

# Academy of Court-Appointed Masters

## Appointing Special Masters and Other Judicial Adjuncts *A Handbook for Judges and Lawyers* January 2013

### Section 3. Ethical Issues and Practical Concerns

For better or for worse, the conduct of a special master (or other judicial adjunct) reflects significantly on the judge. Regardless of restrictions on *ex parte* conversations between the judge and the master, the parties (and the world) will likely believe that, to some extent, the master is able to speak for the judge and is informed by the judge's thinking. Parties read volumes into what the master says, does, and even hints at. In high-profile litigation, even the master's political, social, and religious activity might come under scrutiny. The press, legislative entities, and regulatory entities that cannot contact the judge about the case may try to contact the master about the case, hoping that the master will answer questions the judge will not answer.

What are the rules that should govern the master's behavior? The first rule, of course, is that the master should work with the judge to understand how he or she would like particular situations handled. Beyond that, though, what codes govern a master's conduct?

Section 3 of this bench book specifies the sources of ethical rules for judicial adjuncts, posits a set of basic ethics rules that apply to masters, and provides a checklist of difficult situations the master may face in the course of the appointment.

#### 3.1 Sources of Ethical Rules for Judicial Adjuncts

Several different types of rules and codes of professional responsibility apply or can be construed to apply to a judicial adjunct's conduct, including:

- a. **Applicable State Rules of Professional Responsibility.** If the judicial adjunct is a lawyer, he or she is governed directly by these rules. The state equivalent of Rule 1.12 of the Model Rules of Professional Responsibility may be particularly relevant to a lawyer serving as a judicial adjunct. (Rule 1.12 of the Model Rules of Professional Responsibility can be found at Appendix 6 or at: [http://www.abanet.org/cpr/mrpc/mrpc\\_toc.html](http://www.abanet.org/cpr/mrpc/mrpc_toc.html).)

b. **Code of Conduct for United States Judges (“CCUSJ”), 28 U.S.C.S. app. (2005).** The Compliance section of this Code makes it binding on federal court-appointed special masters, except for the limitations on: certain financial dealings; certain fiduciary activities; the practice of law; participation in political, civic, charitable, and legal organizations; and limitations on the receipt of gifts. (CCUSJ can be found at Appendix 7 or at: <http://www.uscourts.gov/library/conduct.html>.)

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

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

A judge may choose to impose portions of this code on a master or other judicial adjunct. *See* CCJE, Introduction If 2. (CCJE can be found at Appendix 8 or at : <http://www.uscourts.gov/library/conduct.html>.)

d. **28 U.S.C. § 455.** This statute governs the disqualification of federal judges. In addition, Federal Rule of Civil Procedure 53(b)(3) states that a court may appoint a master “only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455.” (Section 455 can be found at Appendix 5 or at: <http://codes.lp.findlaw.com/uscode/28/I/21/455>.)

e. **Federal Rules of Civil Procedure.** Rule 53 directly governs masters. (Rule 53, along with the Advisory Committee Notes, can be found at Appendix 4 and at: <http://www.uscourts.gov/rules/>.)

f. **Codes of Conduct for ADR organizations such as NAF, JAMS, and AAA.** Several alternative dispute resolution (ADR) organizations have their own ethical guidelines for their neutrals. *See, e.g.:*

- ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes, particularly Canons I-VII, available at Appendix 9 and at : [http://www.abanet.org/dispute/commercial\\_disputes](http://www.abanet.org/dispute/commercial_disputes).
- National Arbitration Forum’s Code of Conduct for Arbitrators, available at Appendix 10 and at: <http://www.adrforum.com/users/naf/resources/CodeofConductforArbitrators1.pdf>.
- National Arbitration Forum’s Code of Procedure, particularly Part IV “Arbitrators,” Rules 20-24, available at: <http://www.adrforum.com/users/naf/resources/CodeofProcedure2008-print2.pdf>

- JAMS Arbitrators Ethics Guidelines, particularly Guidelines I-IX, available at Appendix 11 and at:  
<http://www.jamsadr.com/arbitrators-ethics/>
- JAMS Comprehensive Arbitration Rules and Procedures, particularly Rule 30, available at:
- <http://www.jamsadr.com/rules-comprehensive-arbitration/#Rule%2030>

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

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

Table 2 summarizes the potentially applicable codes.

