


THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES

(Revised 1999)

2000

[Draft prepared by ABA Ad Hoc Committee
of Section of Dispute Resolution -
Summer, 1999]

THM

- Proposed changes appear in a box
- Explanations of proposed changes are identified with wavy lines 

The original Code of Ethics for Arbitrators in Commercial Disputes was 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.

This 1999 Revision of the Code was prepared by a Committee convened by the Arbitration Committee of the Section of Dispute Resolution of the American Bar Association and including representatives of the American Arbitration Association and CPR Institute for Dispute Resolution.

2000

The Drafting Committee seeks approval and recommendation by the participating organizations and other organizations that provide, coordinate or administer the services of arbitrators. By doing so such organizations will provide ethical guidance for their arbitration panel members. The Drafting Committee deems it important that ethical standards be developed for such organizations as well but did not take any action on this subject pending the development of standards undertaken by the Working Group for ADR Provider Organizations convened by the CPR-Georgetown Commission on Ethics and Standards in ADR.

The views expressed herein have not yet been approved by the ABA House of Delegates or the Board of Governors of the American Bar Association and accordingly should not be construed as representing the policy of the American Bar Association.

This could be included in the booklet that would contain the Code.

These paragraphs are for current information. They would not be included in the booklet that contains the Code.

The Code of Ethics for Arbitrators
in Commercial Disputes

(1999 Revision)

2000

PREAMBLE

The use of commercial arbitration to resolve a wide variety of disputes forms a significant part of the system of justice on which our society relies for fair determination of legal rights. Persons who act as commercial 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, the American Bar Association and the American Arbitration Association believe that it is in the public interest to set forth generally accepted standards of ethical conduct for guidance of arbitrators and parties in commercial disputes. By establishing this Code, the sponsors hope to contribute to the maintenance of high standards and continued confidence in the process of arbitration.

There are many different types of commercial arbitration. Some cases are conducted under arbitration rules established by various organizations and trade associations, while others are conducted without such rules. ~~The Federal Arbitration Act (9 U.S.C. §§1 et seq.), the Uniform Arbitration Act and other bodies of state or local law control some critically important aspects of the arbitration process and provide default procedures and guidance as to other aspects.~~ Although most cases 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 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 cases, they might be called "umpires," "referees," "neutrals," or have some other title.

Delete.
It is preferable not to refer to statutes or to characterize them - Not needed.

Various aspects of the conduct of arbitrators, including some matters covered by this Code, may be governed by agreements of the parties, by arbitration rules to which the parties have agreed, or by applicable law. This Code does not take the place of or supersede such agreements, rules, or laws and does not establish new or additional grounds for judicial review of arbitration awards. It is intended to provide standards of conduct for arbitrators that will maintain the apparent integrity, perceived fairness and other necessary or desirable characteristics of the arbitration process. It should be so perceived by individual arbitrators when acting as such, and also by organizations that provide, coordinate or administer the services of arbitrators.

and

This Code is intended to provide ethical guidelines to all individuals serving as commercial arbitrators. In those instances where it has been approved and recommended by

organizations that provide, coordinate or administer services of arbitrators it is intended to provide ethical standards for the members of their respective panels of commercial arbitrators. However it does not form a part of the arbitration rules of any such organization. Nor is it intended to apply to persons engaged in such processes as mediation, conciliation, court-annexed arbitration, mini-trial or early neutral evaluation. Labor arbitration is governed by the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, not by this Code. While institutions that provide, coordinate or administer the services of arbitrators are not governed by this Code, it is expected that they will take into account the guidelines in this Code in the performance of their administrative functions.

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 some types of arbitration there are three or more arbitrators. The Code on occasion refers to multiple-arbitrator panels as "the arbitrator." In some cases, it is the practice for each party, acting alone, to appoint one arbitrator and for the other arbitrator to be designated by those two, by the parties, or by an independent institution or individual. The sponsors of this Code believe that it is preferable for parties to agree that all arbitrators should comply with the same ethical standards. However, it is recognized that there is a long-established practice in some types of arbitration for the arbitrators who are appointed by one party, acting alone, to be governed by special ethical considerations. Those special considerations are set forth in the last section of the Code, headed "Ethical Considerations Relating to Arbitrators Appointed by One Party."

The Code refers to the parties to arbitration and to their representatives collectively as "parties."

Although this Code is expected to be sponsored by the American Bar Association and the American Arbitration Association and other institutions, its use is not limited to arbitrations administered by such institutions or to cases in which the arbitrators are lawyers. Rather, it is presented as a public service to provide guidance in all types of commercial arbitration.

