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ADR Process

Neutral Selection: Some Guidance from a Neutral

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The use of ADR in resolving complex commercial disputes is growing substantially, particularly for intellectual property disputes. Undoubtedly, ADR's crucial advantage over litigation, and also the most important decision parties will make in an ADR proceeding, is their ability to select their own neutral. Parties have complete autonomy to select whomever they want as their neutral. But they must be sharply cognizant of a fundamental tenet: the quality of an ADR process is only as good as the neutral conducting it.

There is no "one size fits all" approach for selecting the neutral. The task can be difficult, tedious and even frustrating. Selecting the right neutral may yield substantial cost and time efficiencies and other benefits throughout the entire process, meeting, if not exceeding, the parties' expectations—thus well worth the time and effort expended in selecting that person. Selecting the wrong neutral may well lead to a disaster. Through the prism of my experience as an active arbitrator and mediator handling complex, high-stakes commercial (IP, IT and technology-related) disputes since 1991, I now offer my own perspectives on and general approach to the task of properly selecting a neutral. Though specific qualifications will differ, often quite markedly, based on whether an arbitrator or mediator is being selected, the general approach I present will, with certain exceptions noted, broadly apply to selecting any neutral.

My approach to the task has two basic components: one performed by neutrals, the other performed by the parties.

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GETTING THE WORD OUT—THE NEUTRALS' RESPONSIBILITY

Those who hire neutrals need current, accurate, reliable and comprehensive information about prospective neutrals: who they are, their experience and expertise, education, training, language ability, their location, cost, availability, etc.

Once provided, the information can be disseminated to parties through differing pathways: by ADR institutions for panelists on their own lists, and by neutrals themselves and/or their firms, for example, through professional reputation, neutral attendance and presentations at conferences and meetings,

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existing obligation" – the NASD's agreement with Kidder, Peabody to submit customer disputes to arbitration at the election of the customer.

Therefore, the forum selection clauses in cases similar to *City of Reno,* ought to have no effect on a contract between FINRA and member firms to allow "customers" to "invoke" arbitration with the member. The holding in *City of Reno,* that FINRA's arbitration provision is a "default" arbitration agreement, is questionable at best. The option of arbitration should not be precluded by forum selection clauses.

Moreover, it is noteworthy that the *Reno* decision shies away from the language of "waiver," referring more often to the issue of "disclaimer" of the FINRA rule. The Supreme Court has held, in Moses Cone . . . ., that FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an *allegation of waiver*, delay, or a like defense to arbitrability" (emphasis added). If waiver is not a threshold issue, it is therefore entitled to the presumption of arbitrability, and a matter for arbitral, as opposed to judicial, determination.

INVESTOR CHOICE

It is also interesting that the courts deciding this issue have paid little or no attention to the investor-protection elements in the rulemaking history of FINRA Rule 12200, or the current popular and legislative debate on investor choice. If fairness requires investors to have a choice of forum in which to pursue complaints against broker-dealers, the FINRA arbitration rule should not be capable of being waived, or any waiver should at least have to be clear and express.

The *Dodd-Frank Wall Street Reform and Consumer Protection Act* (H.R. 4173, 111th Cong. (2010; bit.ly/dodd-frank2010) authorizes the SEC to issue rules limiting, imposing conditions on, or even entirely prohibiting agreements that require arbitration by customers of brokers, dealers, municipal securities dealers and investment advisers, "in the public interest *and for the protection of investors*" (emphasis added). Not content to wait for SEC action, in August 2013, Rep. Keith Ellison (D-MN), introduced in Congress the *Investor Choice Act of 2013* (H.R. 2998; bit.ly/InvestChoice2013). The Act would amend the Securities Exchange Act of 1934 (bit.ly/SEA34) to expressly prohibit mandatory pre-dispute arbitration agreements by brokers and dealers, and modify the Investment Advisers Act of 1940 to make it unlawful for any investment adviser to enter into an agreement with a customer that included a pre-dispute arbitration agreement. Although govtrack.us gives the bill a 1% chance of passage (bit.ly/1jpCur3), it has garnered support, in response to investor concerns about fairness in FINRA arbitration, and the general climate of suspicion surrounding all business-to-consumer pre-dispute arbitration agreements that has prompted introduction of the Arbitration Fairness Act (bit.ly/arbfair).

