



AMERICAN ARBITRATION ASSOCIATION®

INTERNATIONAL CENTRE
FOR DISPUTE RESOLUTION®

A FEW THINGS EVERY AAA ARBITRATOR SHOULD KNOW

*Ethics, Standards and Responsibilities for
Members of the AAA Roster of Arbitrators
and Mediators, and Social Media*



Recorded Webinar

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PRESENTATION TOPICS

- The Code of Ethics for Arbitrators in Commercial Disputes
 - Social Media

- *Standards and Responsibilities for Members of the AAA Roster of Arbitrators and Mediators*
 - General Standards
 - Arbitrator/Mediator Fitness Requirements

CODE OF ETHICS

- Arbitration -- an economic alternate to resolve a wide variety of disputes, often an effective alternative to litigation.
 - By deciding disputes and rendering a final, non–appealable and binding award, arbitrators:
 - ◇ Have considerable power and responsibility, and
 - ◇ Must always exercise their power to ensure integrity and fairness of the process.
- The Code of Ethics itself has ten individual canons which regulate different phases of arbitrator conduct.
 - Canons have a certain aspirational (“common sense”) character.
 - Adherence to them is not mandatory except where statutory requirements exist.
 - Arbitrators should make every effort to conform to them. It will keep you out of trouble and safeguards the arbitral process.

HISTORY OF THE CODE OF ETHICS

- Originally proposed in 1977 by a joint committee of AAA and ABA.
- Revised in 2003 by ABA Task Force and AAA committee. Approved and Recommended by both in 2004 (effective March 1, 2004).
 - Canons 1 through 6 – substantially the same as 1977 version
 - Canon 7 – substantially revised
 - Canons 8-10 – new



CODE OF ETHICS

- The Code does not apply to labor arbitrations, which has its own Code of Ethics.
- Various aspects of the Code may be governed by terms in: party-agreed arbitration provisions, governing arbitration rules, applicable law, or other applicable ethics rules.
- The Code also does not establish new or additional grounds for judicial review of arbitration awards.
- Revised Uniform Arbitration Act (where adopted) may include the Code in its entirety, or adaptations or portions of it.
- ADR organizations, other than AAA/ICDR, have adopted the Code (e.g. FINRA), as have professional organizations (e.g., CCA).



THE CANONS

Canon 1 – Uphold Integrity & Fairness of the Arbitration Process

Canon 2 – Disclosure requirements

Canon 3 – Avoid Impropriety or Appearance of Impropriety

Canon 4 – Conduct Proceedings Fairly and Diligently

Canon 5 – Make decisions in a just, independent and deliberate manner

Canon 6 – Be faithful to the relationship of Trust and Confidentiality

Canon 7 – Adhere to standards of Integrity/Fairness in arranging compensation & expense reimbursement.

Canon 8 – Arbitrator advertising/promotion

Canon 9 – Neutral party-appointed arbitrators must determine and disclose their status

Canon 10 – Non-neutral party-appointed arbitrators

Canon 1

Integrity & Fairness of the Arbitration Process



CANON 1

AN ARBITRATOR SHOULD UPHOLD THE INTEGRITY AND FAIRNESS OF THE ARBITRATION PROCESS

- Arbitrator should:
 - Observe high standards of conduct (1A)
 - Accept appointment only where you:
 - Can serve **impartially, independently & competently**, and
 - Be **available** (1B)
- Once you accept appointment: **avoid entering into any business, professional or personal relationship or acquiring any financial or personal interest which may affect your impartiality or reasonably create an appearance of partiality** (1C)
- Always be **fair** to the parties and **ignore external factors** (1D)



CANON 1 (cont.)