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

A. Fair and just processes for resolving disputes are indispensable in our society. Commercial arbitration is an important method for deciding many types of disputes. In order for commercial arbitration to be effective, there must be broad public confidence in the integrity and fairness of the process. Therefore, 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, the arbitrator should recognize a responsibility to the public, to the parties whose rights will be decided, and to all

strongly

be neutral and

non-neutral and to

It is particularly important in any system having any international aspect because some international customs some in fact are not rules and in some of some countries require all arbitrators to observe the same ethical standards, even if the arbitrators are appointed unilaterally by the parties. Accordingly, reference to other arbitrators is included here and in all other headings

CANON

The text refers to this section as "Canon I," and similar references are made to each of the other Canons. It is suggested that the designation "Canon" be included here and in all other headings

other participants in the proceeding. The provisions of this Code should be construed and applied to further these objectives.

B. One should accept appointment as an arbitrator only if fully satisfied (1) of his or her ability to serve without bias; (2) that he or she is competent to serve; and (3) that he or she can be available to commence the arbitration in accordance with the requirements of the case and thereafter to give to it the time and attention to its completion that the parties are reasonably entitled to expect.

C. After accepting appointment and while serving as arbitrator a person should avoid entering into any financial, business, professional, family or social relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality or bias. 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.

D. Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, by public clamor, by fear of criticism or by self-interest. They should avoid conduct and statements that give the appearance of partiality toward any party. They should guard against partiality or prejudice based on any party's personal characteristics, background or performance at the arbitration.

E. When an arbitrator's authority is derived from an agreement of the parties, the 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. The arbitrator has no obligation to comply with any such procedures or rules that are unlawful, unconscionable, or inconsistent with this Code.

F. The arbitrator should make all reasonable efforts to assure the prompt, economical and fair resolution of the matters submitted for decision. The arbitrator should endeavor 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, wherever specifically 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 even after the decision in the case has been given to the parties.

Comment to Canon I

One is not impartial and should not serve as a neutral arbitrator when he or she favors one of the parties or is prejudiced in relation to the subject matter of the dispute. A potential arbitrator does not become partial or prejudiced by having acquired knowledge of the parties or of the applicable law or of the customs and practices of the business involved. A potential

prospective

arbitrator is partial or prejudiced if, for example, prior to appointment he or she for any reason has formed an opinion as to the appropriate outcome of the case.

Existence of any of the matters or circumstances described in subparagraphs C ^e or D of Canon I does not render it unethical for one to serve as a neutral arbitrator where the parties have consented to the arbitrator's appointment or continued service following full disclosure of the relevant facts in accordance with Canon II. The matters set forth in subparagraph B of Canon I reflect the arbitrator's obligation to the public and to the process, and therefore reflect ^s circumstances where it is inappropriate for a neutral arbitrator to serve as such even though the parties have voiced no objection to the appointment or continued service following full disclosure.

During an arbitration, the arbitrator may be expected to engage in discourse with the parties or their counsel, to draw out arguments or contentions, to comment on the law or the evidence, to make interim rulings, and otherwise to control or direct the arbitration. These activities are integral parts of an active adjudicative process. Subparagraph 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.

If an arbitrator is a member of a law firm or a business organization, the arbitrator should endeavor to assure that the firm or organization does not enter into or structure relationships which may affect the arbitrator's neutrality or create a reasonable appearance of partiality, bias or post-award remuneration.

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

OR INDEPENDENCE

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

OTHER

- (1) any direct or indirect financial or personal interest in the outcome of the arbitration which is known or becomes known;
- (2) any existing or past financial, business, professional, family or social relationships which are known or become known and are likely to affect impartiality or which might reasonably create an appearance of partiality of bias. Prospective arbitrators should disclose any such relationships which they personally have with any party or its lawyer, with any party-appointed arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their immediate family or household members or their current employers, partners or professional or business associates;
- (3) the nature and extent of any prior knowledge he or she may have of the dispute; and

Delete. "Known" is covered by Subpara. B below, and "become known" is covered by Subpara. C below.

- (4) any other matters, relationships or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of the institution which is administering the arbitration, 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 the preceding subparagraph A.

C. The obligation to disclose interests or relationships described in the preceding subparagraphs A and B is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose forthwith, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.

D. Disclosure should be made to all parties unless other procedures for disclosure are provided in the agreement of the parties, the rules or practices of the institution which is administering the arbitration, or by law. Where more than one arbitrator has been appointed, each should inform the others of the interests and relationships which have been disclosed.

