MEMORANDUM

To: Hon. Catherine McEwen

From: Prof. Kristen Blankley and Benjamin R. Connor

Date: September 22, 2025

Subject: The appointment of court-appointed neutrals prior to the enactment of Bnkr. Rule 9031.

QUESTIONS PRESENTED

I. Was the appointment of court-appointed neutrals restricted prior to the adoption of Bankruptcy Rule 9031?

a. Was the appointment of court-appointed neutrals limited prior to the Bankruptcy Reform Act of 1978?

b. Was the appointment of court-appointed neutrals restricted prior to the adoption of Bankruptcy Rule 9031?

ANSWERS IN SUMMARY

I. The appointment of court-appointed neutrals (CANs) prior to the adoption of Bankruptcy Rule 9031 was limited by some statutes; however, courts in bankruptcy were willing to appoint court-appointed neutrals as needed.

a. Some statutes prevented the appointment of court-appointed neutrals except in special circumstances, but evidence shows that district courts did, in fact, appoint CANs in some circumstances using their inherent authority.

b. Evidence shows that courts appointed CANs without restrictions prior to the adoption of Rule 9031.

CIVIL RULE OF PROCEDURE RULE 53 & BANKRUPTCY RULE 9031

a. *Background*

Rule 53 of the Federal Rules of Civil Procedure permits a court to appoint a "master" to perform duties consented to by parties, hold trial proceedings and make or recommend findings of fact, or address pretrial and posttrial matters that can't be timely addressed by the judge. Fed. R. Civ. P. 53. The American Bar Association adopted Resolution 516 on August 8, 2023, which resolves to replace the term "master" or "special master" with "court-appointed neutrals." ABA Resolution 516. Hereafter, the undersigned will refer to masters and their like as court-appointed neutrals, or CANs.

Under Bankruptcy Rule 9031, Rule 53 does not apply in bankruptcy cases. Fed. R. Bankr. P. 9031. Efforts are underway to examine the usefulness of the prohibition, and this memo considers the historical relationship between the law of bankruptcy and CANs.

b. Timeline

Rule 53 was adopted in 1938. 28 U.S.C. Appx. Rules of Civil Procedure (1940). At the same time, Congress passed the Chandler Act of 1938, which created chapters under Title Eleven separating the types and kinds of bankruptcy. In 1978, Congress passed the Bankruptcy Reform Act of 1978; this reform established bankruptcy courts in each federal district and created dedicated bankruptcy judges.

Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 53 (1982). However, *Northern Pipeline* found the broad delegation of power to bankruptcy courts unconstitutional, and Congress rectified the situation with additional legislation in 1984. *Id.* at 84-86; 11 U.S.C. § 1 et. seq. (1988). Following the invalidation of the Bankruptcy Reform Act of 1978, the Supreme Court promulgated rules in 1983, including Fed. R. Bankr. P. 9031.

I. Bankruptcy Courts' Use of CANs Prior to 1978.

a. Rule 53

Rule 53 initially defined the role of court-appointed neutrals in 1938. At the time, Rule 53 said that court-appointed neutrals included referees, auditors, examiners, and assessors. Appx. Rules of Civil Procedure (1940). Rule 53 allowed judges in a district to appoint standing masters and could appoint a master in any action within the district, however, Rule 53 encouraged courts to appoint CANs on a case-specific basis. *Id.*

b. Title 11

At roughly the same time, 11 U.S.C. § 62, stated that the district courts shall appoint referees, who were the precursor to today's bankruptcy judges. 11 U.S.C. § 62 (1934). Although the rules of civil procedure mention that referees are included in the definition of special masters, Title 11 provides specific statutory language for the appointment of referees. Additionally, "special masters" are mentioned throughout Title 11, and are considered different from referees.