**Table 2: Codes that Govern the Conduct of Judicial Adjuncts**

| <b>Code</b>                                     | <b>Acronym</b>           | <b>Applicability</b>  | <b>Notes</b>   |
|---|--------------------------|---|--|
| State Rules of Professional Responsibility      |                          | All lawyers   | If case is venued in jurisdiction in which adjunct is not licensed, which states’ rules apply?   |
| Code of Conduct for United States Judges        | CCUSJ                    | See Compliance Section—except for a few specified exceptions, this code applies to special masters in federal court |  |
| Code of Conduct for Judicial Employees          | CCJE                     | Federal judges may impose these or similar standards on non-employee judicial adjuncts                              |  |
| 28 U.S.C. § 455                                 | Disqualification Statute | Fed. R. Civ. P. 53(b)(3) makes this binding on special masters in federal court                                     |  |
| Rule 53 of the Federal Rules of Civil Procedure | Rule 53                  | Binding on special masters in federal court   | Unclear to what extent: (1) 2003 amendments to the rule apply to masters who were appointed before the rule was amended; and (2) the rule applies to adjuncts who are not “special masters.” |

| <b>Code</b>   | <b>Acronym</b>      | <b>Applicability</b>                                 | <b>Notes</b>   |
|---|---------------------|--|--|
| Rules of specific organizations like the American Bar Association, American Arbitration Association, JAMS, National Arbitration Forum | ABA, AAA, JAMS, NAF | Applies to neutrals who work for those organizations |  |
| State rules   |                     |  | There may be specific state rules that govern the conduct of judicial adjuncts in that state |

### 3.2 Basic Ethical Rules for Judicial Adjuncts

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

The basic rules for judicial adjuncts are summarized in the following table.

**Table 3: Basic Rules for Judicial Adjuncts**

|        | <b>Rule</b>  | <b>Sources of Authority</b>   |
|--------|--|---|
| Rule 1 | Preserve Dignity and Integrity of the Court              | CCUSJ, Canon 1; CCJE, Canon 1   |
| Rule 2 | Competence and Diligence                                 | Fed. R. Civ. P. 53(b)(2); CCUSJ, Canon 3.A (1)-(5); CCJE, Canons 3.B and C; JAMS Guidelines, II; ABA/AAA Code, Canons I.B and IV. |
| Rule 3 | Propriety  | CCUSJ, Canon 2; CCJE, Canons 2, 3 and 4; ABA/AAA Code, Canon I.A.   |
| Rule 4 | Neutrality/Absence of Conflict or Appearance of Conflict | Fed. R. Civ. P. 53(a)(2) and (b)(3); CCUSJ, Canon 3.C; CCJE, Canon 3.F; ABA/AAA Code, Canons I and II; JAMS Guidelines, V.        |
| Rule 5 | Disqualification   | 28 U.S.C. § 455; CCUSJ, Canon 3.C; ABA/AAA Code, Canons I.H and I; JAMS Guidelines, VII.  |

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

Judicial adjuncts should observe high standards of conduct so as to preserve the integrity, dignity, and independence of the appointing court and judicial system.

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

## **Rule 2: Competence and Diligence**

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

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

## **Rule 3: Propriety**

- 3A. A judicial adjunct should respect and comply with the law and should at all times act in a manner that promotes public confidence in the integrity and impartiality of the adjunct and the judiciary.
- 3B. A judicial adjunct should not engage in any activities that would call into question the propriety of the adjunct's conduct in carrying out the responsibilities assigned by the appointing court.
- 3C. A judicial adjunct should not allow family, social, or other relationships to influence official conduct or judgment, nor should an adjunct use the prestige of the office for private gain or to advance or appear to advance the private interests of others.
- 3D. A judicial adjunct should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.

