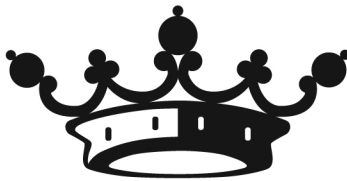


I N S I D E T H E M I N D S

The Role of Ethics in ADR

*Leading Lawyers on Understanding the Ethical
Obligations of Attorneys Engaging
in Alternative Dispute Resolution*



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Promoting and Preserving Neutrality and Impartiality in ADR

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Introduction

ADR processes, both mediation and arbitration, require that a neutral be, and appear to be, impartial. The process of selecting an ADR neutral works against this premise, but best practices, as described in the literature, drive the conduct of ADR neutrals to normative behavior that bespeaks neutrality. Even so, except where they are affirmatively partisan, party-designated arbitrators in three-arbitrator proceedings must take steps to preserve their status as impartial. One place to start is for them to pledge to each other their neutrality. In addition, avoiding *ex parte* communications with the party that selected them contributes to an environment of neutrality.

The Role of Neutrality as a Paramount Ethical Consideration for ADR Practitioners

The ADR process demands first and foremost that the ADR neutral, whether a mediator or an arbitrator, exhibit just that, neutrality. Third-party neutrality is the cornerstone of any ADR process, and the neutral must be, and must be perceived to be, fair and impartial. From the time that the mediator or arbitrator first learns that the parties are considering him or her to serve as the third-party neutral in a dispute, the neutral must exhibit integrity and fairness.

Searching for Fairness

The Supreme Court has interpreted the Due Process Clause of the Constitution's Fifth Amendment as requiring a "neutral and detached judge." U.S. Const. amend. V; *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1971). Litigants expect judges to be fair. While certain judges may have reputations as being plaintiff-minded or defense-minded, litigants come to court with the legitimate expectation that the judge will be open to both sides' presentations and will enter the decision-making process without partisanship, favor, or bias toward any of the parties or their counsel. But there is a different baseline in ADR. Parties and their counsel choose their ADR neutral, unlike in a judicial proceeding where the judge is assigned. In the selection process, parties and their counsel invariably know of or take steps to learn about the neutral they are considering for appointment,

disqualify anyone they think will be adverse to their positions, and opt for candidates whose appointment they believe will be to their advantage.

Paradoxically, the ADR process, whether mediation or arbitration, requires that the ADR professional not be influenced by the very considerations that enter into the parties' selection calculus. The justice proposition requires a private party to serve with fairness as a surrogate for a judge, and society will continue to endorse that proposition by promoting ADR as an accepted and increasingly more popular dispute resolution option so long as justice is not abandoned to achieve the promises of efficiency and economy that come with an ADR proceeding.

To aid in the selection process, the ADR neutral must make full disclosure of any relationships he or she has with any of the parties or their counsel. As gatekeepers, the parties cannot possibly select the appropriate decision-maker in the absence of total disclosure. Whether social, professional, or political, even the most casual interaction or encounter should be disclosed in the neutral selection process. "It cannot therefore be left to the fox, who is the potential arbitrator, to guard the arbitration henhouse, secretly identifying to himself alone all 'prior or present relationships' then just as secretly deciding which are worthy of disclosure and which are not." *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 476 F.3d 278, 293 (5th Cir. 2006) (Wiener, J., dissenting). Further, adversaries in a dispute must have equal access to information about who has known whom, under what circumstances, and for how long. Only then can the parties make their own determinations about whether a proposed mediator or arbitrator is appropriate. Each party must affirmatively believe that the neutral's prior relationships with the participants in the ADR process will not affect the fairness of the neutral's conduct in mediating or arbitrating the dispute.

For ADR processes to exist alongside formal judicial proceedings as an acceptable alternative means for resolving disputes, the perception of impartiality is critical. Indeed, one of the few grounds on which an arbitrator's award may be set aside under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (2011), is "where there was evident partiality or corruption in the arbitrators, or either of them." *See* 9 U.S.C. § 10(a)(2). Promoting and preserving neutrality of ADR practitioners is galvanized by practice and legal standards, and is necessary to the continued growth of ADR.

Model Ethical Standards and Codes of Conduct for Mediators and Arbitrators

As ADR has matured into an accepted and mainstream modality for resolving disputes, provider organizations and governing bodies have developed standards of conduct for mediators and arbitrators. While they do not have the force of law, these standards establish normative behavior for ADR neutrals and provide guidance to ADR practitioners and litigants and their counsel alike.

Guidance on Neutrality in ADR

For arbitrators, there is the Code of Ethics for Arbitrators in Commercial Disputes, originally prepared in 1977 by a joint committee of the American Arbitration Association (AAA) and a special committee of the American Bar Association (ABA), and revised in 2003 by an ABA task force and a special committee of the AAA. *See* Code of Ethics for Arbitrators in Commercial Disputes (ABA 2004), www.americanbar.org/content/dam/aba/migrated/dispute/commercial_disputes.authcheckdam.pdf, included as Appendix A.

For mediators, there is the Model Standards of Conduct for Mediators, initially prepared in 1994 by the AAA, the ABA's Section of Dispute Resolution, and the Association for Conflict Resolution, and revised by those bodies in 2005. *See* Model Standards of Conduct for Mediators (ABA 2005), www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.authcheckdam.pdf, included as Appendix B.

These standards tout integrity and fairness, disclosure, and neutrality and impartiality as key elements of an ADR neutral's mantle, without which the parties cannot rely on the fairness of the process and the sustainability of the outcome.

Model Standards of Conduct for Mediators

The Model Standards of Conduct for Mediators state that mediators serve three primary goals: "to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a

process for resolving disputes.” *Id.* at Preamble. While Standard I provides the foundational principle of self-determination—that is, the parties’ “coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome”—it is Standards II and III that require that the mediator be impartial and free from any conflicts of interest. Standard II.A states that:

a mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

Id. at Standard II.A.

Standard III.A provides that:

a mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after the mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator’s impartiality.

Id. at Standard III.A.

These standards speak to the integrity of both the process and the neutral. They set the bar for acceptable behavior and inform the neutral of his or her obligations of fairness and, equally important, the appearance of fairness in administering a mediation.

The Code of Ethics for Arbitrators in Commercial Disputes

The Code of Ethics for Arbitrators in Commercial Disputes likewise states that its goal is to “set forth generally accepted standards of ethical conduct for the guidance of arbitrators and parties in commercial disputes.” Code of Ethics, Preamble.

Canon I.A notes that the “arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved.” Canon I.B continues:

One should accept appointment as an arbitrator only if fully satisfied:

...

(2) that he or she can serve independently from the parties, potential witnesses, and the other arbitrators...

Id. at Canon I.B.

Special Considerations in Three-Arbitrator Proceedings

Importantly, the Code of Ethics contains a note on neutrality, which recognizes that in some types of commercial arbitrations, the arbitration agreement provides for three arbitrators instead of just one. In certain of those cases, the agreement calls for each party to select one arbitrator, and for the two party-designated arbitrators, the parties, or an independent institution to select the third. The issue that arises from this constellation is whether and to what extent the party-designated arbitrators are truly neutral.