Full-time referees could not practice as attorneys, and part-time referees could not practice as attorneys under Title 11. 11 U.S.C. § 67 (1964). Referees were appointed for a term of years and were referred cases from the district court, and the referees had jurisdiction over the cases they were referred. 11 U.S.C. § 1(26) & (62). In contrast, district judges could refer corporation, railroad, and local taxing agency reorganization proceedings to a court-appointed neutral. 11 U.S.C. § 205 & 207 (1934); 11 U.S.C. § 205, 403, & 517 (1940).

While bankruptcy procedures, at first, had broad powers to appoint court-appointed neutrals, those powers decreased over time. Beginning in the 1930s, district courts could only refer reorganization proceedings to court-appointed neutrals in special circumstances. 11 U.S.C. § 205 & 207 (1934); 11 U.S.C. § 205, 403, & 517 (1940); 11 U.S.C. § 205, 403, 517 (1952); 11 U.S.C. §§ 205, 403, 517 (1958); 11 U.S.C. §§ 205, 403, 517 (1964); 11 U.S.C. §§ 205, 403, 517 (1970); 11 U.S.C. §§ 205, 403, 517 (1977). In *In re American Bantam Car Co.*, the district court appointed a special master for a corporate reorganization under Chapter 10 as provided for in § 517. 193 F.2d 616 (3d Cir. 1952), The court of appeals ruled that a special circumstance allowing a court-appointed neutral to preside includes when all the appointed referees for bankruptcy cases are otherwise disposed or unavailable.

This analysis shows that courts have a long custom of hiring private attorneys as “referees” to manage bankruptcy cases prior to the creation of the separate bankruptcy courts. These professionals share some characteristics with the

work of today's CANs in that they come from the private bar and perform many of the tasks that CANs do today. On the other hand, these referees had standing appointments (either full- or part-time) and do not appear to be appointed by the parties in particular cases.

c. Case Law

I reviewed bankruptcy cases from every circuit in the United States in which a trial court appointed a court-appointed neutral in a bankruptcy case. I searched specifically for cases in which a court appointed a "special master" rather than a referee. In some of the cases, the court appointed a court-appointed neutral and a referee. Unfortunately, the role of CANs prior to 1978 was not well defined or well documented. The following are a number of cases in which trial courts appointed "masters" to hear evidence and make factual and legal decisions. This section presents the cases involving CANs in chronological order.

As early as 1916, the Northern District of New York ruled that a district court having jurisdiction under bankruptcy law operates as a court of equity and may appoint special masters to take evidence for the court. *U.S. v. Coyle*, 229 F. 256, 259-260 (N.D.N.Y 1916). The Court also said that the special masters may be standing masters in chancery or specially appointed masters for particular cases. *Id.* In total, the Court held that a bankrupt party may be required to appear before a special master and submit to the special master's examination. *Id.* at 260. Not four years later in 1920, the Supreme Court ruled that district courts whether

acting in equity or in law have the inherent authority to appoint court–appointed neutrals and prescribed their duties. *In re Peterson*, 253 U.S. 300 (1920).

In *Berl v. Crutcher*, the trial court appointed a special master to "receive the claims of stockholders, take evidence as to ownership, and report to the court." 60 F.2d 440, 443-444 (5th Cir. 1932). The court ruled that the appointment of the master was necessary because a referee or receiver would not have had jurisdiction to determine the ownership of the stock. *Id.* at 444. The court did not contemplate 11 U.S.C. § 207(c)(11) (1934) which allows the appointment of a court–appointed neutral for corporate reorganizations. Section 207 was part of the bankruptcy act of 1898 which established the first bankruptcy court system before it was redesigned in 1978. *Id.* Essentially, the plain language of section 207 suggests that the district court could have appointed a court–appointed neutral under section 207's authority, but the Court chose not to.

In 1940, the Union Trust Company filed a petition in bankruptcy to determine the fee they were entitled to from bonds. *Union Trust Co. of Maryland v. Townshend*, 133 F. 2d 501, 502 (4th Cir. 1943). The district court appointed a court-appointed neutral to investigate the funds and report the fee owed Union Trust Company. *Id*. The district court adopted the findings of the court-appointed neutral and the fee issue was not appealed. *Id*.