Comment: Whether an organization practices invidious discrimination is often a complex question to which judicial adjuncts should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather depends on factors such as how the organization selects members; whether the organization is dedicated to the

preservation of religious, ethnic, or cultural values of legitimate common interest to its members; and whether it is in fact an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. [CCUSJ, comment to Canon 2C]

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

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

4A. A judicial adjunct should avoid conflicts of interest in the performance of official duties. A conflict of interest arises when a judicial adjunct knows that he or she (or a close relative) might be so personally or financially affected by a matter that a reasonable person with knowledge of the relevant facts would question the adjunct's ability to properly perform the assigned responsibilities.

4A. Before an appointment, a judicial adjunct should disclose to the appointing court and the parties all matters required by applicable law, any actual or potential conflict of interest or relationship, or other information of which the adjunct is aware that reasonably could lead a person to question the adjunct's impartiality. This duty of disclosure continues throughout the assignment and requires the prompt disclosure of any interest or relationship that arises that the party recalls or discovers.

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

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

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

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

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

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

Sources: 28 U.S.C. Section 455; CCUSJ, Canon 3.C; ABA/AAA Code, Canons I.H and I; JAMS Guidelines, VII.

## **Rule 6: Confidentiality**

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

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

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

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

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

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

### **3.3 Checklist: Ethical Rules to Consider for Specific Circumstances**

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

The judge and judicial adjunct should meet at the beginning of the appointment to consider the items on the following checklist. Each item on this list may require a particularized interpretation

of the general ethical rules, depending on the circumstances of the case. This list is based on practical problems that have arisen in actual adjuncts' work.

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

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

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

**❑ 1. Conflicts of Interest**

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

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

## ❑ 2. Relationship With the Judge

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

## ❑ 3. Relationship With the Parties

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

## ❑ 4. Relationships Among Neutrals

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

## ❑ 5. Gifts and Favors

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

## ❑ 6. Interactions With the Press

- a. Reactive Press
  - How should the adjunct respond to calls from the press about the case?
  - May the adjunct comment about the case to the extent that information is in the public domain, or solely to explain procedural issues?
  - May the adjunct talk with the press about the case to a greater extent than the appointing judge would talk with the press?
- b. Proactive Press
  - If press reports about the case are inaccurate, may the adjunct, for example, write an op-ed piece to try to correct the reporting?
  - May the adjunct work through the press to create a better public perception of the case?
  - Would the answer be different if the parties agree to the adjunct taking on this work?

## ❑ 7. Interactions With Legislative and Investigative Bodies

- a. May the adjunct respond to inquiries about the case from legislators?
  - May the adjunct say more to legislators than the appointing judge would say?
- b. May the adjunct appear and testify before a legislative committee if asked to do so?
  - If so, what are the types of questions that the adjunct must refuse to answer?
  - For each category of refusal, what privilege will be claimed?

- c. If the Government Accountability Office (GAO), for example, investigates the case, should the adjunct cooperate in the investigation?
  - What types of materials should the adjunct provide?
  - What materials are privileged? And what is the source of the privilege?

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

Unlike a federal judge or judicial employee, a federal court-appointed master is not automatically required to refrain from partisan or non-partisan political activity. CCUSJ, Compliance section, B(1). But when a master's role will be highly public, the master and appointing judge should consider whether it is necessary to limit the master's group memberships, political activity, and fiscal relationships to ensure actual and apparent neutrality. As mentioned above, a federal judge may choose to impose such restrictions. CCJE, Introduction ¶ 2.

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

## **❑ 9. Timekeeping and Compensation**

- a. How should the adjunct record his or her time?
  - Should the descriptions include confidential information?
  - Should itemized bills be submitted only to the court and under seal?
  - What time block should be used? (1/10 hour segments?)
- b. To what extent may the adjunct charge for staff salaries and expenses?
- c. May the adjunct charge an "overhead" rate in addition to actual expenses?
- d. What will the process be for constructing and obtaining court approval of budgets and invoices?

## **❑ 10. Other Work**

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

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