Absent a dispute resolution agreement to the contrary, parties remain free to compose the arbitral tribunal by appointing neutral or non-neutral arbitrators, as long as equal representation is given to each side of the dispute. Whether it is best for the process of arbitration or not, a point that will be discussed below, historically courts have been willing to accept that party-appointed arbitrators often are not impartial. Courts have been clear that “the parties to an arbitration choose their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen.” *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir. 1983), *cert. denied* 464 U.S. 1009 (1983), *mandate amended* 728 F.2d 943 (7th Cir. 1984) (quoting *American Almond Products Co. v. Consolidated Pecan Sales Co.*, 144 F.2d 448, 451 (2d Cir. 1944) (L. Hand, J.)). The Federal

Arbitration Act limits the circumstances under which courts may vacate arbitration awards so as not to jeopardize their finality or return the parties to extended court expense and delay. A court cannot set aside an award under § 10(a)(2) of the Federal Arbitration Act where a party-appointed arbitrator on a tripartite panel exhibited an appearance of partiality, because as one court has stated, “in the main party-appointed arbitrators are *supposed* to be advocates.” *Sphere Drake Ins. Ltd. v. All American Life Ins. Co.*, 307 F.3d 617, 620 (7th Cir. 2002), *cert. denied* 538 U.S. 961 (2003) (holding that the party-appointed arbitrator, who had also represented a subsidiary of the appointing party in an unrelated matter four years prior to the arbitration, was not “evidently partial” for failing to disclose his prior involvement with the appointing party). “Arbitration differs from adjudication, among other ways, because the ‘appearance of partiality’ ground of disqualification for judges does not apply to arbitrators; only *evident* partiality, not appearances or risks, spoils an award.” *Id.*, 307 F.3d at 621.

Ascertaining what constitutes “evident partiality” for neutral and party-designated arbitrators has fostered widely inconsistent standards for vacatur of arbitration awards. The origins of the conflict reach as far back as the Supreme Court’s 1968 decision in *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968). In *Commonwealth Coatings*, the Supreme Court vacated an arbitration award where the “neutral” arbitrator in a tripartite panel had failed to disclose a business relationship with one of the parties to the arbitration. Justice Black explained in his opinion:

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

Id. at 149-150 (emphasis added).

Justice Black imported this rigorous standard from the mandates safeguarding the impartiality of Article III judges. *See id.* at 149. He further concluded that when the parties have the relevant information at their disposal, it is up to them to decide whether a conflict is so significant as to warrant an objection. *Id.*

Some lower courts have limited the impact of Justice Black’s opinion on the ground that he was speaking for a plurality of the court, and instead give effect to Justice White’s concurring opinion, which sets forth a different standard. Justice White emphasized that federal courts ought not hold arbitrators to the strict impartiality standards applicable to Article III judges: “It is enough for present purposes to hold, as the court does, that where the arbitrator has a substantial interest in a firm which has some more than trivial business with a party, the fact must be disclosed.” *Id.* at 151-152 (White, J., concurring). He concluded that “arbitrators are not automatically disqualified by a business relationship with the parties if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial.” *Id.* at 150.

Since *Commonwealth Coatings*, lower courts have generally held that the evident partiality standard occupies the middle ground, requiring something between mere appearance of bias and some evidence of actual bias on the part of the neutral arbitrator, or at least sufficient evidence of circumstantial facts that would give rise to a question of bias, to vacate an arbitral award. *See, e.g., generally Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, certiorari denied (7th Cir. 1983) (holding that although the neutral arbitrator’s failure to disclose the fact that one of the parties to the arbitration was his former employer violated governing legal and ethical standards for arbitrators, it did not constitute “evident partiality”); *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197 (11th Cir. 1982) (arbitration award vacated for “evident partiality” when company owned by the neutral arbitrator’s family was entangled in a dispute with the parties to the litigation in which he personally lost \$85,000, and he was under investigation for alleged unethical conduct involving the same parties); *Lifetime Int’l, Inc. v. CD Medical, Inc.*, 68 F.3d 429 (11th Cir. 1995) (affirming district court decision that neutral arbitrator’s failure to disclose prior disagreement and contacts with party counsel did not give rise to “reasonable impression of partiality”); *Schmitz v. Ziveti*, 20 F.3d 1043 (9th Cir. 1994) (recognizing that the evident partiality of

an arbitrator appointed as a neutral is established from the non-disclosure itself, regardless of whether the undisclosed information actually establishes evident partiality or bias).

How, then, do the teachings of *Commonwealth Coatings* and its progeny guide the application of the “evident partiality” standard of the Federal Arbitration Act’s Section 10(a)(2) to the analysis, in the absence of language in the governing arbitration agreement to the contrary, of a party-appointed arbitrator’s right to “appear” to be a partial advocate, and concomitant obligation not to exhibit “evident partiality”? *Sphere Drake*, 307 F.3d. at 620, 621. The still unfolding conflict of authority as to whether party-appointed arbitrators will be held to the same standards as neutrals is rooted in the contractual agreements of the parties themselves and the applicable statutes governing the arbitration (*i.e.*, the Federal Arbitration Act or the various states’ adoption of the Uniform Arbitration Act or the Revised Uniform Arbitration Act, discussed below). In general, courts impose less exacting duties and less burdensome disclosure rules upon non-neutral arbitrators. With that said, resolution of the conflict created by the opinions of Justices White and Black in *Commonwealth Coatings* relies less on statutory interpretation than individual analysis. A case-by-case objective inquiry into evident partiality is appropriate where the complaint of evident partiality concerns a party-appointed arbitrator. *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 645 (6th Cir. 2005) (holding that evident bias of party-appointed arbitrator must be shown by more than an amorphous institutional predisposition toward the other side). The resulting disunity surrounding the application of the evident partiality standard where the complaint concerns a party-appointed arbitrator’s bias and its effect on arbitration due process is the likely byproduct of any inquiry into fairness, bias, and partiality, all of which are inherently driven by questions of fact.

Despite the unsettled state of the law, courts have imposed limitations on both party-appointed arbitrators and the parties who nominate them. As for party-appointed arbitrators, one court has stated, “although party-appointed arbitrators may not be expected to be neutral, this ‘does not mean that such arbitrators are excused from their ethical duties and the obligation to participate in the arbitration process in a fair, honest, and good-faith manner.’” *Metropolitan Dist. Comm’n v. Connecticut Resources Recovery Authority*,

22 A.3d 651, 657 (Conn. App. 2011) (*quoting Metropolitan Prop. & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co.*, 780 F. Supp. 855, 892 (D. Conn. 1991) (recognizing the Code of Ethics’ distinction between a neutral arbitrator’s and a non-neutral party-appointed arbitrator’s duty to disclose conflicts of interest, holding that the non-neutral party-appointed arbitrator’s failure to disclose, *inter alia*, violated the Code of Ethics).