- **Don't exceed your powers** granted in the arbitration agreement (1E)
- **Conduct the process fairly and efficiently** (1F)
- **Your ethical obligations begin when you accept appointment and continue throughout entire proceeding** (1G)
- Once you accept a case, **do not withdraw or abandon the appointment unless unanticipated circumstances make it impossible or impractical to continue**
 - You may withdraw for non-payment (if parties agreed to pay you, but then fail to do so) (1H)
 - If you withdraw, take reasonable steps to protect parties' interest (1I)

STANDARDS AND RESPONSIBILITIES FOR MEMBERS OF THE AAA ROSTER OF ARBITRATORS AND MEDIATORS

- New and in effect as of August 2017 – To remain on the AAA roster, AAA arbitrators and mediators are annually required to review and acknowledge:
 - their compliance with these standards and responsibilities, and
 - the accuracy of the information included in their resume and user profile.
- Are a direct outgrowth of **Canon 1A – Arbitrator must observe high standards of conduct ...**



WHAT ARE THE *STANDARDS AND RESPONSIBILITIES*?

- **General standards:**

- Panelists must understand and support their responsibilities to the ADR process, the parties they serve, and the AAA.
 - ◇ Understand arbitration/mediation are expeditious, more efficient and less formal alternatives to litigation and commit to providing speed, economy and just resolution.
 - ◇ Dedication to highest practice of ethical behavior and integrity.
 - ◇ Provide very best service to users of AAA arbitration/mediation.
 - ◇ Respect for those who contribute to ADR process and roles they play.
 - ◇ Support of AAA and its policies/practices.

WHAT ARE THE *STANDARDS AND RESPONSIBILITIES*? (CONT.)

- **Fitness Requirements:**

- AAA-ICDR Arbitrators/Mediators must be **fit** to engage in cases for which they are listed/appointed.
- You must advise AAA-ICDR of any **personal, physical or mental condition that may impair your ability to fully execute your responsibilities.**
- Inactive status:
 - ◇ You can request it.
 - ◇ AAA-ICDR can, at its own discretion, place an arbitrator or mediator on inactive status.
- Advise AAA-ICDR of other Arbitrator/Mediator who may be unfit to serve.

Canon 1E

Exceeding Authority



CANON 1E
EXCEEDING AUTHORITY

- The scope of review of an arbitration award is very narrow and courts are strongly inclined to confirm these awards except in very narrow circumstances.
- One exception occurs when an arbitrator decides an issue that the parties did not submit.



CANON 1E



Arbitrator should not exceed his or her authority, but an arbitrator has no ethical obligation to comply with any agreement, procedure or rule that is unlawful or “would be inconsistent with this Code.”

CANON 1E

When a arbitrator decides an issue not submitted by the parties, a court may either vacate the award entirely or, depending on the facts, modify the award if the law permits.



DECIDING ISSUES NOT IN THE CASE

International Brotherhood of Electronic Workers, Local Union 824 v. Verizon Florida, 803 F.3d 1241 (11th Cir. 2015).

- Dispute involving a planned layoff of union employees.
- Clause in contract provided for “bumping rights” to full-time employees with more than 12 months seniority.
 - More senior person could bump less senior person.
 - Senior person must have previously held that position or can perform the job with minimum additional training.
- Union filed grievance arguing four employees should have been permitted to bump.

INT'L BROTHERHOOD (cont.)

- Arbitrator issued award applying the “previously held” and “minimum additional training” clauses in the parties’ collective bargaining agreement to the employees.
- Arbitrator agreed with the company regarding two employees but found the other two employees should have received the jobs at issue.
- Two days later, the union asked the arbitrator to clarify the award contending that all four employees should have received the jobs.
- The company argued that the arbitrator improperly relied on the “previously held” clause that had not properly been submitted for his consideration.
- Arbitrator agreed with the company and issued a substitute award denying the union’s grievance for all four employees.

INT'L BROTHERHOOD - QUESTION

- Union sought to confirm the original award and vacate the substitute award.

Should the court rule in favor of the union?



- District court ruled in favor of the Union.
- On appeal, the Eleventh Circuit agreed, concluding that the arbitrator lacked authority to revisit his original award.
- **AAA Rules preclude an arbitrator from revisiting the merits of a claim already decided (“functus officio” doctrine).**
 - There are state cases and possibly state statutes that authorize an arbitrator, who would be functus officio, to “clarify” an award by providing supplemental explanation (but not modification).