E. In the event that an arbitrator is requested by all parties to withdraw, the arbitrator should do so. In the event that an arbitrator is requested to withdraw by less than all of the parties because of alleged partiality or bias, the arbitrator should withdraw unless either of the following circumstances exists:

- (1) If an agreement of the parties, arbitration rules agreed to by the parties, or applicable law establishes procedures for determining challenges to arbitrators, then those procedures should be followed; or,
- (2) 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, and that withdrawal would cause unfair delay or expense to another party or would be contrary to the ends of justice.

~~F. Nothing contained in this Code shall require or be deemed to require any arbitrator or prospective arbitrator to disclose any confidential or privileged information without the consent of the person who furnished the information or the holder of the privilege.~~

Comment to Canon II

This Canon reflects the prevailing principle that arbitrators should disclose the existence of interests or relationships that are likely to affect their impartiality or that might reasonably create an appearance that they are biased against one party or favorable to another. These provisions of this Canon are intended to be applied realistically so that the burden of detailed disclosure does not become so great that it is impractical for persons in the business or legal

any

Including a new provision on confidentiality is a good idea, but the proposed text is problematic. Accordingly, we might consider substituting the following:

In the event that compliance by a prospective arbitrator or arbitrator with any provision of this Code would require disclosure of any confidential or privileged information, he or she should either (i) secure the consent of the person who furnished the information or the holder of the privilege, or (ii) withdraw, unless, applying the same considerations as set forth in the preceding subparagraph E (2), he or she determines that such withdrawal would be inappropriate.

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Amend by
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worlds to be arbitrators, thereby depriving parties of the services of those who might be best informed and qualified to decide particular types of cases.¹

Except as provided in the Comment to Canon I, Canon II does not limit the freedom of parties to agree on whomever they choose as an arbitrator. When parties, with knowledge of a person's interests and relationships, nevertheless desire that individual to serve as an arbitrator, that person may properly serve.

Comment to Subparagraph A.

Although Canon II identifies interests and relationships which should be the subject of disclosure, there may also be matters in a proposed arbitrator's background or experience which so closely parallel facts asserted or proved in the arbitration that if known by the parties might give rise to a reasonable appearance of bias, and thus should be disclosed.

Comment to Subparagraph B.

The scope of a reasonable effort to become informed depends upon the circumstances. A single standard cannot be established for all situations. As a general proposition an inquiry by a member of a firm or business organization should encompass the current or recent business or professional relationships of his or her employers, partners and associates as well.

Comment to Subparagraph E.

Since arbitration generally exists by virtue of agreement between or among the parties to submit their disputes to a non-judicial forum, it is appropriate that an arbitrator withdraw upon the request of all parties. If the arbitrator has disclosed to the parties in advance that a fee will be charged if time has been set aside for the arbitration and cannot be filled, in accordance with Canon VII, a cancellation or termination charge is not improper.

In applying the provisions of Paragraph E in the circumstance where less than all of the parties have requested that the arbitrator

¹In applying the provisions of this Code relating to disclosure, it might be helpful to recall the words of the concurring opinion, in a case decided by the US Supreme Court, that arbitrators "should err on the side of disclosure" because "it is better that the relationship be disclosed at the outset when the parties are free to reject the arbitrator or accept him with knowledge of the relationship." At the same time, it must be recognized that "an arbitrator's business relationships may be diverse indeed, involving more or less remote commercial connections with great numbers of people." Accordingly, an arbitrator "cannot be expected to provide the parties with his complete and unexpurgated business biography," nor is an arbitrator called on to disclose interests or relationships that are merely "trivial" (a concurring opinion in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 US 145, 151-152 (1968)).

Circumstances that, if known to the parties, might be likely to give rise to justifiable doubts as to a prospective arbitrator's impartiality or independence include that he or she participated in as a party or representative or took a position with respect to another dispute in which the facts closely parallel those alleged in the arbitration in which he or she would serve. Accordingly, if the prospective arbitrator knows that such a circumstance exists, he or she should disclose it. However, this does not require a prospective arbitrator to disclose any confidential or privileged information.

an arbitrator

in connection with

withdraw, the institution that is administering the arbitration and is charged with responsibility for passing upon the request, if one exists, or the arbitrator in a non-administered proceeding, should consider the timeliness of the request. Where the arbitrator has had minimal involvement in the case it may be preferable that the arbitrator withdraw. If the matter has proceeded to the point where substantial time and effort have been devoted to hearings and withdrawal will result in duplication of effort, significant expense, and significant delay in resolving the matter, the prejudice to the non-objecting party must be weighed against the credibility and seriousness of the basis for the request.