Thus, at the same time that the legislature is attempting to ensure that investors are not locked into a particular forum or mechanism until a dispute arises, the courts are allowing broker-dealers to foreclose the arbitration option by including forum selection clauses.

CONCLUSION

Recent FINRA arbitration decisions impose unworkable obstacles to resolving investor disputes and needlessly protract, delay, and hinder attempts by FINRA to enforce fair industry practices. FINRA arbitrability decisions now employ a unique second class interpretative model when compared to all other arbitration analysis. Recent decisions not only create an analytical divergence in determining issues of arbitrability between FINRA and non-FINRA arbitration disputes, but also harm investors by limiting their rightful option of arbitration and the enhanced protections for investors afforded under the FINRA Rules.

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publications, legitimate law firm/neutral marketing websites, directories, advertisements, and other appropriate vehicles. Any neutral must ultimately provide sufficient trustworthy information that reaches the hands of those people who will hire him/her. In nearly all situations, the information flows indirectly, through successive paths, from the neutral to that decision-maker—and that often takes considerable time. Occasionally, and particularly for ad hoc matters, counsel or even a disputant will directly contact a prospective neutral of interest to seek needed information about that person, with the resulting information then flowing from that neutral rather quickly back to the inquirer.

SELECTION—THE PARTIES' RESPONSIBILITY

At its crux, the selection process involves the following. A preliminary list of potentially qualified candidate neutrals is first assembled; sufficient information is then obtained on each of them; thereafter, clearly unqualified neutrals are eliminated from the list; the resulting candidates are rank ordered, based on defined selection criteria; and finally a small number of these candidates (to provide alternates) is selected, from the list and in order of preference, to appoint. Far easier said than done.

Each dispute has its own unique characteristics. Even within a common substantive area, two facially similar disputes can have widely divergent characteristics.

Carefully think about, formulate and then follow a selection process that takes into account the primary characteristics of your dispute and matches your neutrals to that dispute. Avoid selecting anyone without adequate forethought. If the results are not what you need, modify the process accordingly and iterate it as often as necessary to yield the desired neutrals.

NEUTRAL QUALIFICATIONS

Specifically, to start the selection process, decide what neutral qualifications you want. Decide if you want a neutral with substantive/legal expertise in the field of the dispute. If you are advocating a position contrary to conventional wisdom in the area or prefer to have someone with no preconceived notions whatsoever based on prior experience, you

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might want someone who has no knowledge of the field/technology in question, which allows the parties an opportunity to educate the neutral. However, if your position comports with conventional wisdom and you want your neutral to quickly and credibly cut through any misconceptions put forth by the other side, look for an expert in your field/technology.

The ADR clause in the governing contract may specify the necessary qualifications. However, those clauses may be too narrowly drawn such that a qualified neutral may be difficult to find or, worse yet, not exist at all. Be realistic in what you seek. If the ADR clause does not specify qualifications, then decide what minimum qualifications you absolutely need (not "want"; in practice, all the qualifications you want may collectively be too restrictive in terms of the neutrals, if any, you actually find). Rank those qualifications in order of descending importance, as you may need to successively relax some of those qualifications from the bottom up later in the process. For a case filed with an institution, ask your case manager to screen potential candidate neutrals on its roster. This often occurs in collaboration with the parties, through carefully and mutually selected keyword searches on the institution's neutral database, sometimes followed by additional screening through specialized queries posed directly by the case manager to those neutrals. Keywords are initially chosen to pull a reasonable number of potential candidates from the database. If that does not happen, appropriately change the keywords accordingly—including using those with increasingly broad meanings—until it does. If your case is non-administered, compile a list, from all available sources, of neutrals with those qualifications. Work with opposing counsel, if need be. The result, however obtained, is a preliminary list of potential candidate neutrals.

> "Selecting the right neutral may yield substantial cost and time efficiencies and other benefits . . . and [is] therefore well worth the time and effort expended in selecting that person."