- An employment contract at issue contained provisions that entitled the employee to severance pay if he was fired without cause, required him to return all confidential information and company property when he left, compelled the parties to arbitrate “any claim, action, dispute, or controversy of any kind or nature ...arising from or otherwise with respect to this Agreement,” and awarded attorneys’ fees and costs to the prevailing party in an arbitration.
- McHale sought severance pay as well as fees and costs.
- Respondent claimed as an affirmative defense that the employee was not entitled to severance pay because after he was terminated, he did not promptly return a company laptop.

McHALE V. TAYLORED SERVICES (AWARD)

- The arbitrator awarded the employee severance pay but denied him attorneys' fees and costs.
- The arbitrator reasoned that the employee had violated the confidentiality provisions of the employment agreement by not promptly returning the laptop (restrictive covenant).



- Deciding the case under the New Jersey Arbitration Act, N.J.S.A. §2A:23B-1 to 32, the district court modified that portion of the arbitration award denying the employee his attorneys' fees and costs.
- The court observed arbitrators may not decide issues that have not been submitted to them by the parties.
- It found that the claim submitted to the arbitrator was “whether [the employer] was reasonable in terminating [the employee] ‘for cause’ and, ultimately, whether [the employee] was entitled to severance” but not any issue concerning the restrictive covenant.

McHALE V. TAYLORED SERVICES, LLC - NO. 16-3196 (3RD CIRCUIT JULY 12, 2017)

- On appeal, the Third Circuit District reversed holding the restrictive covenant issue was properly before the arbitrator and included in the arbitration agreement.
- The Third Circuit reversed the district court's ruling modifying the arbitrator's award.



McHALE - TAKEAWAYS

- Case highlights the need for arbitrators to take great care to understand the scope of the submissions/counterclaims, and to not exceed the scope of their authority.
- Importantly, parties must draft submissions that expressly state what the arbitrator is to decide.
- Similarly, respondents should clearly and expressly raise the relief they believe they are entitled to in the form of counterclaims.



Canon 2

Disclosure



CANON 2
DUTY TO DISCLOSE

- Unless a party can show discernible lack of integrity in the arbitral process, an award will be confirmed.
- Did the arbitrator act:
 - Fairly;
 - Impartially; and,
 - Without bias.



ARTICLE 10(2) FEDERAL ARBITRATION ACT

- An arbitrator's failure to disclose certain information may require the award to be vacated.
- An award should be set aside where an arbitrator demonstrates "evident partiality."
- Actual bias or appearance of possible bias?

THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES



- An arbitrator should disclose any interest or relationship likely to affect impartiality; or,
- Which might create an appearance of partiality.

This code is intended to be applied realistically so that the burden of detailed disclosure does not become so great that it is impractical for person in the business world to be arbitrators, thereby depriving parties of the service of those might be best informed and qualified to decide particular types of cases.

WHAT TO DISCLOSE

- Any known direct or indirect financial or personal interest in the outcome of the arbitration.



WHAT TO DISCLOSE

- Any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack independence in the eyes of any of the parties.
- Relationships with the parties or arbitrators or witnesses.



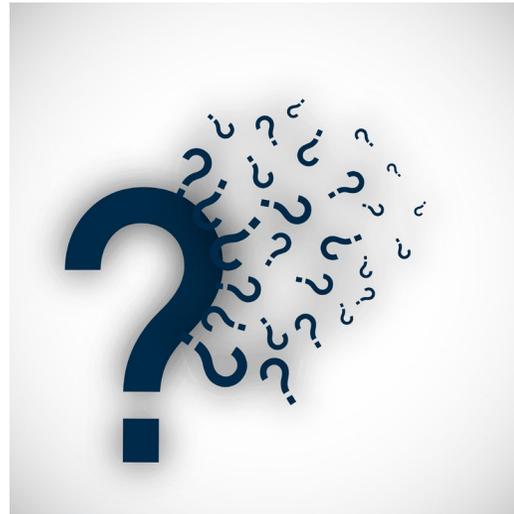
WHAT TO DISCLOSE



- Any relationships involving the arbitrator's families or household members or current employers, partners, or professional or business associates that can be ascertained by reasonable efforts.

