rules, procedures (including the provisions of any court-based alternative dispute resolution program) and principles of ethics applicable to the services being performed." This language is designed, for example, to avoid having the rule supplant referrals for mediation.

[8] *See, e.g.*, Fed. R. Civ. P. 16 (amended in its current form 1983); Steven S. Gensler, "Judicial Case Management: Caught in Crossfire," 60 Duke Law Journal 669, 671-72 (Dec. 2010) ("Starting in 1983 and continuing into the present era, a series of amendments have enshrined active judicial case management into the Federal Rules of Civil Procedure…") (citation omitted); Civil Justice Reform Act of 1990, Pub. L. 101–650, 28 476, 104 Stat. 5089, 28 U.S.C. §476.

integral part of case administration to be employed as tools by both the court and the parties to secure the just, speedy and inexpensive resolution of actions.[9] And as Judge Kaplan notes, we have moved from a perception of bankruptcy proceedings as a specialty field of "referees" only just given the more professional name of "bankruptcy judges," to a critical part of the judicial system addressing some of the most complex problems our federal courts face.

Today, bankruptcy courts actively manage their cases, tailoring the processes and procedures to the situation, and balancing the needs of the case with the cost sensitivities of the case. In 2024, bankruptcy judges will administer billions of dollars in dispute in a fair, efficient, and economical manner day after day. Amending Rule 9031 would give them additional tools to do so.

Rule 9031 Does Not Achieve its Stated Goal

Rule 9031 is titled "Masters Not Authorized." It states that "Rule 53 F.R.Civ.P. does not apply in cases under the Code." The entirety of the Advisory Committee notes to the rule say that "This rule precludes the appointment of masters in cases and proceedings under the Code."[10]

However, Rule 9031 literally does not do what it says it is intended to do. Although the title says "Masters [Are] Not Authorized," and the advisory notes say that the rule precludes appointment, what the text says is that ***Federal Rule of Civil Procedure 53*** does not apply. Federal Rule 53 is ***not*** the source of authority for appointing masters. Instead, that authority falls within the inherent power of the judiciary.[11] Indeed, current Rule 53 presupposes that there is an outside source of authority for appointing "masters"; it *limits* the exercise of that authority by specifying that "a court may appoint a master ***only to***" perform functions that the Rule then defines broadly.[12] Hence, the literal effect of Bankruptcy Rule 9031 is to *permit* the Bankruptcy Court to appoint masters without the limitations in Federal Rule of Civil Procedure 53.

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[9] *See, e.g.*, Robert J. Niemic; Donna Stienstra, Randall E. Ravitz "Guide to Judicial Management of Cases in ADR," Federal Judicial Center (2001) (discussing development of federal ADR programs in the 1980s and 1990s; https://www.justice.gov/archives/olp/file/827536/download (identifying federal court-based ADR programs as of 2006).

[10] 1983 Advisory Committee Notes to Federal Rule of Bankruptcy Procedure 9031.

[11] *See, e.g.*, *supra.* nn. 18, 19, and accompanying text. The inherent authority to appoint neutrals is a reason for example, why courts have appointed neutrals in criminal cases, even though there is no Criminal Rule analog to Federal Rule of Civil Procedure 53. *See, e.g.*, *United States v. Black*, No. 16-20032-JAR, 2016 WL 6967120, at *3 (D. Kan. Nov. 29, 2016) (it "is well-settled that" federal "courts have inherent authority to appoint Special Masters to assist in managing litigation") (citing *Schwimmer v. United States*, 232 F.2d 855, 865 (8th Cir. 1956) (quoting In re: Peterson, 253 U.S. 300, 311 (1920)); *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 746 (6th Cir. 1979) (the authority to appoint "expert advisors or consultants" derives from either Rule 53 or the Court's inherent power); *Regents of the Univ. of Cal. v. Micro Therapeutics, Inc*., No. C 03-05669 JW, 2006 WL 1469698, at *1 (N.D. Cal. May 26, 2006) (to similar effect).

[12] Fed. R. Civ. P. 53(a)(1) (emphasis added).

(1) The Rationale for Rule 9031 Remains Unclear

The purpose served by Bankruptcy Rule 9031 was never fully or fairly explained. The one-sentence statement in the Advisory Committee Note on the rule – "[t]his rule precludes the appointment of masters in cases and proceedings under the Code" – provides no insight. There is also an ambiguity between (a) the text of the rule and the Advisory Committee Note, and (b) the preface to the proposed Rules of Bankruptcy Procedure from 1983.