forming the arbitral tribunal and conducting the proceedings,

Although the Canons are for the guidance of arbitrators, not parties, the role of the parties should be noted. If a party is aware of material interests or relationships that the arbitrator has not disclosed or has overlooked, it is preferable that these be made known to the other parties or arbitrators or to the tribunal if one exists. In considering an untimely request for withdrawal the arbitrator or tribunal may properly consider whether the requesting party was aware of the claimed relationship or interest at the time the arbitrator was appointed or delayed unduly in presenting its request after acquiring such knowledge, to the prejudice of non-objecting parties.

generally

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

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 the following subparagraphs B and C.

B. Unless otherwise provided in applicable arbitration rules or in an agreement of the parties, arbitrators should not discuss a case 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 identity of parties or witnesses and the general nature of the case; and (b) may respond to inquiries from the parties or their counsel designed to determine his or her suitability and availability for the appointment. In any such dialogue the prospective arbitrator may receive information disclosing the general nature of the dispute, but should not permit the parties or their representatives the opportunity to ~~argue~~ 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

discuss

with the party who appointed the arbitrator concerning the acceptability of persons under consideration for appointment of the third arbitrator.

choice

- (3) Discussions may be had with a party concerning such 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 any other party of the discussion and should not make any final determination concerning the matter discussed before giving any absent party an opportunity to express the party's views.
- (4) If a party fails to be present at a hearing after having been given due notice, the arbitrator may discuss the case with any party who is present.
- (5) If all parties request or consent to it, such discussion may take place.

C. Unless otherwise provided 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.

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

A. The arbitrator should conduct the proceedings in an evenhanded manner and treat all parties with equality and fairness at all stages of the proceedings.

B. The arbitrator should perform duties diligently and conclude the case as promptly as the circumstances reasonably permit.

C. The arbitrator should be patient and courteous to the parties, to their representatives and to the witnesses and should encourage similar conduct by all participants in the proceedings.

D. Unless otherwise agreed by the parties or provided in applicable arbitration rules, the arbitrator should afford to all parties the right to appear in person and to be heard after due notice of the time and place of any hearing or pre-hearing conference. At any evidentiary hearing, the arbitrator should allow each party fair opportunity to present its evidence and arguments. The arbitrator may preclude evidence which is irrelevant or cumulative.

E. The arbitrator should not deny any party the opportunity to be represented by counsel.

F. If a party fails to appear after due notice, the arbitrator should proceed with the arbitration when authorized to do so by the agreement of the parties, the applicable rules or by

law. However, the arbitrator should do so only after receiving assurance that appropriate notice has been given to the absent party.

G. 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.

H. It is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement of the case or the use of mediation, conciliation or other dispute resolution processes. However, an arbitrator should not be present or otherwise participate in the settlement discussions or such other processes unless requested to do so by all parties. An arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes.

I. Nothing in this Code is intended to prevent a person from acting as a mediator or conciliator of a dispute in which he or she has been appointed as arbitrator, if requested to do so by all parties or where authorized or required to do so by applicable laws or rules.

J. When there is more than one arbitrator, the arbitrators should afford each other the full opportunity to participate in all aspects of the proceedings.

Comment to Canon IV

Subparagraph J of Canon IV is not intended to preclude one arbitrator from acting in limited circumstances (*i.e.*, ruling on discovery issues) where authorized by the agreement of the parties or 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.

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. The arbitrator should decide no other issues.

B. The arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.

C. The 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 the 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.

Comment to Canon V, Subparagraph C

Subparagraph C does not preclude an arbitrator from obtaining help from an associate or from a research, clerical or other assistant in connection with reaching his or her decision, so long as such assistants agree to be bound by the provisions of subparagraphs A, B and C of Canon VI.

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 or disclose confidential information acquired during the arbitration proceedings to gain personal advantage or advantage for others, or to affect adversely the interest of another.

B. Unless otherwise agreed by the parties or required by applicable rules or law, the arbitrator should keep confidential all matters relating to the arbitration proceedings and decision.

C. It is not proper at any time for an arbitrator to inform anyone of the decision in advance of the time it is given to all parties, with the exception of an organization which is administering the arbitration, under applicable rules or procedures. In a case in which there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone concerning the deliberations of the arbitrators. After an arbitration award has been made, it is not proper for an arbitrator to assist in postarbitral proceedings, except as is required by applicable rules or law or by the terms of the award, or if the parties agree that the arbitrator may do so.