WHAT TO DISCLOSE

- The nature and extent of any prior knowledge the arbitrator may have of the dispute.



WHAT TO DISCLOSE



- Any other matters, relationships, or interests which the arbitrator is obligated to disclose by agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.

TIME LIMITS ON DISCLOSURES

- Unlike federal Judges, arbitrators do not have a time limit on how far back in time to disclose information (temporal limit).
- Nor do arbitrators have a limit on what personal relationships to disclose (affinity limit).



KINSELLA V JAMS 37-2015-00026133-CU-FR-CTL (CAL. SUPER. CT. 2017)
ALLEGED RESUME PADDING BY AN ARBITRATOR

- Sonenshine is a retired California appellate court and family law trial judge. Her JAMS' bio states she founded a private equity fund and co-founded an small investment bank.
- Kinsella hired Sonenshine to preside, as a neutral, over his marital dissolution.
 - She ordered him to pay \$123,000 a month in temporary spousal support — \$100,000 more than he'd been paying voluntarily. Kinsella was not pleased.
- During the proceeding, he hired a PI to scour her personal and professional background, including contacting her law school and former bank employees. PI found that there was no private equity fund and the investment bank paid \$41 Million to settle a shareholder class action.
- Kinsella made repeated attempts to recuse her. She eventually withdrew after 15 months into the case.

- Litigation:
 - Kinsella sued JAMS in 2015 for about \$1.5 million claiming that misrepresentations in Sonenshine’s JAMS bio duped him into hiring her, with \$80,000 of that amount having been Sonenshine’s fees.
 - JAMS contended that Kinsella was an implacable litigant who waged “an unrelenting campaign” of harassment against any jurist who might rule against him. He forced the next judge assigned to his dissolution to recuse as well.

- On March 3, 2017, San Diego Superior Court denied JAMS motion for summary judgment stating:
 - “[N]either judicial immunity nor California’s litigation privilege bars claims that Sonenshine oversold her credentials to drum up business”.
 - Statements in Sonenshine’s bio “were made to sell defendants’ services to litigants at large.”
- In response to a prior JAMS’ motion, the California Fourth District Court of Appeal had found that Sonenshine’s “online bio is advertising that contains factual representations, not nonactionable opinion or hyperbole as JAMS had contended.”

- On May 19, 2017, jury found that, regardless of whether Sonenshine’s bio was truthful, it was not a substantial factor in causing Kinsella any damage. JAMS and Sonenshine were acquitted.
- Result: JAMS includes a disclaimer, on its neutral bios, stating that JAMS makes no warranties about accuracy or completeness.

MORAL OF THE STORY

- Parties and advocates rely on your AAA-ICDR resume.
- Their hiring decision is based on your resume.
- Always make sure your resume is accurate, current and contains no exaggerations.
 - *AAA Standards and Responsibilities* requires that you keep your profile and resume current (Section 6).
- Don't misrepresent yourself!



Canon 3

Impropriety



CANON 3

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

- You should follow any rules or procedures set forth in parties' agreement as to manner and content of communications. (3A)
- Ex parte communications are prohibited except:
 - Where a party-appointed arbitrator (you) are being considered for appointment, you may:
 - ◇ Inquire about the identities of the parties, counsel, witnesses and the general nature of the case;
 - ◇ Respond to inquiries from a party regarding your suitability and availability.



CANON 3 (cont.)

- You may also:
 - Consult with your appointing party concerning the **choice of Panel Chair**. (3B)
 - Discuss **compensation** with your appointing party. (3B)
 - Consult with appointing party concerning **your neutrality**. (3B)
- **Whenever you communicate with one party, send a copy of the communication to all other parties.** (3C)
 - Exception: if parties' agreement or arbitration rules require otherwise.



Canon 3B

Ex-Parte Communications



CANON 3B
EX PARTE COMMUNICATIONS

- Arbitration panels usually adopt rules pertaining to ex-parte communications concerning:
 - The time periods within which counsel may communicate with their party arbitrators;
 - Counsel copying opposing counsel and party arbitrators on communications with the chair;
 - Party arbitrators copying the opposing party arbitrator on communications with the chair; and
 - The chair copying both party arbitrators on external communications.