As for the parties that have appointed non-neutral party-designated arbitrators, it should come as no surprise that the potential unfairness from the non-neutral nature of a party-appointed arbitrator is rarely grounds for post-arbitration vacatur of the award. See *Astoria Med. Group v. Health Ins. Plan of Greater New York*, 182 N.E.2d 85, 87 (N.Y. 1962) (“arising out of the repeated use of the tripartite arbitral board, there has grown a common acceptance of the fact that the party-designated arbitrators are not and cannot be ‘neutral,’ at least in the sense that the third arbitrator or a judge is”). Parties continue to seek to vacate arbitration awards for party-appointed arbitrator bias and prejudice. Ironically, the result is not less litigation, but more, which thwarts the promise of ADR. The hurdles that movants in these cases face are twofold. First, when a party-appointed arbitrator is selected, the parties are on notice that impartiality may exist. *Id.* Second, failure to timely raise bias objections to party-appointed arbitrators often bars a later motion to vacate, on the ground of waiver. See, e.g., generally *Fidelity Federal Bank v. Duga Ma Corp.*, 386 F.3d 1306 (9th Cir. 2004) (holding that objecting party waived its right to seek vacatur of award by party-appointed arbitrator who agreed to “act neutrally,” as objecting party had constructive knowledge of potential arbitrator partiality and failed to raise objection until after award); *Delta Mine Holding Co. v. AFC Coal Props., Inc.*, 280 F.3d 815 (11th Cir. 2001) (finding that when a neutral arbitrator fails to disclose a relationship with one party that casts significant doubt on the arbitrator’s impartiality, as in *Commonwealth Coatings*, but where the parties have expressly agreed to select partial party arbitrators, the award should be confirmed unless the objecting party proves that the party-arbitrator’s partiality prejudicially affected the award); *Daiichi Hawaii Real Estate Corp. v. Lichter*, 82 P.3d 411 (Haw. 2003) (where objecting lessee in commercial lease tripartite arbitration who, along with lessor, had appointed a non-neutral arbitrator, was found to have had both actual and constructive knowledge of party-appointed arbitrator’s prior relationships).

The Uniform Arbitration Act and the Revised Uniform Arbitration Act

The teachings of the Uniform Arbitration Act (1955) (UAA), in effect in twenty-four states, and the Revised Uniform Arbitration Act (2000) (RUAA), in effect in fourteen states and the District of Columbia, are consistent with case law under the Federal Arbitration Act. The UAA revised the RUAA to bring clarity to arbitration by fleshing out and largely codifying the arbitration law that courts have used over the years. The UAA and the RUAA, where adopted, provide guidance under state law for enforcing arbitration agreements and awards. *See generally* Rev. Unif. Arb. Act prefatory note (2000). Under the RUAA, an arbitrator appointed as a neutral who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under § 23(a)(2). *See* Rev. Unif. Arb. Act § 12(e), 7 U.L.A. 12 (2000).

The relevant RUAA commentary provides:

Sections 12(c), (d), and (e) seek to accommodate the tensions between concepts of partiality and the need for experienced decision makers, as well as the policy of relative finality in arbitral awards. Therefore, in Section 12(e) a neutral arbitrator's failure to disclose "a known, direct, and material interest in the outcome or a known, existing, and substantial relationship with a party," gives rise to a presumption of "evident partiality" under Section 23(a)(2). Cf. Minn. Stat. Ann. § 572.10(2) (1998) (failure to disclose conflict of interest or material relationship is grounds for vacatur of award). A person who has this type of interest or relationship, in the absence of agreement by the parties, is not to serve as a neutral arbitrator under Section 11(b). Failure to disclose that type of interest or relationship creates the presumption of vacatur in Section 23(a)(2). In such cases, it is then the burden of the party defending the award to rebut the presumption by showing that the award was not tainted by the non-disclosure or there in fact was no prejudice. *See, e.g., Drinane v. State Farm Mut. Auto Ins. Co.*, 153 Ill. 2d 207, 214-16, 606

N.E.2d 1181, 1184-85, 180 Ill. Dec. 104, 107-08 (1992). A party-appointed, non-neutral arbitrator's failure to disclose would be covered under the corruption and misconduct provisions of Section 23(a)(2) because in most cases it is presumed that a party arbitrator is intended to be partial to the side which appointed that person.

Rev. Unif. Arb. Act § 12(e) cmt. 4.

The RUAA also provides:

Upon [motion] to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

1. the award was procured by corruption, fraud, or other undue means;
2. there was:
 - A. evident partiality by an arbitrator appointed as a neutral arbitrator;
 - B. corruption by an arbitrator; or
 - C. misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

Rev. Unif. Arb. Act § 23(a), 7 U.L.A. 23.

The associated RUAA commentary reads:

Section 23(a)(2) is based on UAA Section 12(a)(2). The reason “evident partiality” is a grounds for vacatur only for a neutral arbitrator is because non-neutral arbitrators, unless otherwise agreed, serve as representatives of the parties appointing them. As such, these non-neutral, party-appointed arbitrators are not expected to be impartial in the same sense as neutral arbitrators. Macneil Treatise § 28.4. However, corruption and misconduct are grounds to vacate an award by both neutral arbitrators and non-neutral

arbitrators appointed by the parties. As to misconduct, before courts will vacate an award on this ground, objecting parties must demonstrate that the misconduct actually prejudiced their rights. *Creative Homes & Millwork, Inc. v. Hinkle*, 426 S.E.2d 480 (N.C. Ct App. 1993). Courts have not required a showing of prejudice when parties challenge an arbitration award on grounds of evident partiality of the neutral arbitrator or corruption in any of the arbitrators. *Gaines Constr. Co. v. Carol City Ut., Inc.*, 164 So. 2d 270 (Fl. Dist. Ct. 1964); *Northwest Mech., Inc. v. Public Ut. Comm'n*, 283 N.W.2d 522 (Minn. 1979); *Egan & Sons Co. v. Mears Park Dev. Co.*, 414 N.W.2d 785 (Minn. Ct. App. 1987). Corruption is also a ground for vacatur in Section 23(a)(1) that does not require any showing of prejudice.

Rev. Unif. Arb. Act § 23(a) cmt. 1.

What, then, given the reluctance of courts under the Federal Arbitration Act and the UAA and RUAA to set aside party-appointed arbitrators' awards on the ground of partiality, does partisanship of party-appointed arbitrators add to ADR? Is the acknowledgement of partisanship of party-appointed arbitrators good for the process? For a variety of reasons, the answer is no. The goals of arbitration (speed, efficiency, and economy) are hindered rather than helped by partisanship on the part of party-appointed arbitrators. Indeed, the sponsors of the Code of Ethics for Arbitrators in Commercial Disputes think that partisanship of party-appointed arbitrators should be avoided. The note on neutrality states:

The sponsors of this Code believe that it is preferable for all arbitrators including any party-appointed arbitrators to be neutral, that is, independent and impartial, and to comply with the same ethical standards... However, parties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral and governed by special ethical considerations. These special ethical considerations appear in Canon X of this Code.

...

This Code...requires all party-appointed arbitrators to ascertain and disclose as soon as practicable whether the parties intended for them to serve as neutral or not. If doubt or uncertainty exists, the party-appointed arbitrators should serve as neutrals unless and until such doubt or uncertainty is resolved in accordance with Canon IX. This Code expects all arbitrators, including those serving under Canon X, to preserve the integrity and fairness of the process.

Code of Ethics, Note on Neutrality.

The note references Canon IX and Canon X. Canon IX is titled “Arbitrators appointed by one party have a duty to determine and disclose their status and to comply with this Code, except as exempted by Canon X.” Specifically, Canon IX.A notes that “in tripartite arbitrations to which this Code applies, all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator.”