D. Except where otherwise agreed by the parties or required by applicable rules or law, when the award has been made the arbitrator may offer to return all evidentiary materials to the producing parties or their representatives. If the offer is not accepted, following due notice, the arbitrator may ~~dispose~~ of such materials in any manner reasonably calculated to prevent their use or disclosure.

Comment to Canon VI

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 office.

VII. AN ARBITRATOR'S ARRANGEMENTS FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES SHOULD BE FAIR AND CLEARLY DISCLOSED TO ALL PARTIES.

In some types of arbitration it is customary practice for the arbitrators to serve without pay. In other cases, however, arbitrators receive compensation for their services and reimbursement for their expenses. In making arrangements for such payments all persons who

submitted by a party to that party or its

retain any of

or dispose of any of them

Should this provision be moved up and designated E, rather than being presented as a comment?

SHOULD BE GOVERNED BY STANDARDS OF INTEGRITY AND FAIRNESS WHEN MAKING

This heading more closely reflects the text that follows.

are requested to serve or who are serving as arbitrators should be governed by the same high standards of integrity and fairness as apply to their other activities in the case. Accordingly, such persons should avoid any communications concerning the amount of or matters pertaining to such payments which would create an appearance of coercion or other impropriety. In the absence of governing provisions in the agreement of the parties or in applicable rules or law, certain practices relating to payments are generally recognized as being preferable in order to preserve the integrity and fairness of the arbitration process. These practices include the following.

- (1) It is preferable that, before the arbitrator finally accepts appointment, the terms and conditions of payment, including cancellation fees and compensation for study and preparation time, be established and that all parties be informed thereof in writing.

- (2) In cases conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, the payments should be arranged by the institution to avoid the necessity for communication by the arbitrators directly with the parties concerning the subject.

- (3) In cases where no institution has been engaged by the parties to administer the arbitration, it is preferable that any communication with arbitrators concerning payments take place in writing or in the presence of all parties.
- (4) Absent extraordinary circumstances, the arbitrator should not ask that his or her rate of compensation be increased during the pendency of the arbitration.

VIII. AN ARBITRATOR MAY ENGAGE IN ADVERTISING OR PROMOTION OF ARBITRAL SERVICES IN A DISCREET AND PROFESSIONAL MANNER.

Advertising or promotion of an arbitrator's willingness or availability to serve as such should be limited to the statement that he or she is an arbitrator, a brief description of his or her professional credentials, experience, and relevant areas of expertise or activities, and such information as may be required to facilitate contact and communication. Such advertising or promotion must not (a) be inaccurate or likely to mislead; (b) make comparison with other arbitrators or members of other professions; (c) include statements about the quality of the arbitrator's work or the success of the arbitrator's practice; or (d) imply any willingness to accept an appointment otherwise than in accordance with this Code. This Canon does not preclude an arbitrator, from printing, publishing or disseminating advertisements conforming to the foregoing 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.

IX. THE AWARD SHOULD BE CLEAR, COMPLETE AND EFFECTIVE.

See comment on next page

Individuals generally

as an arbitrator

It is inappropriate to contact parties or their representatives to solicit appointment as an arbitrator in a particular case.

This is based on IBA Code Sec. 4.2 and the IBA Code Canon 1-B

Comments on Canon IX

This new Canon relates to matters that would be appropriate in a good practice manual - - it does not express ethical standards. For example, writing in plain English in a logical format is desirable but is not an ethical requirement. Similarly, whether a court eventually holds that an award is not enforceable could be an error of the court and is not necessarily evidence of unethical conduct by the arbitrator. Arbitrators should not be stigmatized as being unethical on the basis of their writing style or whether a court enforces an award.

Also, whether an arbitrator chooses to express the reasons for the award in writing, in a case where the agreement, rules and law are silent, is not an ethical issue, unless one thinks that the arbitrator is inflating his compensation by wasting time writing. But that possibility, as well as various other ways that an arbitrator could inflate his/her compensation, ^{is} ~~are~~ covered by the ethical standards elsewhere in the Code, particularly, Canon I. The points referred to in Canon IX might well be considered for inclusion in institutional rules and as subject for educational programs - - but they are not appropriate in a Code of Ethics.

Accordingly, Canon IX should be deleted.