WHAT IS EX-PARTE?

- An ex-parte communication is typically defined as communications between counsel and the court when opposing counsel is not present and ordinarily prohibited.
- There shall be no communication between the parties and a neutral arbitrator other than at oral hearings, unless the parties and the arbitrator agree otherwise.

CONSEQUENCES

- Under the FAA, an arbitration award can be vacated where there is evident partiality or corruption in the arbitrator.
- Evident partiality means more than an “appearance of bias”.
- Improper ex parte communications could reflect evident partiality or corruption.

WHEN IS EX-PARTE COMMUNICATION ALLOWED?

- 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.
- 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 that arbitrator concerning the choice of the third arbitrator.



Social Media



DISCLOSURES - SOCIAL MEDIA

- Neutral should disclose the information about any existing relationship on a social media network that might give rise to justifiable doubt concerning the arbitrator's independence or impartiality.
- Examples:
 - "I may have met them at bar association functions or professional conferences or they may subscribe to an ADR related list serve that I subscribe to or members of one of my www.Linkedin.com groups or be one of my over 700 "connections" on LinkedIn, an on-line network in which I accept all invitations to connect sent to me by anyone in the litigation or alternative dispute resolution field whether I know them or not and which is strictly professional in nature.
 - A more comprehensive listing of my activities is found on my website at www.FosterAtlaw.com or LinkedIn at www.linkedin.com/in/AngelaFosterPhDEsq. You are invited to promptly conduct such further review and research online or otherwise and seek response from me to any further inquiry as you deem appropriate.

CONFIDENTIALITY - SOCIAL MEDIA

- Information posted on social media or communicated among users cannot be assumed to be or remain confidential.
- Posting by a neutral, or communication by a neutral, of any information pertaining to an arbitration may violate any obligation the neutral may have to maintain the confidentiality of the proceedings or may be asserted in post-award proceedings as evidence of earlier partiality or lack of independence.
 - *AAA Standards and Responsibilities* emphasizes the requirement to maintain the confidentiality of the process. (Section 8)

EX-PARTE CONTACT – SOCIAL MEDIA

- Because arbitrators have an obligation to refrain from ex-parte communication with the parties, counsel and witnesses of a case, the use of social media may be perceived by the parties as a violation.
- During the pendency of a matter, a neutral should refrain from connecting with or attempting to connect with any party, counsel or witness via social media.
- During the pendency of a matter, a neutral should refrain also from recommending any party, counsel or witness via social media.

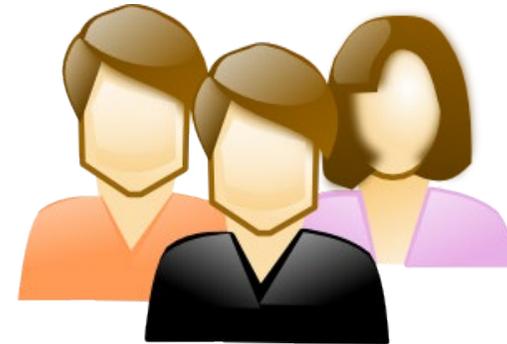
Canon 4

Arbitrator Conduct



CANON 4
ARBITRATOR CONDUCT

- Arbitrator should conduct the proceedings fairly and diligently.
- Chair arbitrator should allow co-arbitrators opportunity to participate.
 - Breakout to address issues.
 - Make collective decisions.



ARBITRATOR CONDUCT – EXAMPLE 1

- Before giving his opening statement, the petitioner states for the record that respondent's counsel continues to deny his client a fair hearing by refusing to produce discovery.
- Petitioner continues that it has been months, and still have not received the requested documents.
- Respondent responds: I object to your accusations of inadequate discovery. If anyone is guilty of inadequate discovery production it is you. I have asked for months for tax returns with no response, which is in clear violation of the discovery rules.

EXAMPLE 1 - ARBITRATOR BEST RESPONSE?