Canon IX.C continues:

A party-appointed arbitrator has an obligation to ascertain, as early as possible but not later than the first meeting of the arbitrators and parties, whether the parties have agreed that the party-appointed arbitrators will serve as neutrals or whether they shall be subject to Canon X, and to provide a timely report of their conclusions to the parties and other arbitrators...

Code of Ethics, Canon IX.C.

Canon X is titled “Exemptions for arbitrators appointed by one party who are not subject to rules of neutrality.” Under this canon, party-designated arbitrators may be “predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness.” Code of Ethics, Canon X.A.(1). In sum, Canon X arbitrators may be “predisposed toward deciding in favor of the party who appointed them.” Code of Ethics, Canon X.E.

The Need for Neutrality of Party-Appointed Arbitrators

To secure ADR's place in the justice system, promote the use of ADR as a dispute resolution modality, and assist the third arbitrator in the decision-making process, neutrality on the part of all three arbitrators in a tripartite panel is preferable to partisanship on the part of two. For the same reasons that a single arbitrator must be neutral, the integrity of the party-designated arbitrators is heightened by a decision that they will serve without preference for the positions being advanced by the side that selected them. A fully neutral panel can have more open discussions about the weight of the parties' evidence, and the quality of the decision-making is improved by the three arbitrators' using each other as sounding boards in reaching the ultimate determination of the dispute. If a transaction is high-stakes enough to warrant drafting an agreement that accepts the added expense of a three-arbitrator panel, instead of a single arbitrator, it likely means that most disputes arising out of that transaction will be that much more complex and, as a result, will benefit from three fact-finders examining the proof and considering its legal import. Party-appointed arbitrators reduce the efficacy of arbitration as well as the quality of justice achieved. Having two of those arbitrators predisposed to an outcome robs the panel of its ability to have the kind of robust and fair-minded discussions that ultimately increase the chances of a well-reasoned and demonstrably correct decision.

The Code of Ethics establishes that party-appointed arbitrators have a duty at the earliest possible time to confer with their appointing party and determine whether they are to be neutral and follow Canon IX, or be partisan and follow Canon X. Canon IX.C.(2) makes this clear:

Where party-appointed arbitrators conclude that the parties intended for the party-appointed arbitrators not to serve as neutrals, they should so inform the parties and the other arbitrators.

Code of Ethics, Canon IX.C.(2).

If neutrality is the course the party-designated arbitrators jointly agree to follow, it highlights the importance of the early conversations between arbitrator and appointing party. What is said and what remains unspoken is key to the process. When an agreement is silent on the issue of partisanship,

the party-designated arbitrator who is appointed pursuant to that agreement should express to the designating party that he or she expects to be neutral, and explain why that is the preferable course of conduct. This may come as some surprise to the designating party, who may believe that merely by having appointed that arbitrator, the party is entitled to some special consideration in the decision-making process. In the absence of explicit direction to the contrary in the governing arbitration agreement, however, the arbitrator should counsel his or her appointing party that neutrality of all three arbitrators is best. Citing to Canon IX may provide the clarity the designating party needs to dispel any notion that the designated arbitrator will in some small way be in that party's camp at decision-making time.

The Difficulties of Neutrality

But what about the arbitrator himself or herself? Can a party-designated arbitrator ever totally divorce himself or herself from the party that selected him or her? Influence can so easily disrupt the decision process. This is where character separates the truly neutral party-appointed arbitrator from the one who continues to feel the pull and tug of allegiance, even in some small way, to the designating party. The enlightened neutral recognizes that objective good faith is not the only dominion over an arbitrator's actions and (i) is inclined to set aside considerations of practice sustainability and reputational interest (will this party select me again in the future?), (ii) will not shield himself or herself from information to avoid a conflict or restriction; (iii) does not succumb to the heuristic of anchoring and adjustment (you hear the story from your appointing party first, which anchors your impression of the facts); and (iv) resists the ever-so-subtle affinity an arbitrator might feel from the mere fact of having been chosen. Human nature suggests that all four factors will be in play. The truly neutral party-designated arbitrator will exert internal pressure on himself or herself to overcome them.

The Third Arbitrator

The third arbitrator in a two party-designated arbitrator constellation can also have a positive impact on the fundamental fairness and complete neutrality of the two other arbitrators. At the first opportunity, usually in the initial telephone conference of all the arbitrators, which is set up to

discuss schedules and tend to administrative tasks, the third arbitrator, often referred to by the value-laden term “umpire,” should ask the two party-designated arbitrators if they are neutral or partisan.

When the third arbitrator asks about the neutrality of the other two arbitrators, stating the question in the affirmative sets the stage, such as: “I assume unless you tell me otherwise that you are neutral and nonpartisan, and that you will decide this case with impartiality and without bias in favor of the party who selected you. Tell me now, so I know how to treat you when we confer, as equals in the decision-making process or as advocates for one of the parties.”

If the two party-appointed arbitrators verbally affirm their neutral status in the presence of each other and the third arbitrator, and each hears the other say that he or she is not predisposed to one of the parties, the third arbitrator has, in effect, cemented the public commitment of the other two to neutrality and is assured that each will hold both himself or herself and the other party-designated arbitrator to that standard.

Ex Parte Communication

This commitment to neutrality can be undercut, however, by a practice that allows the party-appointed arbitrators to communicate *ex parte* with the party that appointed them until some future date, often the date of the filing of pre-hearing memoranda, or worse yet, the first day of hearings. Allowing such communication sends the wrong message.

If all arbitrators are to be neutral, there is no reason a party-appointed arbitrator should speak to the party that appointed him or her once the panel is constituted and the arbitrators make a commitment to neutrality. To behave otherwise is to allow the party-appointed arbitrator to inform the designating party of the inner workings of the panel, the impressions the third arbitrator has of each side’s initial presentation at the first pre-hearing conference, and the relative strength of the two sides’ positions. None of this is in the spirit of impartiality, and all of this leads to distrust and mischief. To be truly neutral, all *ex parte* discussions must cease immediately upon the selection of the third arbitrator and the taking of the

pledge of neutrality that the third arbitrator asks of the other two members of the panel.

What's in a Name?

Calling the third arbitrator the “umpire” does nothing but undercut the concept of neutrality across the full arbitration panel. It creates the impression that the two party-designated members of the panel will be importuning the third arbitrator to decide individual disputes that arise during the pre-hearing process, or, indeed, the ultimate outcome of the dispute. An umpire calls balls and strikes, and decides if a player is safe or out. He or she does it alone, not in committee, and the umpire’s call is final and binding. This construct robs the party-appointed arbitrators of their rightful place as full and equal participants in deciding the matter, and it places them in partisan opposition to each other, even if they have pledged their neutrality.

Instead, the third arbitrator should be designated as the “chair” of the panel. Doing so acknowledges that he or she is the head of the panel and, as such, is the administrative leader when it comes to setting up pre-hearing conferences and, commonly, drafting orders and opinions. It is a title that is organizational in nature, not one that connotes greater weight in the decision process. It allows a free flow of ideas and open discussion. It accounts for the possibility that the two other arbitrators will agree with each other and not with the chair, and it breeds equality of status and point of view. Such a designation is more than window-dressing. It is a public expression of the unity of the panel in reaching a fair decision, unencumbered by any hint of partisanship. Words have weight, and this word distributes the authority of decision-making equally among all three arbitrators.