The arbitrator's award should conform to any requirements of the agreement of the parties. To the extent practicable it should be drafted in plain English, in a logical format, and in accordance with any formal requirements of applicable rules or law. All matters submitted to the arbitrator for decision should be dealt with, and each decision should be clear and explicit in order that the outcome may be legally enforceable. Except as specifically requested by the parties or provided in the agreement or applicable rules or law, the arbitrator may but need not provide the reasons leading to the arbitrator's decision.

Comment to Canon IX

The second sentence of Canon IX creates an ethical obligation to provide an award which conforms in format and structure to legal requirements (*i.e.* in writing, under oath if required, *e.g.*, Uniform Arbitration Act, § 8). The Code takes no position as to whether an arbitrator has any ethical obligation to render an award that conforms to applicable principles of substantive law.

An arbitrator should prepare a written statement of reasons for his or her award or a reasoned award if (1) the arbitration agreement or applicable rules or law require the arbitrator to do so; or (2) all parties request or stipulate that the arbitrator do so.

In all other circumstances the arbitrator should take the following factors into account in determining whether or not to prepare a written statement of reasons or a reasoned award: (1) the nature and importance of the legal or economic issues presented by the case; (2) any need for such statement or award as a guide to the parties in conducting their future affairs; (3) any need for such statement or award as a guide to the parties in dealing with the rights or obligations of third parties; (4) whether or to what extent the award may serve as a legal or business precedent; and (5) the additional cost to the parties, if any, for the arbitrator's services in preparing such statement or award, weighed against any additional benefit to be derived from it.

X. ETHICAL CONSIDERATIONS RELATING TO ARBITRATORS APPOINTED BY ONE PARTY.

A. Disclosure of Status

In all arbitrations in which there are two or more party-appointed arbitrators, each party-appointed arbitrator should inform the other arbitrators forthwith following appointment that he or she is party-appointed, whether he or she is to be neutral, and whether he or she will or will not observe those obligations which are excused by subparagraphs A, B, C and E of this Canon X, unless (i) all parties have informed the arbitrators that all of the arbitrators are to be neutral or (ii) the applicable rules or law require that all arbitrators be neutral. A party-appointed arbitrator who has informed the other arbitrators that he or she is to be neutral or that he or she will observe those obligations referred to shall thereafter observe such obligations. A party-appointed arbitrator who has informed the other arbitrators that he or she will not be neutral or that he or she will not observe those obligations is referred to in this Canon X as a "non-neutral arbitrator."

← See Comment and substitute text on the next pages

Comments on X-A

Identifying When Party-Appointed Arbitrators Are Non-Neutral

As stated in the present Code, "it is important for everyone concerned to know from the start whether the party-appointed arbitrators are expected to be neutrals or non-neutrals." (Canon VII, Intro. Note). The proposed Section X-A of the Revised Code provides a new method for identifying whether party-appointed arbitrators are neutral or non-neutral. That new method requires each party-appointed ^{arbitrator} to inform the other arbitrators "whether he or she is to be neutral." That procedure is not found in the present Code, the IBA Code, arbitral rules or laws. It is problematic for several reasons: First, it assumes that it is up to each party-appointed arbitrator to decide whether he/she will be neutral or non-neutral. That decision should not be made by individual arbitrators, but rather by mutual agreement of the parties, or should be determined by applicable rules or by the law that governs the proceeding. Second, the proposed provision facilitates a process in which one party-appointed arbitrator could be non-neutral while the other party-appointed arbitrator in the same case could be neutral. That would result in inequality among the parties and thereby breach a fundamental principle of fairness. Third, if one arbitrator declares that she/he is non-neutral, the other is faced with a dilemma: would it be better also to declare non-neutrality and thereby assure that the party who appointed her/him will have equal opportunity for communication, or should she/he declare neutrality and thereby perhaps gain increased credibility with the third arbitrator. The Code should not include a provision that invites such tactical maneuvering.

Fourth, the proposal inserts additional new steps in the arbitral procedure that could result in uncertainty and delay.

The present Code avoids those difficulties. It provides that "the two party-appointed arbitrators should be considered non-neutral^s unless both parties inform the arbitrators that all^{three} arbitrators are to be neutral, or unless the contract, the applicable arbitration rules, or any governing law requires all three arbitrators to be neutral." (Canon VII, Intro. Note). This presumption recognizes long-established practice in some types of cases in the United States. It would not be prudent to attempt to reverse a presumption that has for so long been an accepted part of the American arbitration scene. Reversing the presumption would be likely to create numerous difficulties because many arbitrators and parties would learn too late - - if at all - - that the presumption had undergone a 180-degree turn. Rather it is better to continue to emphasize in the Code that the sponsors recommend all-neutral arbitral tribunals in all cases - - indeed, that advice could be strengthened in the revised text. Institutions, such as the AAA, already encourage all-neutral arbitration, and this result can be achieved through education and persuasion rather than by new wording tucked away in the Code that many - - most? - - practitioners will not notice.