In the preface, the Advisory Committee reviewed former Bankruptcy Rule 513. Rule 513 provided that "if a reference is made in a bankruptcy case by a judge to a special master, the Federal Rules of Civil Procedure applicable to masters apply."[13] Under Rule 513, "judge" referred to a district court judge and not a bankruptcy court judge.[14] As a result, Rule 513 only applied in bankruptcy matters when a district judge retained or withdrew the reference to a bankruptcy case. If a district court judge presided, then special masters could be used, whereas if a bankruptcy court judge presided then special masters could not be used.

The preface also indicated an intent to carry forward this distinction between district court and bankruptcy court judges: "[t]here does not appear to be any need for the appointment of special masters in bankruptcy cases ***by bankruptcy judges*.** The Advisory Committee, therefore, has decided that Former Rule 513 not be continued in the rules and the Rule 53 F. R. Civ. P., not be made applicable." (Emphasis added).[15]

However, the drafters of Rule 9031 did not incorporate this distinction. Instead, Rule 9031 provides broadly that F.R. Civ. P. 53 does not apply to bankruptcy cases (or per the Advisory Committee Notes "cases ***and proceedings***"). Accordingly, it is unclear whether the Rule was directed to preventing the use of "masters" in bankruptcy cases, or only to preventing the use of masters when a bankruptcy judge is handling them.

The logic for either intent also is not apparent. The Advisory Committee Notes do not explain why nothing could possibly arise in a bankruptcy proceeding making it appropriate for a judge to consider using an appointed neutral, or why otherwise appropriate uses of neutrals should be barred simply because the case is before a bankruptcy judge.

With so little information about the basis for this prohibition, authors analyzing the rule have had difficulty discerning its logic. Some posit that the rule may have arisen out of a concern about

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[13] Fed. R. Bankr. P. 513 (repealed Aug. 1, 1983), *reprinted in* 12 James Wm. Moore & Lawrence P. King, eds., Collier on Bankruptcy, at 5-103 (14th ed. 1978) ("Collier").

[14] *See* Collier, *supra.* n.3, at 5-103 ("[t]he word 'judge,'" in this context "meant the United States district judge, not the bankruptcy judge."). *See also* Paulette J. Delk, *"Special Masters in Bankruptcy: The Case Against Bankruptcy Rule 9031,"* 67 Mo. L. Rev. 29, at n.64 and accompanying text (Winter 2002) (discussing the history).

[15] *See* Delk, *supra.* n.32, 67 Mo. L. Rev. at 42.

cronyism.[16] Although "cronyism" is not mentioned specifically in the published Advisory Committee notes or preface, as discussed below, concerns about cronyism were discussed periodically as a reason not to amend Bankruptcy Rule 9031.[17] The prior history of cronyism among bankruptcy referees is part of what animated the Bankruptcy Reform Act of 1978 that implemented the mandate to create bankruptcy judges.[18]

However, after Bankruptcy Rule 9031 was adopted, legislation was enacted to address cronyism directly. Comparing today's office of bankruptcy judges with the prior office of referees in bankruptcy 40 years ago does an injustice to today's bankruptcy judges who are bound by the same ethical rules as Article III judges. Indeed, the Bankruptcy Amendment Act of 1984, which was enacted after Rule 9031 was adopted, changed the method of appointing bankruptcy judges. As a result of the 1984 amendments, bankruptcy judges are now appointed by the United States Circuit Court of Appeals for each circuit for a period of fourteen years.[19] In 1986, a preexisting pilot program was expanded for use of the United States Trustee as an additional check in 48 states on the process. Indeed, the House of Representatives hoped that the creation of the U.S. trustees would eliminate cronyism and regularize the appointment process for trustees, examiners, committees, and others.[20]

Another recent article speculates that the statement that Federal Rule of Civil Procedure 53 did not apply to cases under the Code was based in the then current (1983) version of Rule 53, which was limited to *trial* masters, largely in cases requiring an accounting. "[P]erhaps, in 1983, the rationale for Bankruptcy Rule 9031 was that referring trials to a "master" is a rare thing to start with, and if the judge has already referred the matter to a bankruptcy judge (who in some sense specializes in matters of account and difficult computation of damages), it is not going to be necessary to refer the trial further to a 'master.'"[21]

In any event, Federal Rule of Civil Procedure 53 was amended in 2003 specifically to recognize that court-appointed neutrals could be useful in pre- and post-trial proceedings.[22] There is no

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[16] Delk, *supra*, n.32, at n.66, and accompanying text. *See also* R. Spencer Clift, III, "Should the Federal Rules of Bankruptcy Procedure Be Amended to Expressly Authorize United States District and Bankruptcy Courts to Appoint a Special Master in an Appropriate and Rare Bankruptcy Case or Proceeding?" 31 U. MEM. L. REV. 353 (2001).