Why Have Non-Neutral Arbitrators?

Finally, a comment about Canon X arbitrators. In effect, what is the point? The parties have able counsel who can argue their positions, put up witnesses to present testimony, and brief their arguments and the applicable law at the conclusion of the case. What value is there in interposing another set of adversaries between the parties’ counsel and the single neutral? A

third arbitrator can never trust the views expressed by Canon X arbitrators, who are presumptively partisan. Every utterance by a Canon X arbitrator must be discounted by the inherent bias of that arbitrator's very position.

By definition, Canon X arbitrators cannot exhibit fairness in helping the neutral arbitrator decide the case. They make every discussion contentious, they serve only to restate their designating party's view, and they champion a predetermined outcome, repeating only the testimony that favors their party and restating only the arguments that support it. The parties would be far better off with a single arbitrator in such cases, a clear-thinking and open-minded referee who is faithful to the pledge of fairness and whose only goal is to get it right when reaching a decision on the merits.

Conclusion

Mediators and arbitrators alike must dedicate themselves to neutrality as third-party participants in ADR proceedings. The Model Standards of Conduct for Mediators, the Code of Ethics for Arbitrators in Commercial Disputes, and the UAA and RUAA all establish a framework for thinking about neutrality, and serve as a guide to both neutrals and parties as they enter the ADR arena. As ADR becomes a more widely used method of resolving disputes and takes a larger place in the justice system, it must continue to serve its users without bias or interest or predisposition as to outcome. The public depends on this, and so does the reputation of ADR providers everywhere.

Key Takeaways

- To ensure fairness as an ADR neutral, a neutral must first disclose any connections, no matter how slight, with the parties involved in a dispute and, in the case of a three-arbitrator panel, with the other arbitrators with whom he or she will be serving. A neutral's impartiality, and the perception of impartiality, must be beyond question.
- The ABA Model Standards of Conduct for Mediators, the ABA Code of Ethics for Arbitrators in Commercial Disputes, and the Uniform Arbitration Act and Revised Uniform Arbitration Act all establish normative behavior for ADR neutrals.

- To secure ADR's place in the justice system, promote the use of ADR as a dispute resolution modality, and assist the third arbitrator in the decision-making process, neutrality on the part of all three arbitrators in a tripartite panel is preferable to partisanship on the part of two.
- Where the parties each appoint an arbitrator and the two party-appointed arbitrators select the third, in the absence of explicit contrary direction in the governing arbitration agreement, the two party-appointed arbitrators should be neutral, and should affirm their neutral status in the presence of each other and the chair. This causes them to publicly commit to neutrality and hold themselves and each other to that standard.
- Allowing *ex parte* communication undercuts the neutrality of the arbitration panel. Best practices suggest that where the party-appointed arbitrators are truly neutral, all *ex parte* discussions stop upon the selection of the third arbitrator and the taking of the pledge of neutrality.

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APPENDIX A

ABA CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES

*Approved by the American Bar Association
House of Delegates on February 9, 2004*

*Approved by the Executive Committee
of the Board of Directors of the AAA*

The Code of Ethics for Arbitrators in Commercial Disputes was originally prepared in 1977 by a joint committee consisting of a special committee of the American Arbitration Association and a special committee of the American Bar Association. The Code was revised in 2003 by an ABA Task Force and special committee of the AAA. Both the original 1977 Code and the 2003 Revision have been approved and recommended by both organizations.

Preamble

The use of arbitration to resolve a wide variety of disputes has grown extensively and forms a significant part of the system of justice on which our society relies for a fair determination of legal rights. Persons who act as arbitrators therefore undertake serious responsibilities to the public, as well as to the parties. Those responsibilities include important ethical obligations.

Few cases of unethical behavior by commercial arbitrators have arisen. Nevertheless, this Code sets forth generally accepted standards of ethical conduct for the guidance of arbitrators and parties in commercial disputes, in the hope of contributing to the maintenance of high standards and continued confidence in the process of arbitration.

This Code provides ethical guidelines for many types of arbitration but does not apply to labor arbitration, which is generally conducted under the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.

There are many different types of commercial arbitration. Some proceedings are conducted under arbitration rules established by various organizations and trade associations, while others are conducted without such rules. Although most proceedings are arbitrated pursuant to voluntary agreement of the parties, certain types of disputes are submitted to arbitration by reason of particular laws. This Code is intended to apply to all such proceedings in which disputes or claims are submitted for decision to one or more arbitrators appointed in a manner provided by an agreement of the parties, by applicable arbitration rules, or by law. In all such cases, the persons who have the power to decide should observe fundamental standards of ethical conduct. In this Code, all such persons are called “arbitrators,” although in some types of proceeding they might be called “umpires,” “referees,” “neutrals,” or have some other title.

Arbitrators, like judges, have the power to decide cases. However, unlike full-time judges, arbitrators are usually engaged in other occupations before, during, and after the time that they serve as arbitrators. Often, arbitrators are purposely chosen from the same trade or industry as the parties in order to bring special knowledge to the task of deciding. This Code recognizes these fundamental differences between arbitrators and judges.

In those instances where this Code has been approved and recommended by organizations that provide, coordinate, or administer services of arbitrators, it provides ethical standards for the members of their respective panels of arbitrators. However, this Code does not form a part of the arbitration rules of any such organization unless its rules so provide.

Note on Neutrality

In some types of commercial arbitration, the parties or the administering institution provide for three or more arbitrators. In some such proceedings, it is the practice for each party, acting alone, to appoint one arbitrator (a “party-appointed arbitrator”) and for one additional arbitrator to be designated by the party-appointed arbitrators, or by the parties, or by an independent institution or individual. The sponsors of this Code believe that it is preferable for all arbitrators – including any party-appointed arbitrators – to be neutral, that is, independent and impartial, and to comply with the same ethical standards. This expectation generally is essential in

arbitrations where the parties, the nature of the dispute, or the enforcement of any resulting award may have international aspects. However, parties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral and governed by special ethical considerations. These special ethical considerations appear in Canon X of this Code.

This Code establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise. This Code requires all party-appointed arbitrators, whether neutral or not, to make pre-appointment disclosures of any facts which might affect their neutrality, independence, or impartiality. This Code also requires all party-appointed arbitrators to ascertain and disclose as soon as practicable whether the parties intended for them to serve as neutral or not. If any doubt or uncertainty exists, the party-appointed arbitrators should serve as neutrals unless and until such doubt or uncertainty is resolved in accordance with Canon IX. This Code expects all arbitrators, including those serving under Canon X, to preserve the integrity and fairness of the process.

Note on Construction

Various aspects of the conduct of arbitrators, including some matters covered by this Code, may also be governed by agreements of the parties, arbitration rules to which the parties have agreed, applicable law, or other applicable ethics rules, all of which should be consulted by the arbitrators. This Code does not take the place of or supersede such laws, agreements, or arbitration rules to which the parties have agreed and should be read in conjunction with other rules of ethics. It does not establish new or additional grounds for judicial review of arbitration awards.