DUE DILIGENCE

Once you have assembled that list, perform due diligence on each listed candidate. This includes collecting useful information from multiple sources, such as websites misleading, incomplete or just wrong—for that reason, exercise caution toward the ultimate source of the information and skepticism of its content), listings and directories (traditionally in print but now increasingly online). While doing so, remember that such sources, while useful, tend to be somewhat self-serving, as they base their own information on CVs and bios from neutrals or questionnaires completed by neutrals. No numeric third-party mechanism currently exists to rate neutrals in terms of their proven ability. If you do not have enough information from an institution on a potential candidate neutral's background, ask the institution to query the neutral for you, or, if the ADR process is ad hoc, then ask the neutral directly. Find out if the candidate has any published writings of interest or has taken any position on an issue involved in your dispute. Ask your colleagues at law firms for their thoughts on the potential candidates. Most law firms maintain lists of neutrals with whom they have had prior dealings. As many IP disputes tend to be sent these days to large law firms or, for certain narrow practice areas, to specialized boutiques, if your own firm does not have information for any candidate on the list, the odds are that another such law firm will. Get referred to it and others, if need be. As there are relatively few neutrals serving in certain substantive areas (such as highly technical patent disputes), you should be able to quickly reach a firm that has useful information.

Ask each of your candidate neutrals to disclose any conflicts: substantive, relational (affinities including with parties, counsel, witnesses and the institution involved),

FURTHER READING ON NEUTRAL SELECTION

American Arbitration Association, "Fact Sheet: Enhance Neutral Selection Process for Large Complex Cases," bit.ly/1lOnu94.

D. Bishop et al, "Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration," 14 *Arb. Int'l* 395 (1998).

Chartered Institute of Arbitrators "Practice Guideline 16: The Interviewing of Prospective Arbitrators" (2011), bit.ly/QG4Cej.

CPR "Due Diligence Evaluation Tool for Selecting Arbitrators and Mediators," International Institute for Conflict Prevention and Resolution (2010), bit.ly/1nNXmrL.

H. R. Dundas, "Guidelines for Interviewing Prospective Arbitrators," 2 *NY Disp. Res. L.* 33 (Spring 2009).

D. Kahneman, *Thinking, Fast and Slow* (Farrar, Strauss & Giroux 2011), specifically Ch. 21, "Intuitions vs. Formulas."

J. Kichaven, "You're Letting 'em Choose the Mediator? Your Case Isn't That Good! Getting to Settlement Demands Mutual Participation in Selection," 25 *Alternatives* 115 (July/August 2007).

H. N. Mazadoorian, "Disclosure Questions for ADR counsel to Ask When Choosing Neutrals or Provider Groups", 14 *Alternatives* 95 (September 1996).

P. L. Michaelson, "Enhanced Tribunals: Why It's Time to Use Personality Screening to Supplement Selection Criteria," 28 *Alternatives* 189 (November 2010) (part 1 of two-part article).

P. L. Michaelson, "Can Conflicting Styles Be Detected? How Personality Screens Make Tribunal 'Matches' for More Effective Arbitration," 28 *Alternatives* 205 (December 2010) (part 2 of two-part article).

D. Rothman and J. Kichaven, "Litigators' Views and Goals Vary on Selecting their Arbitrators," 22 *Alternatives* 13 (January 2004).

M. Young, "Rethinking Mediation: A New and Better Path to Neutral Selection," 30 *Alternatives* 111 (May 2012).

financial and temporal (availability). Inquire about their current caseloads. Be conscious of a marked tendency among busy neutrals to take on too many cases which, when arranging hearings, can cause extended schedule conflicts and often necessitate multiple hearing sessions separated by weeks, if not months, which leads to inefficiency and increased cost.

If you are considering using an ADR institution that is not well known or with which you have no experience, undertake due diligence of the institution itself. You need to gain comfort and repose trust in the institution, not just its neutrals. Find out about the institution's quality and selection of its neutrals, how its neutrals are compensated, if it has any relationships that may cause inherent biases or conflicts of interest with disputants on one side or another in your dispute, its industry reputation, governing ethics rules, organizational longevity, members, support (filing fees, member contributions, etc.) and other factors of interest.