1. The panel should remain quiet and allow the parties the opportunity to vent their frustration on the record.
2. Arbitrator should admonish the parties on the record and talk to each party separately about their outstanding issues.
3. Arbitrator should remind the parties to limit their opening statements to a brief, non-argumentative outline of what they intend to prove at the hearing and not to interrupt each other during the opening statements. He should also remind the parties to direct comments/objections to the panel and not to each other.



ARBITRATOR CONDUCT – EXAMPLE 2

- During cross-examination of one of the claimant's witnesses, the Chairperson A quietly states to Arbitrator B to be sure they ask the witness whether he remembers document X.
- Arbitrator B agrees and responds that they should also ask the witness about the attachments to document X.
- Arbitrator C loudly states: what am I missing – I would like to be a part of this discussion too.



EXAMPLE 2 - ARBITRATOR BEST RESPONSE?



- Although appropriate for arbitrators to have a private conversation in front of the parties during the hearing, an arbitrator should not have an outburst during a hearing in front of the parties. Additionally, an outburst may indicate to the parties that there is discord among the panelists. Arbitrators should always present a united front and work out any differences in an executive session.
- Arbitrators may discuss issues privately during the hearing to avoid interrupting the process to call an executive session. However, Arbitrator C should not have disrupted the hearing by shouting out loud that he wanted to be included in the conversation.
- Chairperson A and Arbitrator B should not have had a private conversation during the hearing. However, Arbitrator C should not have shouted out loud that he wanted to be included in the conversation. Instead, the arbitrators should have called an executive session to discuss issues privately.

Canon 5

Arbitrator Decision



CANON 5

ARBITRATOR SHOULD MAKE DECISIONS IN A JUST, INDEPENDENT AND DELIBERATE MANNER

- An arbitrator should after careful deliberation and exercising independent judgment, promptly or otherwise within the time period agreed to by the parties or AAA rules, decide all issues submitted. An arbitrator should decide no other issues.
- The arbitrator's award should not be influenced by fear or criticism or any interest in potential future case referrals by any of the parties or counsel.
- Nor should an arbitrator issue an award that reflects a compromise position in order to achieve such acceptability.
- Arbitrator should not delegate the duty to decide to any other person.



ARBITRATOR DECISIONS – CONSENT AWARD



- If the parties agree upon a settlement, the arbitrator may draft the agreement in a consent award. The award should state that it is based on an agreement of the parties.
- The arbitrator may refuse to enter the proposed consent award and withdraw from the case.
- If the Arbitrator believes the terms of the agreement are illegal or undermine the integrity of the arbitration process, the arbitrator should not draft the consent award.

Canon 6

Confidentiality



CANON 6

ARBITRATOR MUST MAINTAIN CONFIDENTIALITY

- An arbitrator should keep confidential all matters relating to an arbitration proceeding and decisions.
- An arbitrator should not discuss a case with person not involved directly in the arbitration.
- An arbitrator may obtain assistance from an associate, a research assistant or other person(s) in connection with reaching his/her decision if the arbitrator informs the parties of such assistance and that person agrees to be bound by Canon 6.

CANON 6 (cont.)

- An arbitrator may discuss a case with another member of the arbitration panel hearing that case whether or not all panel members are present.
- An arbitrator should not use confidential information acquired during the arbitration proceeding to gain a personal advantage or advantage of others or to affect adversely the interest of another.
- An arbitrator should not inform anyone of the decision in advance of giving it to all parties.
- Where there is more than one arbitrator, an arbitrator should not disclose to anyone the deliberation process of the arbitrators.

CONFIDENTIALITY – EXAMPLE 1

- During a break in the hearing, Arbitrator A and Arbitrator B have a discussion in the hallway.
- Arbitrator A: Sure glad the chairperson called a break. I need to stretch my legs. I know the hearing isn't over, but it doesn't seem to be going well for Claimant, does it? I don't have much sympathy for her. Did you hear the testimony about how careless she was in managing her investments? No wonder she lost money in her account.
- Arbitrator B: Ssshhh! We shouldn't talk about the case in the open. Claimant is standing a few feet away. She probably can't hear us, but just in case...