All provisions of this Code should therefore be read as subject to contrary provisions of applicable law and arbitration rules. They should also be read as subject to contrary agreements of the parties. Nevertheless, this Code imposes no obligation on any arbitrator to act in a manner inconsistent with the arbitrator's fundamental duty to preserve the integrity and fairness of the arbitral process.

Canons I through VIII of this Code apply to all arbitrators. Canon IX applies to all party-appointed arbitrators, except that certain party-appointed arbitrators are exempted by Canon X from compliance with certain provisions of Canons I-IX related to impartiality and independence, as specified in Canon X.

CANON I. AN ARBITRATOR SHOULD UPHOLD THE INTEGRITY AND FAIRNESS OF THE ARBITRATION PROCESS.

- A. An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator should recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding. This responsibility may include pro bono service as an arbitrator where appropriate.
- B. One should accept appointment as an arbitrator only if fully satisfied:
 - 1. that he or she can serve impartially;
 - 2. that he or she can serve independently from the parties, potential witnesses, and the other arbitrators;
 - 3. that he or she is competent to serve; and
 - 4. that he or she can be available to commence the arbitration in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the parties are reasonably entitled to expect.
- C. After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality. For a reasonable period of time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which

might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest. Existence of any of the matters or circumstances described in this paragraph C does not render it unethical for one to serve as an arbitrator where the parties have consented to the arbitrator's appointment or continued services following full disclosure of the relevant facts in accordance with Canon II.

- D. Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, and fear of criticism or self-interest. They should avoid conduct and statements that give the appearance of partiality toward or against any party.
- E. When an arbitrator's authority is derived from the agreement of the parties, an arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules. An arbitrator has no ethical obligation to comply with any agreement, procedures or rules that are unlawful or that, in the arbitrator's judgment, would be inconsistent with this Code.
- F. An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision. An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.
- G. The ethical obligations of an arbitrator begin upon acceptance of the appointment and continue throughout all stages of the proceeding. In addition, as set forth in this Code, certain ethical obligations begin as soon as a person is requested to serve as an arbitrator and certain ethical obligations continue after the decision in the proceeding has been given to the parties.
- H. Once an arbitrator has accepted an appointment, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue. When an

arbitrator is to be compensated for his or her services, the arbitrator may withdraw if the parties fail or refuse to provide for payment of the compensation as agreed.

- I. An arbitrator who withdraws prior to the completion of the arbitration, whether upon the arbitrator's initiative or upon the request of one or more of the parties, should take reasonable steps to protect the interests of the parties in the arbitration, including return of evidentiary materials and protection of confidentiality.

Comment to Canon I

A prospective arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved. Arbitrators may also have special experience or expertise in the areas of business, commerce, or technology which are involved in the arbitration. Arbitrators do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the arbitration, but an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration.

During an arbitration, the arbitrator may engage in discourse with the parties or their counsel, draw out arguments or contentions, comment on the law or evidence, make interim rulings, and otherwise control or direct the arbitration. These activities are integral parts of an arbitration. Paragraph D of Canon I is not intended to preclude or limit either full discussion of the issues during the course of the arbitration or the arbitrator's management of the proceeding.

CANON II. AN ARBITRATOR SHOULD DISCLOSE ANY INTEREST OR RELATIONSHIP LIKELY TO AFFECT IMPARTIALITY OR WHICH MIGHT CREATE AN APPEARANCE OF PARTIALITY.

- A. Persons who are requested to serve as arbitrators should, before accepting, disclose:

1. Any known direct or indirect financial or personal interest in the outcome of the arbitration;
 2. Any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective arbitrators should disclose any such relationships which they personally have with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts;
 3. The nature and extent of any prior knowledge they may have of the dispute; and
 4. Any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.
- B. Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in paragraph A.
- C. The obligation to disclose interests or relationships described in paragraph A is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, as soon as practicable, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.
- D. Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure.
- E. Disclosure should be made to all parties unless other procedures for disclosure are provided in the agreement of the parties, applicable rules or practices of an institution, or by law. Where more than one arbitrator has been appointed, each should inform the others of all matters disclosed.

- F. When parties, with knowledge of a person's interests and relationships, nevertheless desire that person to serve as an arbitrator, that person may properly serve.
- G. If an arbitrator is requested by all parties to withdraw, the arbitrator must do so. If an arbitrator is requested to withdraw by less than all of the parties because of alleged partiality, the arbitrator should withdraw unless either of the following circumstances exists:
 - 1. An agreement of the parties, or arbitration rules agreed to by the parties, or applicable law establishes procedures for determining challenges to arbitrators, in which case those procedures should be followed; or
 - 2. In the absence of applicable procedures, if the arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can nevertheless act and decide the case impartially and fairly.
- H. If compliance by a prospective arbitrator with any provision of this Code would require disclosure of confidential or privileged information, the prospective arbitrator should either:
 - 1. Secure the consent to the disclosure from the person who furnished the information or the holder of the privilege; or
 - 2. Withdraw.

CANON III. AN ARBITRATOR SHOULD AVOID IMPROPRIETY OR THE APPEARANCE OF IMPROPRIETY IN COMMUNICATING WITH PARTIES.

- A. If an agreement of the parties or applicable arbitration rules establishes the manner or content of communications between the arbitrator and the parties, the arbitrator should follow those procedures notwithstanding any contrary provision of paragraphs B and C.
- B. An arbitrator or prospective arbitrator should not discuss a proceeding with any party in the absence of any other party, except in any of the following circumstances:

1. When the appointment of a prospective arbitrator is being considered, the prospective arbitrator:
 - a. may ask about the identities of the parties, counsel, or witnesses and the general nature of the case; and
 - b. may respond to inquiries from a party or its counsel designed to determine his or her suitability and availability for the appointment. In any such dialogue, the prospective arbitrator may receive information from a party or its counsel disclosing the general nature of the dispute but should not permit them to discuss the merits of the case.
2. In an arbitration in which the two party-appointed arbitrators are expected to appoint the third arbitrator, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the choice of the third arbitrator;
3. In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning arrangements for any compensation to be paid to the party-appointed arbitrator. Submission of routine written requests for payment of compensation and expenses in accordance with such arrangements and written communications pertaining solely to such requests need not be sent to the other party;
4. In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the status of the arbitrator (i.e., neutral or non-neutral), as contemplated by paragraph C of Canon IX;
5. Discussions may be had with a party concerning such logistical matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the arbitrator should promptly

inform each other party of the discussion and should not make any final determination concerning the matter discussed before giving each absent party an opportunity to express the party's views; or

6. If a party fails to be present at a hearing after having been given due notice, or if all parties expressly consent, the arbitrator may discuss the case with any party who is present.
- C. Unless otherwise provided in this Canon, in applicable arbitration rules or in an agreement of the parties, whenever an arbitrator communicates in writing with one party, the arbitrator should at the same time send a copy of the communication to every other party, and whenever the arbitrator receives any written communication concerning the case from one party which has not already been sent to every other party, the arbitrator should send or cause it to be sent to the other parties.

CANON IV. AN ARBITRATOR SHOULD CONDUCT THE PROCEEDINGS FAIRLY AND DILIGENTLY.