[17] *See* https://www.uscourts.gov/file/15429/download at 137-144.

[18] Pub. L. 95-598, 92 Stat. 2549 (eff. Nov. 6, 1978).

[19] *See* Cases and Materials on Bankruptcy, Second Edition, by James J. White and Raymond T. Nimmer (1992), 60-61.

[20] *Id*. 63-64 (citing to H.R. Rep. 595, 95th Cong. 1st Sess. 107, reprinted in U.S. Code Cong. & Ad. News 1978, 5963, 6069.

[21] *See* Merril Hirsh and Sylvia Mayer, "Time to Stop Hamstringing Bankruptcy Judges: Amending Bankruptcy Rule 9031 To Recognize and Permit the Use of Court-Appointed 'Masters,'" ABA Judicial Division JUDGES JOURNAL, v. 61, no. 4 (Fall 2022) 22, 23.

[22] Rule 23(a)(1)(C) (2003). *See also supra.* n.26 and accompanying text.

reason why "court-appointed neutrals" would be potentially useful for pre- and post-trial proceedings in a federal district court, but of no use when those proceedings occur in a bankruptcy court. And in perpetuating Bankruptcy Rule 9031, our rules go even further. In effect, this Rule reflects a notion that it is so obviously inappropriate for bankruptcy courts ever to make use of court-appointed neutrals that it is better to have a rule prohibiting their use in every case than to leave the decision to a bankruptcy judge who is informed by the actual circumstances of a case.

This has always been a questionable premise. Bankruptcy courts are the quintessential federal courts of equity. If anything, they are the most obvious example of courts that can benefit from creative, fair, and flexible use of resources. Indeed, bankruptcy courts often face the same type of (or even greater) case administration challenges that face the district courts. In contrast to district court cases, bankruptcy cases routinely involve thousands and sometimes tens of thousands of participants (creditors). There is no compelling reason to limit the case management options available to bankruptcy courts when a bankruptcy filing often increases the complexity of the issues and the number and type of stakeholders involved in the dispute.

(2) Bankruptcy Rule 9031 is a Vestige from a Time When Courts Operated Very Differently.

Rule 9031, adopted in 1983, is a vestige from another time. In requesting that this rule be changed, the ABA is asking the Judicial Conference to revisit a decision made most recently in 2009 to advise against amending Bankruptcy Rule 9031.[23]

Court administration and management of bankruptcy cases have changed significantly from 1983 to 2024. Even if the notion that it is best to prohibit the use of court-appointed neutrals in bankruptcy had a legitimate basis in the past, it does not now. Bankruptcy courts handle over one million filings each year ranging from simple consumer chapter 7 cases to detailed wage earner chapter 13 cases to complex multi-billion dollar chapter 11 cases, and everything in between. They often involve scores of interested parties and can involve hundreds, thousands or even hundreds of thousands of claims with issues that touch on virtually the entire gamut of civil litigation. Today, discovery is measured in terabytes instead of boxes; the same mass torts that might in one case be in multi-district litigation proceedings may instead be in a bankruptcy proceeding; and judges face an array of new issues, including the prospect of cases arising from a multiverse that did not exist when any of them went to law school.

Judge Kaplan's letter and the accompanying analysis amply illustrate a conundrum that now exists in our rules concerning mass tort cases. Federal Rule of Civil Procedure 53 was amended 20 years ago in recognition that judges were already appointing neutrals to operate in numerous ways to assist the administration of justice when cases come before federal district courts; and that use has become especially common in dealing with multi-district and other mass tort litigation involving numerous parties, complex issues and extensive discovery. But Bankruptcy Rule 9031 still reads as it did 20 years before that – in effect establishing an irrebuttable

[23] *See* https://www.uscourts.gov/file/15429/download at 137-144.

presumption that the very tools found to be of use when cases arise in federal district court cannot possibly be justified, under any circumstances, when the cases arise in bankruptcy court.