INTERVIEW AND SELECTION PROCESS

Eliminate clearly unqualified neutrals from the list based on qualifications, conflicts and availability. Further, ask what type of demeanor/temperament/perspective you want in your neutral and further narrow the list. Perhaps you need an experienced practicing attorney who has substantial subject matter/industry expertise. Alternatively, choose an ex-judge if you need someone who can command authority and possibly "twist some arms." Such a person may, however, exhibit dictatorial conduct and lack sufficient subject matter/industry experience. For an arbitrator, you might also want someone who remains closely "involved" throughout the proceeding, exercises appropriate but not overpowering "muscular" control, including the ability to make hard decisions throughout so the arbitration doesn't explode or follow a tangential path and who can get it back on its proper track when and if necessary, yet is sensitive to cost and autonomy issues, but is certainly not just a "go along, get along" person. The remaining neutrals are your candidates.

Define interview selection criteria (e.g., potential inter-candidate incompatibilities, temperament, neutral practice preferences, suitability to the particular dispute, views on attaining process efficiencies, etc.), rank order those criteria in descending order of importance, and interview the remaining candidates, whether in person or by telephone (or video web connection), to ferret out and then compile data relevant to these criteria. Interviews are best done inter partes and, if an institution is involved, with the case manager present. A very limited scope of inquiry, not touching on the merits of the dispute, is permitted under applicable standards of ethics. If need be, particularly in an ad hoc process, interviews can be conducted ex parte, though the scope of inquiry, particularly for arbitrators, is further restricted under those standards.

On an ex parte basis, you can discuss the general nature of the case, the candidate's suitability to hear the case, including availability, conflicts, language proficiency (if applicable), references, and, for a tripartite panel where the chair is selected by the co-panelists, your party's preference for the chair. For an inter partes interview, the areas of permissible inquiry are broader than in an ex parte interview. Here, you can also inquire about a candidate's preferred practice on awards if given

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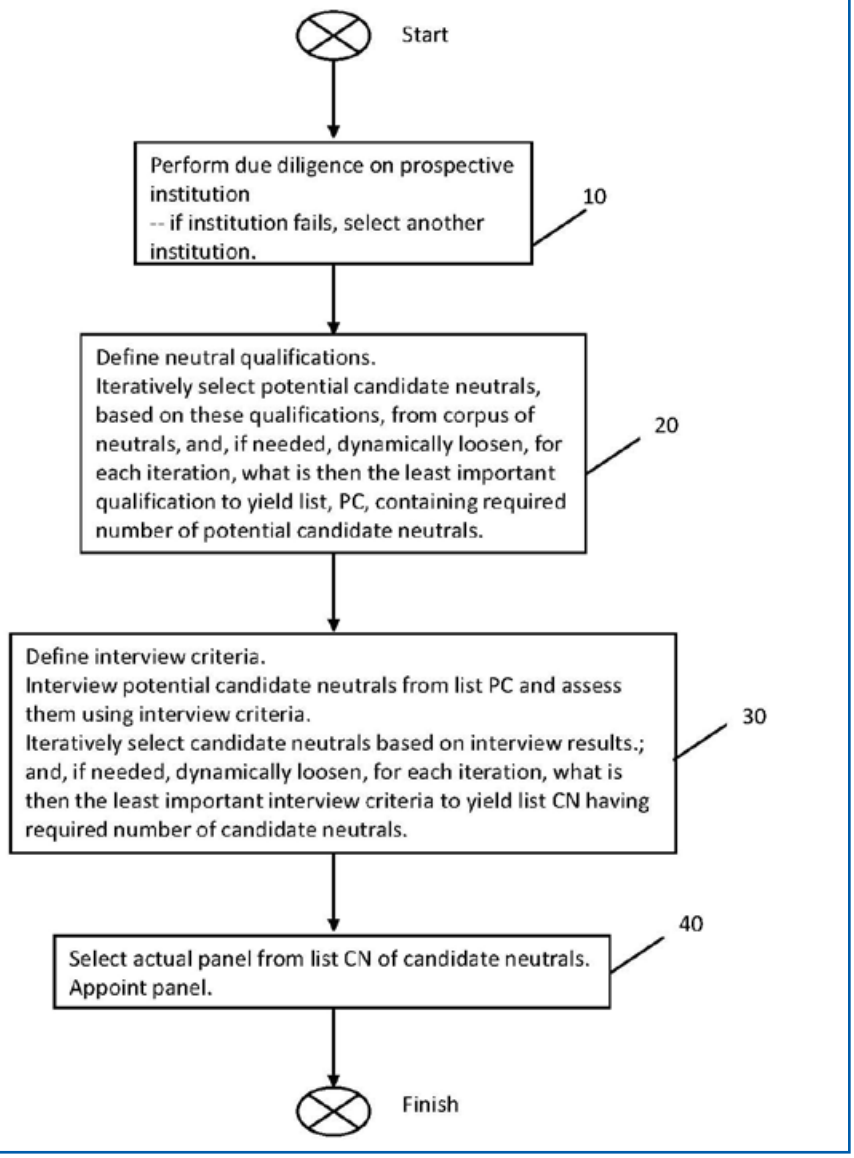
Figure 1. Neutral Selection Approach