- A. An arbitrator should conduct the proceedings in an even-handed manner. The arbitrator should be patient and courteous to the parties, their representatives, and the witnesses and should encourage similar conduct by all participants.
- B. The arbitrator should afford to all parties the right to be heard and due notice of the time and place of any hearing. The arbitrator should allow each party a fair opportunity to present its evidence and arguments.
- C. The arbitrator should not deny any party the opportunity to be represented by counsel or by any other person chosen by the party.
- D. If a party fails to appear after due notice, the arbitrator should proceed with the arbitration when authorized to do so, but only after receiving assurance that appropriate notice has been given to the absent party.
- E. When the arbitrator determines that more information than has been presented by the parties is required to decide the case, it is not improper for the arbitrator to ask questions, call witnesses, and request documents or other evidence, including expert testimony.

- F. Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes. An arbitrator should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all parties.
- G. Co-arbitrators should afford each other full opportunity to participate in all aspects of the proceedings.

Comment to paragraph G

Paragraph G of Canon IV is not intended to preclude one arbitrator from acting in limited circumstances (e.g., ruling on discovery issues) where authorized by the agreement of the parties, applicable rules or law, nor does it preclude a majority of the arbitrators from proceeding with any aspect of the arbitration if an arbitrator is unable or unwilling to participate and such action is authorized by the agreement of the parties or applicable rules or law. It also does not preclude ex parte requests for interim relief.

CANON V. AN ARBITRATOR SHOULD MAKE DECISIONS IN A JUST, INDEPENDENT AND DELIBERATE MANNER.

- A. The arbitrator should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues.
- B. An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.
- C. An arbitrator should not delegate the duty to decide to any other person.
- D. In the event that all parties agree upon a settlement of issues in dispute and request the arbitrator to embody that agreement in an award, the arbitrator may do so, but is not required to do so unless satisfied with the propriety of the terms of settlement. Whenever an arbitrator embodies a settlement by the parties in an award, the arbitrator should state in the award that it is based on an agreement of the parties.

CANON VI. AN ARBITRATOR SHOULD BE FAITHFUL TO THE RELATIONSHIP OF TRUST AND CONFIDENTIALITY INHERENT IN THAT OFFICE.

- A. An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.
- B. The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision. An arbitrator may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision if the arbitrator informs the parties of the use of such assistance and such persons agree to be bound by the provisions of this Canon.
- C. It is not proper at any time for an arbitrator to inform anyone of any decision in advance of the time it is given to all parties. In a proceeding in which there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone about the substance of the deliberations of the arbitrators. After an arbitration award has been made, it is not proper for an arbitrator to assist in proceedings to enforce or challenge the award.
- D. Unless the parties so request, an arbitrator should not appoint himself or herself to a separate office related to the subject matter of the dispute, such as receiver or trustee, nor should a panel of arbitrators appoint one of their number to such an office.

CANON VII. AN ARBITRATOR SHOULD ADHERE TO STANDARDS OF INTEGRITY AND FAIRNESS WHEN MAKING ARRANGEMENTS FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES.

- A. Arbitrators who are to be compensated for their services or reimbursed for their expenses shall adhere to standards of integrity and fairness in making arrangements for such payments.
- B. Certain practices relating to payments are generally recognized as tending to preserve the integrity and fairness of the arbitration process. These practices include:

1. Before the arbitrator finally accepts appointment, the basis of payment, including any cancellation fee, compensation in the event of withdrawal and compensation for study and preparation time, and all other charges, should be established. Except for arrangements for the compensation of party-appointed arbitrators, all parties should be informed in writing of the terms established.
2. In proceedings conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, communication related to compensation should be made through the institution. In proceedings where no institution has been engaged by the parties to administer the arbitration, any communication with arbitrators (other than party appointed arbitrators) concerning payments should be in the presence of all parties; and
3. Arbitrators should not, absent extraordinary circumstances, request increases in the basis of their compensation during the course of a proceeding.

**CANON VIII. AN ARBITRATOR MAY ENGAGE IN
ADVERTISING OR PROMOTION OF ARBITRAL SERVICES
WHICH IS TRUTHFUL AND ACCURATE.**

- A. Advertising or promotion of an individual's willingness or availability to serve as an arbitrator must be accurate and unlikely to mislead. Any statements about the quality of the arbitrator's work or the success of the arbitrator's practice must be truthful.
- B. Advertising and promotion must not imply any willingness to accept an appointment otherwise than in accordance with this Code.

Comment to Canon VIII

This Canon does not preclude an arbitrator from printing, publishing, or disseminating advertisements conforming to these standards in any electronic or print medium, from making personal presentations to prospective users of arbitral services conforming to such standards or from responding to inquiries concerning the arbitrator's availability, qualifications, experience, or fee arrangements.

CANON IX. ARBITRATORS APPOINTED BY ONE PARTY HAVE A DUTY TO DETERMINE AND DISCLOSE THEIR STATUS AND TO COMPLY WITH THIS CODE, EXCEPT AS EXEMPTED BY CANON X.

- A. In some types of arbitration in which there are three arbitrators, it is customary for each party, acting alone, to appoint one arbitrator. The third arbitrator is then appointed by agreement either of the parties or of the two arbitrators, or failing such agreement, by an independent institution or individual. In tripartite arbitrations to which this Code applies, all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator.
- B. Notwithstanding this presumption, there are certain types of tripartite arbitration in which it is expected by all parties that the two arbitrators appointed by the parties may be predisposed toward the party appointing them. Those arbitrators, referred to in this Code as "Canon X arbitrators," are not to be held to the standards of neutrality and independence applicable to other arbitrators. Canon X describes the special ethical obligations of party-appointed arbitrators who are not expected to meet the standard of neutrality.
- C. A party-appointed arbitrator has an obligation to ascertain, as early as possible but not later than the first meeting of the arbitrators and parties, whether the parties have agreed that the party-appointed arbitrators will serve as neutrals or whether they shall be subject to Canon X, and to provide a timely report of their conclusions to the parties and other arbitrators:
 - 1. Party-appointed arbitrators should review the agreement of the parties, the applicable rules and any applicable law bearing upon arbitrator neutrality. In reviewing the agreement of the parties, party-appointed arbitrators should consult any relevant express terms of the written or oral arbitration agreement. It may also be appropriate for them to inquire into agreements that have not been expressly set forth, but which may be implied from an

established course of dealings of the parties or well-recognized custom and usage in their trade or profession;

2. Where party-appointed arbitrators conclude that the parties intended for the party-appointed arbitrators not to serve as neutrals, they should so inform the parties and the other arbitrators. The arbitrators may then act as provided in Canon X unless or until a different determination of their status is made by the parties, any administering institution or the arbitral panel; and
3. Until party-appointed arbitrators conclude that the party-appointed arbitrators were not intended by the parties to serve as neutrals, or if the party-appointed arbitrators are unable to form a reasonable belief of their status from the foregoing sources and no decision in this regard has yet been made by the parties, any administering institution, or the arbitral panel, they should observe all of the obligations of neutral arbitrators set forth in this Code.

D. Party-appointed arbitrators not governed by Canon X shall observe all of the obligations of Canons I through VIII unless otherwise required by agreement of the parties, any applicable rules, or applicable law.

CANON X. EXEMPTIONS FOR ARBITRATORS APPOINTED BY ONE PARTY WHO ARE NOT SUBJECT TO RULES OF NEUTRALITY.