The Situation in International Arbitration

In 1990, the ABA House of Delegates adopted a resolution proposed by the Section of International Law and Practice that "unless otherwise agreed party-appointed in international commercial arbitration should, to the extent practicable in the circumstances, serve as neutrals."

Questions related to non-neutral arbitrators rarely arise in international cases because in virtually all such cases the parties have agreed to rules that require all arbitrators, including party-appointed arbitrators, to be neutral. See e.g., ICC, UNCITRAL, AAA International Rules, LCIA, WIPO etc. etc. Thus, viewed in perspective and in the light of practice, the problem is very small.

Nonetheless, parties and arbitrators should be warned that the provisions for non-neutral arbitrators in this Canon may not be consistent with governing law outside the United States. A simple way to accomplish that would be to include a statement that in cases in which the locale of the arbitration is outside the United States or where it appears that enforcement of any award might be sought outside the United States, the two-party appointed arbitrators should be considered neutral unless provided otherwise by agreement of the parties, by any applicable rules or by governing law. This presumption would reflect practice.

Form of Canon

For the foregoing reasons, the new Canon X-A should be deleted. In its place, the present Introductory Note should be retained with (i) the addition of stronger wording with respect to international arbitration, and (ii) some improvements found in the revised draft. In the other Canons, explanatory materials typically appear in a "Comment" that follows the text of the ethical provisions. Canon X, however, would be clearer if its purpose is explained at the outset. Also, keeping the Introductory Note up front will give a more prominent place to the new statement concerning international cases. (Note that much of the text of the

Introductory Note is included in the Revised Draft under the heading
"Comment on Canon X" - - it is simply proposed to move it forward.)

Accordingly, the following text should be considered:

Introductory Note:

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 either by agreement of the parties or of the two arbitrators, or, failing such agreement, by an independent institution or individual. In some of these types of arbitration, all three arbitrators are customarily considered to be neutral and are expected to observe the same standards of ethical conduct. However, there are also many types of tripartite arbitration in which it has been the practice that the two arbitrators appointed by the parties are not considered to be neutral and are expected to observe many - but not all - of the same ethical standards as the neutral third arbitrator. For the purposes of this Code, an arbitrator appointed by one party who is not expected to observe all of the same standards as the third arbitrator is referred to as a "non-neutral arbitrator." This Canon describes the ethical obligations that non-neutral arbitrators should observe and those which are not applicable to them. A non-neutral arbitrator is expected to observe all of the ethical obligations prescribed by the Code with the exceptions set forth in this Canon X. Non-neutral arbitrators are thus expected to adhere to the standards applicable to neutral arbitrators except as specifically excused. They too bear responsibility for the integrity and fairness of the process.

In all arbitrations in which there are two or more party-appointed arbitrators, it is important for everyone concerned to know from the start whether the party-appointed arbitrators are expected to be neutrals or non-neutrals. In United States arbitrations, the two party-appointed arbitrators should be considered non-neutrals unless both parties inform the arbitrators that all three arbitrators are to be neutral, or unless an agreement of the parties, the applicable arbitration rules, or any governing law requires that all three arbitrators are to be neutral.

However, in cases in which the place of arbitration is outside the United States and/or it appears that judicial enforcement of an award might be sought outside the United States, the two party-appointed arbitrators should be considered neutral unless an agreement of the parties, the applicable arbitration rules or any governing law requires otherwise. This reflects the fact that some governing laws outside the United States and various rules issued outside the United States typically require that all arbitrators shall be neutral.

It should be noted that, in some cases, the applicable rules or laws might require that all arbitrators be neutral. Therefore, the governing rules or laws should be considered before applying any of the provisions of Canon X relating to non-neutral arbitrators.

A. B. Obligations under Canon I

Non-neutral arbitrators should observe all of the obligations of Canon I to uphold the integrity and fairness of the arbitration process, subject only to the following provisions.