However, the benefits to amending Rule 9031 are not limited to mass tort cases. Amending the rule would make it easier for these judges to use neutrals to manage myriad other practical issues that arise and reduce expense. For example, bankruptcy judges could appoint neutrals to serve as:

- **Discovery Referees or Facilitators** to manage myriad discovery issues in complex proceedings, including reviewing privilege logs, establishing electronically stored information (ESI) protocols, resolving discovery and ESI disputes, and creating and monitoring compliance with discovery plans;

- **Expert Advisors** to offer a neutral perspective on technical or specialized issues (e.g., audits, patents, trade secrets, ESI, disposition of unique assets, equitable apportionment of marital assets, etc.;

- **Investigators** to explore the circumstances and produce a report and recommendation on issues such as valuation, asset disposition, claims estimation, or damages computation; and

- **Fee Adjudicators** to adjudicate fee disputes, which may entail making a report and recommendation to the court.

(3) The Reasons Previously Offered to Maintain Rule 9031 Are Not Persuasive Today.

Bankruptcy Rule 9031 has long been controversial and there have been efforts in the past to amend it. The last time the Advisory Committee on Bankruptcy Rules appears to have considered the issue is in 2009, when the Subcommittee on Business Issues voted not to change the rule.[24] In addition to citing the general principle of avoiding revisiting rules unless circumstances cast doubt on prior determinations, various members of the Subcommittee cited four considerations:

(a) "Although concerns about cronyism may have faded to a large extent since the 1970s and early 1980s, the bankruptcy judge members of the Subcommittee indicated that they like not having appointment power, and some Subcommittee members worried about the possible return of cronyism if judges were given the authority to appoint special masters;"[25]

[24] *See* https://www.uscourts.gov/file/15429/download at 137-144.

[25] *Id.* at 143.

(b) A concern that using neutrals could add to the complexity and expense of bankruptcy proceedings;[26]

(c) The fact that one member of the subcommittee had "questioned the constitutional legitimacy of delegation twice removed from an Article III judge;"[27] and

(d) Doubts whether there is a need for the appointment of special masters in bankruptcy cases. No one is aware of any bankruptcy case in which a court has expressed frustration about the inability to appoint a special master, and it appears to the Subcommittee that the use of examiners is a sufficient alternative."[28]

Each of these concerns is addressed below.

(a) Cronyism

While cronyism may have been a substantial concern in the 1970's and early 1980's, as discussed above, a number of reforms were implemented to mitigate this concern. There is no reason today to presume that bankruptcy judges (appointed by the United States Circuit Courts of Appeal; who swear to abide by ethical requirements that apply to other federal judges; and operate with a U.S. Trustee's Office that was created in large part to address concerns of cronyism[29]), will operate in bad faith. Moreover, if there are truly concerns today about cronyism between courts and appointees, the appropriate solution would not be to ban all uses of neutrals, but to have the court request that the U.S. Trustee choose the neutral. This process is already used in other contexts when a bankruptcy court orders an appointment.

(b) Added Cost and Complexity

Perhaps even more so than other courts, bankruptcy courts are conscious of the need to manage costs. Every dollar paid to professionals and neutrals means one less dollar available to pay creditors. Bankruptcy courts balance this need daily as they manage their cases. The goal of amending Rule 9031 is not to require the use of court-appointed neutrals in bankruptcy cases, but instead to enable their use. Effectively, amending Rule 9031 adds another tool to the courts' case management toolbox in bankruptcy cases. If utilizing a court-appointed neutral would add cost or complexity, then a court could choose not to appoint one.

Rule 9031 does not, however, allow judges to determine whether appointment saves or increases costs. It bars the use of court-appointed neutrals no matter how much the use of neutrals might save costs in actual circumstances. This is counterproductive because there are many situations where the ability to order the appointment of a neutral could very well reduce the cost and

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[26] *Id.*

[27] *Id.* at 143-44.

[28] *Id.* at 144.

[29] https://govinfo.library.unt.edu/nbrc/report/19admini.html

complexity of a case (e.g., to reduce costs and delay from discovery disputes) – much as they can do in non-bankruptcy proceedings.