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full discretion (i.e., fully reasoned, abbreviated reasoning, bald; providing a draft award to the parties for review, etc.) and his/her views on attaining cost-effectiveness and process efficiencies. For high-stakes arbitrations and/or those with multiple hearing sessions where the arbitrators will need to work together over an extended period of time, consider testing and evaluating your candidates for inter-personal compatibility with each other (even if only informally through assessing contemporaneous temperament and responses to oral inquiries), and taking the results into account when selecting tripartite panels from among your candidates. Also, to improve selection accuracy by eliminating undue reliance on intuition and its inherent biases, consider establishing, for each potential candidate neutral, a statistical, rather than merely intuitive, measure for each interview selection criteria, and an overall numeric score reflective of how well that candidate meets all such criteria. This score can then be compared against a predefined threshold (metric) to select appropriate candidate neutrals.

Do not merely acquiesce in your adversary's selection of a neutral, particularly if you are selecting a sole arbitrator or mediator. While many parties will simply abdicate their responsibility for the sake of signaling goodwill and cooperation to their adversary, if you have strong preferences for your neutral, make them known to the other side and, to the extent reasonable, insist on them: otherwise you may be stuck with a neutral you do not want.

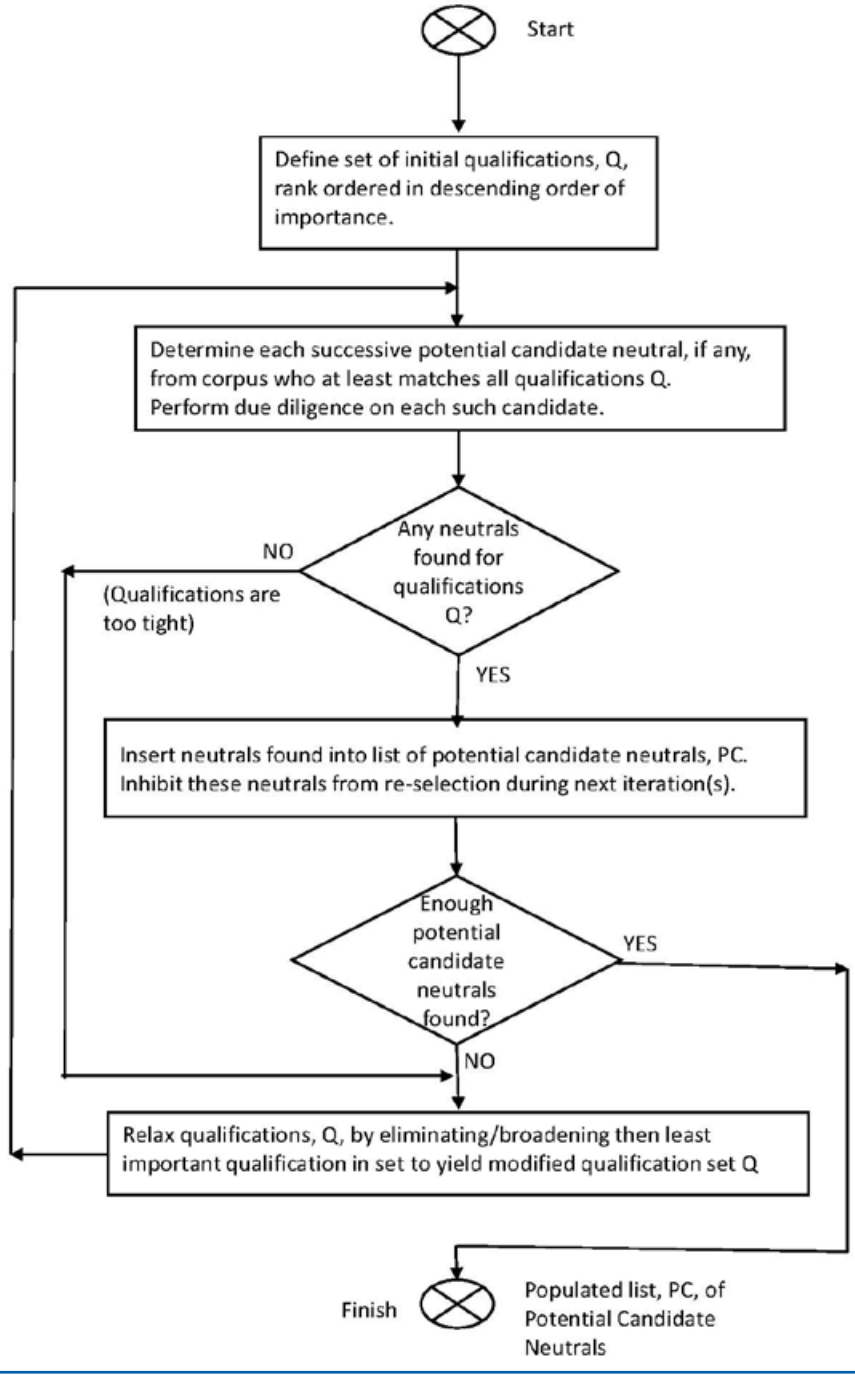
For mediation, try to identify the underlying driving causes of the dispute (e.g., relational, psychological, substantive, financial, etc.) and an appropriate skill set to deal with them. Choose mediators from among your candidates who possess most, if not all, of those skills.