- (1) Non-neutral 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, non-neutral 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.
- (2) The provisions of subparagraphs B(1), C and D of Canon I relating to bias, relationships and interests, are not applicable to non-neutral arbitrators.

partiality or

insofar as they relate

B. C. Obligations under Canon II

Non-neutral 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 non-neutral arbitrator, but also for the benefit of the other parties and arbitrators so that they may know of any bias which may exist or appear to exist. ~~However, non-neutral arbitrators are not obliged to withdraw if requested to do so by the party who did not appoint them, notwithstanding the provisions of subparagraph E of Canon II.~~

However, this obligation is subject to the following provisions:

- (1) Disclosure by non-neutral arbitrators should be sufficient to describe the general nature and scope of any interest or relationship, but need not include as detailed information as is expected from persons appointed as neutral arbitrators.
- (2) Non-neutral arbitrators are not obligated to withdraw if requested to do so by the party who did not appoint them, notwithstanding the provisions of Canon II-E.

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C. D. Obligations under Canon III

Non-neutral arbitrators should observe all of the obligations of Canon III concerning communications with the parties, subject only to the following provisions.

- (1) In an arbitration in which two party-appointed arbitrators are expected to appoint the third arbitrator, party-appointed arbitrators, whether or not they are neutral, may consult with the parties who appointed them as provided in subparagraph B(2) of Canon III.
- (2) Non-neutral arbitrators may communicate with the party who appointed them concerning any other aspect of the case except for matters being deliberated by the arbitrators, provided they first inform the other arbitrators and the parties that they intend to do so. If such communication occurred prior to the time the person was appointed as arbitrator, or prior to the first hearing or other meeting of the parties with the arbitrators, the non-neutral arbitrator should, at or before the first hearing or meeting, disclose the fact that such communication has taken place. In complying with the provisions of this paragraph, 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 non-neutral arbitrator's intention to participate in such communications in the future is sufficient, and there is no requirement

ADD AAA Comm. Rule 20(b) 20(5)

thereafter that there be disclosure before or after each separate occasion on which such a communication occurs.

- (3) When non-neutral arbitrators communicate in writing with the party who appointed them concerning any matter as to 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. E.~~ *Obligations under Canon IV*

Non-neutral arbitrators should observe all of the obligations of Canon IV to conduct the proceedings fairly and diligently.

~~E. F.~~ *Obligations under Canon V*

Non-neutral arbitrators should observe all of the obligations of Canon V concerning making decisions, subject only to the following provision.

- (1) Non-neutral arbitrators are permitted to be predisposed toward deciding in favor of the party who appointed them.

~~F. G.~~ *Obligations under Canon VI*

Non-neutral arbitrators should observe all of the obligations of Canon VI to be faithful to the relationship of trust inherent in the office of arbitrator.

~~G. H.~~ *Obligations under Canon VII*

Non-neutral arbitrators are not subject to the provisions of Canon VII with respect to any arrangements for payments with or payments by the party that appointed them.

~~H. I.~~ *Obligations under Canon VIII*

Non-neutral arbitrators should observe all the obligations of Canon VIII concerning advertising and promotion of arbitral services.

~~I. J. *Obligations under Canon IX*~~
Non-neutral arbitrators should observe all the obligations of Canon IX concerning the form of the award.

Delete if Canon IX is deleted

Comment to Canon X

~~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 some of these types of arbitration, all three arbitrators are customarily considered to be neutral and are expected to observe the same standards of ethical conduct. However, there are also many types of tripartite arbitration in which it has been the~~

Delete here. This wording is included in the introductory part in Canon X for the reasons explained above.

practice that the two arbitrators appointed by the parties are not considered to be neutral and are expected to observe many - but not all - of the same ethical standards as the neutral third arbitrator. For the purposes of this Code, an arbitrator appointed by one party who is not expected to observe all of the same standards as the third arbitrator is called a "non-neutral arbitrator." This Canon X describes the ethical obligations that non-neutral arbitrators should observe and those that are not applicable to them. A non-neutral arbitrator is expected to observe all of the ethical obligations prescribed by the Code with the exceptions set forth in Canon X. Non-neutral arbitrators are thus expected to adhere to the standards applicable to neutral arbitrators except as specifically excused. They too bear responsibility for the integrity and fairness of the process.

It should be noted that, in some cases, the applicable rules or laws might require that all arbitrators be neutral. In such cases, the governing rules or laws should be considered before applying any of the foregoing provisions relating to non-neutral arbitrators.

In international commercial arbitration party-appointed arbitrators are ordinarily expected to be neutral. Thus, party-appointed arbitrators in international commercial arbitration should, to the extent practicable in the circumstances, observe all of the obligations of Canons I through IX without exception.

Delete. This text is largely included in the Introductory Note to Canon X with changes noted above