The most support for CANs in these early cases comes from the Ninth Circuit. In 1969, the Court of Appeals for the Ninth Circuit held that the reference to a court-appointed neutral was proper under Rule 53. *Faucher v. Lopez*, 411 F.2d

992, 995 (9d. Cir. 1969). In this case, the court-appointed neutral was appointed to hear non-jury issues in an involuntary bankruptcy case, and the court-appointed neutral made a number of decision of law. *Id.* at 994.

Courts acting under bankruptcy jurisdiction did not appear to have any clear boundaries on the appointment of court-appointed neutrals during this time frame. The most obvious restrictions are presented in section 205, 403, and 517 of Title 11 prior to 1978, however, courts were quick to appoint court–appointed neutrals when the case called for them. The case law also shows that Rule 53 was not clearly used as a grounds to appoint a neutral under bankruptcy jurisdiction until the early 1960s.

II. Bankruptcy courts and court-appointed neutrals after 1978

As noted above, in 1983, the Supreme Court adopted the prohibition on the use of “masters” in bankruptcy courts. Fed. R. Bankr. P. 9031. The 1978 amendments to Title 11 are largely silent on the topic of “special masters” and court-appointed neutrals. 11 U.S.C. §§ 1 et seq.

Prior to these amendments, Bankruptcy Rule 513, indicated that any appointment of a court-appointed neutral by a judge would be governed by Rule 53 of the Federal Rules of Civil Procedure. 11 U.S.C App’x Fed. R. Bankr. P. 513 (1982). Bankruptcy Rule 513 was approved alongside the first set of bankruptcy rules on October 1, 1973, by an order of the Supreme Court. Federal Judicial Center, *Rules: Federal Rules of Bankruptcy Procedure*, https://www.fjc.gov/ (last visited Aug. 23, 2025). *Collier on Bankruptcy*, in a discussion of Rule 513, suggests

that the appointment of CANs is only within the authority of the district judge, and that Rule 513 did not confer the power to appoint CANs on referees in bankruptcy. 12 Collier on Bankruptcy 5-103 to 5-108 (James WM. Moore et al. eds., 14th ed. 1978). *Collier* goes on to note the nuance of Rule 513 in relation to referees and district judges especially within specific chapters. *Id.* Although *Collier* suggests a clear restriction on referees' appointment of CANs, the most important piece to note is that prior Rule 513 contemplated the use of CANs and incorporated Federal Rule of Civil Procedure 53 into the law of bankruptcy for at least some period of time. When Rule 513 was replaced by Bankr. R. 9031, there ceased to be any provision of law or rule that drew an express distinction between federal district court judges appointing neutrals in bankruptcy cases and bankruptcy judges appointing neutrals in bankruptcy cases.

Accordingly, after a thorough review of bankruptcy court cases prior to 1983, we have been unable to find any support for the premise there is any inherent principle, or existing provision, of law besides Bankr. R. 9031 that would prevent bankruptcy court judges from appointing court-appointed neutrals., Indeed, in 1979, the United States Bankruptcy Court for the Northern District of Ohio appointed a court-appointed neutral to receive and distribute funds for a bankrupt. *In re Durkay*, 9 B.R. 58, 59 (N.D. Ohio 1981). This appointment occurred after the bankruptcy reform act in 1978 and before Bankruptcy Rule 9031 was enacted. The case does not create any hurdle to the appointment of court-appointed neutrals prior to 1983.

CONCLUSION

Prior to 1979, the Federal Rules of Civil Procedure and Title 11 provided an avenue for the appointment of Court-Appointed Neutrals. Title 11, especially, limited the instances in which court could appoint court-appointed neutrals, however, courts largely allowed themselves the power to appoint court-appointed neutrals when the facts called for their appointment. Since 1983, it has been Bankruptcy Rule 9031 and no other provision of law that has prevented bankruptcy judges from appointing CANs.