Canon X arbitrators are expected to observe all of the ethical obligations prescribed by this Code except those from which they are specifically excused by Canon X.

A. Obligations under Canon I

Canon X arbitrators should observe all of the obligations of Canon I subject only to the following provisions:

1. Canon X arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness. For

example, Canon X arbitrators should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statements to the other arbitrators; and

2. The provisions of subparagraphs B(1), B(2), and paragraphs C and D of Canon I, insofar as they relate to partiality, relationships, and interests are not applicable to Canon X arbitrators.

B. Obligations under Canon II

1. Canon X arbitrators should disclose to all parties, and to the other arbitrators, all interests and relationships which Canon II requires be disclosed. Disclosure as required by Canon II is for the benefit not only of the party who appointed the arbitrator, but also for the benefit of the other parties and arbitrators so that they may know of any partiality which may exist or appear to exist; and
2. Canon X arbitrators are not obliged to withdraw under paragraph G of Canon II if requested to do so only by the party who did not appoint them.

C. Obligations under Canon III

Canon X arbitrators should observe all of the obligations of Canon III subject only to the following provisions:

1. Like neutral party-appointed arbitrators, Canon X arbitrators may consult with the party who appointed them to the extent permitted in paragraph B of Canon III;
2. Canon X arbitrators shall, at the earliest practicable time, disclose to the other arbitrators and to the parties whether or not they intend to communicate with their appointing parties. If they have disclosed the intention to engage in such communications, they may thereafter communicate with their appointing parties concerning any other aspect of the case, except as provided in paragraph (3).
3. If such communication occurred prior to the time they were appointed as arbitrators, or prior to the first hearing

or other meeting of the parties with the arbitrators, the Canon X arbitrator should, at or before the first hearing or meeting of the arbitrators with the parties, disclose the fact that such communication has taken place. In complying with the provisions of this subparagraph, it is sufficient that there be disclosure of the fact that such communication has occurred without disclosing the content of the communication. A single timely disclosure of the Canon X arbitrator's intention to participate in such communications in the future is sufficient;

- a. Canon X arbitrators may not at any time during the arbitration disclose any deliberations by the arbitrators on any matter or issue submitted to them for decision;
 - b. communicate with the parties that appointed them concerning any matter or issue taken under consideration by the panel after the record is closed or such matter or issue has been submitted for decision; or
 - c. disclose any final decision or interim decision in advance of the time that it is disclosed to all parties.
4. Unless otherwise agreed by the arbitrators and the parties, a Canon X arbitrator may not communicate orally with the neutral arbitrator concerning any matter or issue arising or expected to arise in the arbitration in the absence of the other Canon X arbitrator. If a Canon X arbitrator communicates in writing with the neutral arbitrator, he or she shall simultaneously provide a copy of the written communication to the other Canon X arbitrator;
5. When Canon X arbitrators communicate orally with the parties that appointed them concerning any matter on which communication is permitted under this Code, they are not obligated to disclose the contents of such oral communications to any other party or arbitrator; and
6. When Canon X arbitrators communicate in writing with the party who appointed them concerning any matter on which communication is permitted under this Code, they

are not required to send copies of any such written communication to any other party or arbitrator.

D. *Obligations under Canon IV*

Canon X arbitrators should observe all of the obligations of Canon IV.

E. *Obligations under Canon V*

Canon X arbitrators should observe all of the obligations of Canon V, except that they may be predisposed toward deciding in favor of the party who appointed them.

F. *Obligations under Canon VI*

Canon X arbitrators should observe all of the obligations of Canon VI.

G. *Obligations Under Canon VII*

Canon X arbitrators should observe all of the obligations of Canon VII.

H. *Obligations Under Canon VIII*

Canon X arbitrators should observe all of the obligations of Canon VIII.

I. *Obligations Under Canon IX*

The provisions of paragraph D of Canon IX are inapplicable to Canon X arbitrators, except insofar as the obligations are also set forth in this Canon.

APPENDIX B

MODEL STANDARDS OF CONDUCT FOR MEDIATORS

*American Arbitration Association
(Adopted September 8, 2005)*

*American Bar Association
(Adopted August 9, 2005)*

*Association for Conflict Resolution
(Adopted August 22, 2005)*

September 2005

The Model Standards of Conduct for Mediators was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution.¹ A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.² Both the original 1994 version and the 2005 revision have been approved by each participating organization.³

Preamble

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating

¹ The Association for Conflict Resolution is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR was the third participating organization in the development of the 1994 Standards.

² Reporter's Notes, which are not part of these Standards and therefore have not been specifically approved by any of the organizations, provide commentary regarding these revisions.

³ The 2005 revisions to the Model Standards were approved by the American Bar Association's House of Delegates on August 9, 2005, the Board of the Association for Conflict Resolution on August 22, 2005 and the Executive Committee of the American Arbitration Association on September 8, 2005.

parties; and to promote public confidence in mediation as a process for resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

Note on Construction

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

The use of the term “shall” in a Standard indicates that the mediator must follow the practice described. The use of the term “should” indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

The use of the term “mediator” is understood to be inclusive so that it applies to co-mediator models.

These Standards do not include specific temporal parameters when referencing a mediation, and therefore, do not define the exact beginning or ending of a mediation.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of

these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

STANDARD I. SELF-DETERMINATION

- A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.
 1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.
 2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.
- B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

STANDARD II. IMPARTIALITY

- A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.
- B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.
 - 1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.
 - 2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.
 - 3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.
- C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

STANDARD III. CONFLICTS OF INTEREST

- A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.
- B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a

reasonable inquiry into potential conflicts of interest may vary based on practice context.

- C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.
- D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.
- E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.
- F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

STANDARD IV. COMPETENCE

- A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.
 - 1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence. A person who offers

- to serve as a mediator creates the expectation that the person is competent to mediate effectively.
2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.
 3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation.
- B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.
- C. If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

- A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.
1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.
 2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.
 3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.

- B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.
- C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.
- D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

STANDARD VI. QUALITY OF THE PROCESS

- A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.
 - 1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.
 - 2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.
 - 3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.
 - 4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.
 - 5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator

- may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.
6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.
 7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.
 8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.
 9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.
 10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.
- B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.
- C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

STANDARD VII. ADVERTISING AND SOLICITATION

- A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.
 - 1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.
 - 2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.
- B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.
- C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

STANDARD VIII. FEES AND OTHER CHARGES

- A. A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.
 - 1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.
 - 2. A mediator's fee arrangement should be in writing unless the parties request otherwise.

- B. A mediator shall not charge fees in a manner that impairs a mediator's impartiality.
 - 1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.
 - 2. While a mediator may accept unequal fee payments from the parties, a mediator should not use fee arrangements that adversely impact the mediator's ability to conduct a mediation in an impartial manner.

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

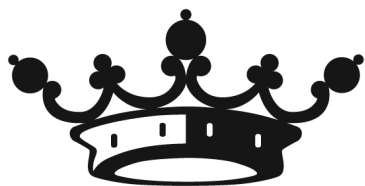
- A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:
 - 1. Fostering diversity within the field of mediation.
 - 2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.
 - 3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.
 - 4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
 - 5. Assisting newer mediators through training, mentoring and networking.
- B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.



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