EXAMPLE 1 - ARBITRATOR BEST RESPONSE?

1. Arbitrators may make comments about the case; however, they should make sure that a party or representative is not able to overhear the conversation.
2. Arbitrators should not come to any conclusions about the case before all the evidence and testimony are presented. Arbitrators should **also beware of discussing the case in an open space where parties and representatives may overhear their conversation.**
3. Comments made by arbitrators outside of the hearing room are off the record, so they are free to discuss their opinions.



Canon 7

Compensation



CANON 7

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

- Arbitrator, who is compensated, should adhere to standards of integrity and fairness in making arrangements for payments. (7A)
- Preferred practices include:
 - Before accepting appointment, you should establish:
 - ◇ basis of payment,
 - ◇ your compensation for study and preparation time, and
 - ◇ all other charges. (7B)
 - Inform the parties in writing of these terms (7B)



CANON 7

- If proceeding is institutionally administered, and institution is available to handle the payments:
 - All communication between you and the parties regarding compensation should go through the institution.
- If no institution is available:
 - You should send all communications, regarding payment, to all parties. (7B)
- Absent extraordinary circumstances, **do not increase your compensation during a proceeding.** (7C).



Canon 8

Advertisement



CANON 8 ADVERTISING



- Advertising 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.
- Advertising and promotion must not imply any willingness to accept an appointment otherwise than in accordance with this Code.

ADVERTISING

- The arbitrator is not precluded from printing, publishing or disseminating advertisements.
- Advertisement may be any form including electronic, print, or personal presentations.
- Arbitrator should refer to state ethics rules. For example, New Jersey considers arbitration the practice of law; thus, attorney arbitrators are subject to the New Jersey Rules of Professional Conduct (Attorney Professional Ethics rules).

Canon 9

Party-Appointed Arbitrators



CANON 9

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 10

- In tripartite panels, **all three arbitrators are presumed to be neutral.** (9A)
- However, in certain tripartite arbitrations where the party-appointed arbitrators are expected to be pre-disposed to their corresponding appointing parties, those arbitrators are not held to standards of neutrality and independence applicable to neutral arbitrators. (“Canon 10 arbitrators”) (9B)



CANON 9

- You (as a party-appointed arbitrator) must ascertain, as early as possible, whether the parties have agreed that you are neutral or a Canon 10 arbitrator, and then report your conclusions to the other panel members:
 - You need to review the parties' agreement, rules and applicable law regarding your neutrality, and inform parties and other arbitrators.
 - Until both party-appointed arbitrators conclude that they were intended by the parties to be non-neutral, they are to observe all obligations of neutral arbitrators. (9C)
- Canon 10 arbitrators must observe all other provisions of Canons 1-8 not specifically exempted by Canon 10 (unless the parties agree otherwise, or any applicable rules or law require otherwise). (9D)

Canon 10

Exemptions for

Party-Appointed Arbitrators



CANON 10

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

- You may be **predisposed toward the party which appointed you.**
 - In all other aspects, you must act in good faith and with integrity and fairness.
 - Provisions of Canon 1 which relate to partiality, relationships and interests do not apply to you. (10A)
- You **must make all disclosures** required under Canon 2.
 - If non-appointing party requests your withdrawal, the withdrawal and withdrawal procedure in Canon 2 do not apply to you. (10B)
- You **must disclose to other arbitrators if you intend to communicate with your appointing party beyond bounds for neutral arbitrators.**
 - Then, you may communicate regarding anything in the case.
 - You do not need to share contents of your communications with any other party or arbitrator. (10C)

CANON 10 EXEMPTIONS

- You **cannot disclose**:
 - **Panel deliberations** on any matter or issue submitted for decision;
 - **Any matter or issue taken under consideration** by panel after the record is closed or once it has been submitted for decision;
 - **Any final or interim decision** in advance of the time it is disclosed to all parties. (10C)
- You **can not communicate ex-parte with panel chair**. All such communications must be provided to the other Canon 10 arbitrator. (10C)



QUESTIONS



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