When assessing neutrals, trust your instincts. If, after doing all your due diligence and owing solely to your own intuition, you just do not have a good feeling about a particular candidate but cannot articulate the reason, strike that candidate from your list and move on to the next person.

Using your interview data and criteria, compare your candidates and rank them in order of your preference. Then, select the top ranked candidates as those you want appointed. If you do not get useful results, modify the process, including your neutral requirements and interview selection criteria, as needed, and repeat the process, or appropriate parts of it, as often as necessary until you get the neutrals you want.

To enhance understanding, an illustrative, though simplistic, implementation of this approach is diagrammatically shown in flowchart form in accompanying Fig-

Figure 2. Potential Candidate Neutral Selection (20)



ures 1–3. The overall process, shown in Figure 1, consists of four basic blocks (processes) 10–40.

First, through block 10, institutional due diligence, if necessary, is performed. Then, through block 20, neutral qualifications are defined; and potential candidate neutrals are then selected based on how well each neutral in a corpus matches (or exceeds) all the qualifications, and, if an insufficient number of potential candidate neutrals results, the qualifications, starting with those which are then the least important, are successively eliminated or relaxed, with the selection and qualification modification steps iteratively continuing in tandem until enough potential candidate neutrals have been selected. This eventually yields a list of potential candidate neutrals, PC. Thereafter, block 30 is performed, through which interview criteria are developed; each potential candidate in list PC is interviewed and assessed using these criteria; and candidate neutrals are then selected based on how well each potential candidate neutral matches (or exceeds) all the criteria, and, if an insufficient number of candidate neutrals results, the criteria, starting with those which are then the least important, are successively eliminated or relaxed, with the selection and criteria modification steps iteratively continuing in tandem until enough candidate neutrals have been selected. This yields a list of candidate neutrals, CN, from which, via block 40, actual neutrals are selected and appointed to the panel.

Further details of blocks 20 and 30 are shown respectively in Figures 2–3. The selection and qualifications/criteria modification steps in each block are implemented through very similar loop operations. Depending on the qualifications and criteria chosen and the degree to which the neutrals in the corpus actually meet either or both of those, either the qualifications or criteria may be dynamically eliminated or relaxed to a considerable extent through operation of blocks 20 or 30, respectively. As the remaining details of these two figures are quite self-evident, no further explanation is needed.

No selection process can guarantee good results. However, where potential neutrals have made sufficient trustworthy information about themselves readily available, then, by following my perspectives, you are more likely than not to find the right neutral(s) who will run a high-quality ADR process to the benefit of all concerned.

Figure 3. Candidate Neutral Selection (30)