Indeed, if anything, the particular need for practical, creative and efficient problem solving in bankruptcy proceedings adds more reason to think neutrals could be useful. Under the Bankruptcy Code, as reflected in 11 U.S.C. §503(b)(1), a core principle is that administrative expenses of the estate should be necessary to preserve the estate. By incorporating this concept into the revised rules, there will be an additional protection in the appointment process that does not apply to the non-bankruptcy proceedings in which neutrals are permitted. As a result, when considering the appointment of neutrals in a bankruptcy case, courts will consider whether the benefit outweighs the cost. The ABA proposes that this language be incorporated into the revised version of Rule. 9031 and the proposed new rule for adversary proceedings, Rule 7053.[30]

(c) Constitutional Legitimacy of Having Article I Judges Appoint Neutrals.

We have been unable to find any other Article I Judge besides Bankruptcy Judges who are prohibited from appointing neutrals. For example, United States Magistrate Judges appoint "masters" in accordance with Federal Rule of Civil Procedure 53.[31] The United States Court of Federal Claims maintains an "Office of Special Masters."[32] The District of Columbia Superior Court, which is *also* an Article I Court, has its own version of Rule 53.[33]

Moreover, bankruptcy courts already frequently order appointments. They order the appointment of equity committees, examiners, fee examiners, trustees, mediators, privacy concern ombuds, patient care ombuds, and others to facilitate case administration and due process. We are aware of no question that these appointments are constitutional.

(d) Need

There is a very real need to amend Rule 9031. While bankruptcy courts have the authority to order the appointment of a mediator or panel of mediators or an examiner to investigate and report, as it stands now, they are unable to order the appointment of discovery referees or facilitators, expert advisors to advise the court, fee adjudicators, claims facilitators, compliance

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[30] This language also, we believe addresses another concern raised in course of previous discussions of Bankr. R. 9031. It establishes the standards under which neutrals can be paid.

[31] *See, e.g.*, *FTF Lending LLC v. Blue Int'l Grp., LLC*, 2023 U.S. Dist. LEXIS 210407 (M.D. Fla. Sept. 12, 2023) (Hon. Nicholas P. Mizell, USMJ*); In v. Donelson (In re Consol. Discovery in Cases Filed by Alysson Mills)*, 2023 U.S. Dist. LEXIS 233028 (S.D. Miss. Mar. 10, 2023) *Smiledirectclub LLC v. Singer*, 2023 U.S. Dist. LEXIS 93323 (M.D. Tenn. Feb. 24, 2023) (Hon. Barbara D. Holmes, USMJ); *Cannata v. Wyndham Worldwide Corp*., 2012 U.S. Dist. LEXIS 20625 (D. Nev. Feb.12, 2012) (Hon. Cam Ferenbach, USMJ).

[32] *See* https://www.uscfc.uscourts.gov/special-masters-biographies.

[33] District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (1970); D.C. Superior Court Rule 53.

monitors, or other neutrals uniquely positioned to address the specific needs of a situation. While not relevant to every case, enabling courts to order such appointments in bankruptcy cases expands courts' ability to effectively manage their cases to maximize value and achieve a fair and efficient process for the debtor and creditors.

Interestingly, one of the concerns raised in the 2009 Memorandum from the Subcommittee on Business Issues to the Advisory Committee on Bankruptcy Rules, when this issue was last considered, was that bankruptcy judges had not expressed a need to amend Rule 9031. Clearly, times have changed as Judge Kaplan's request illustrates. The ABA adopted Resolution 516 at the request of the ABA Judicial Division, which includes bankruptcy judges, and with the vetting, support, and input of the bankruptcy judges who are part of the National Conference of Federal Trial Judges. Among the most active participants in this process are Judge Elizabeth Stong (Bankr. E.D.N.Y.) and recently retired Judge Frank Bailey (Bankr. D. Mass), a former Chair of the National Conference of Bankruptcy Judges. Bankruptcy judges have now spoken up and asked for this amendment.

In short, none of the reasons – whether from 40 years ago or 15 years ago – justify a general prohibition against the use of court-appointed neutrals in bankruptcy proceedings.

We appreciate the Judicial Conference's consideration of these changes and are of course available to address any concerns. Attached for reference is a copy of the ABA's letter also submitted today requesting changes to the Federal Rules of Civil Procedure to change the term from "master" to "court-appointed neutral".

Sincerely,

Mary Smith

Mary Smith
President, American Bar Association