

# Handling the Tricky Stuff: Difficult Questions Arbitrators Face

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SELECTED SCENES BASED ON REAL  
PROBLEMS

# Presented by

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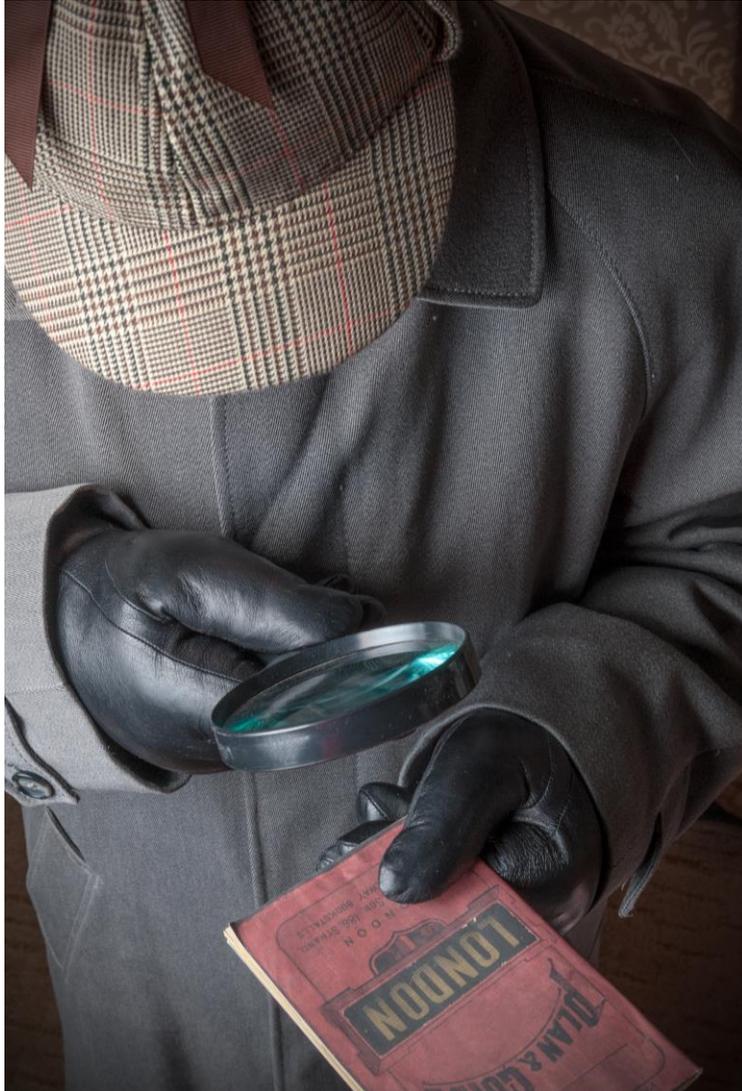
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# Prequel: The investigation

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DISCLOSING PROBLEMS



# Prequel: The investigation

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You are on a panel. You have only served a few times.

You are gratified you have been asked to serve  
Joe Doe is a witness. He is a client of your firm.  
But not your client. That's all you know.

You are a very fair person. You plan to just apply  
the law to the facts.

Why investigate further? Nothing really to  
disclose. Don't rock the boat!

# Prequel: The investigation

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*Are there any problems with this approach?*

- a. No problem, because you have no direct contact with Joe Doe and your impartiality cannot be questioned.
- b. Yes, remaining silent about the connection violates the arbitrator's ethical duty to disclose.
- c. No problem. Unless and until Joe Doe actually shows up at a hearing as a witness, you do not have to disclose or investigate such a remote "relationship."
- d. Yes, there is a problem because you are sanctimonious.



## Scene 1: The scheduling conference

Paper and problems

# Scene 1: The scheduling conference

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There is one arbitrator: you.

The scheduling conference, conducted by phone, begins.

Mr. Difficult , counsel for Respondent says, “I object. There is no jurisdiction. AAA is wrong. The claim is false . . . And frivolous. We plan to have them sanctioned by the court for even bringing it!” More invective and filibuster follows.

You finally get to discovery.

Mr. Earnest: “I need interrogatories, doc requests, and requests for admissions after our rule 26 disclosures. Then full depositions. We will need another conference in about 5 months to discuss experts including reports, depositions, rebuttal reports and rebuttal depositions. We can revisit surrebuttal after that.”

Mr. Difficult: “Ridiculous. This is supposed to be cheaper. The claim has no merit anyway. No depositions are allowed. I’ll list documents in my prehearing exhibit list. Period.”



# Scene 1: The scheduling conference

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## *What should the arbitrator do?*

- a. Allow 100 interrogatories, 50 document requests, and 200 requests for admission; set the hearing date for 36 months from now.
- b. Agree with Mr. Difficult, forbid any and all discovery, and set a final hearing date to take place in one month.
- c. Stop the hearing to call a friend and ask what to do.
- d. Discuss the need for discovery, how to limit it, and how to set the schedule for the rest of the case, then promptly issue a preliminary scheduling order.



# Scene 2: The subpoena

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WAITING FOR THE COURT

# Scene 2: The subpoena

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The hearing is in 5 days.

Mr. Earnest calls: “Postpone the hearing. Our subpoena on third-party Apex Corporation is pending. It objected. The court hasn’t ruled.”

He goes on, “I don’t know when the court will rule, but a fair hearing is *not possible* without the information!”

Mr. Difficult: “I object! We bought our tickets!”



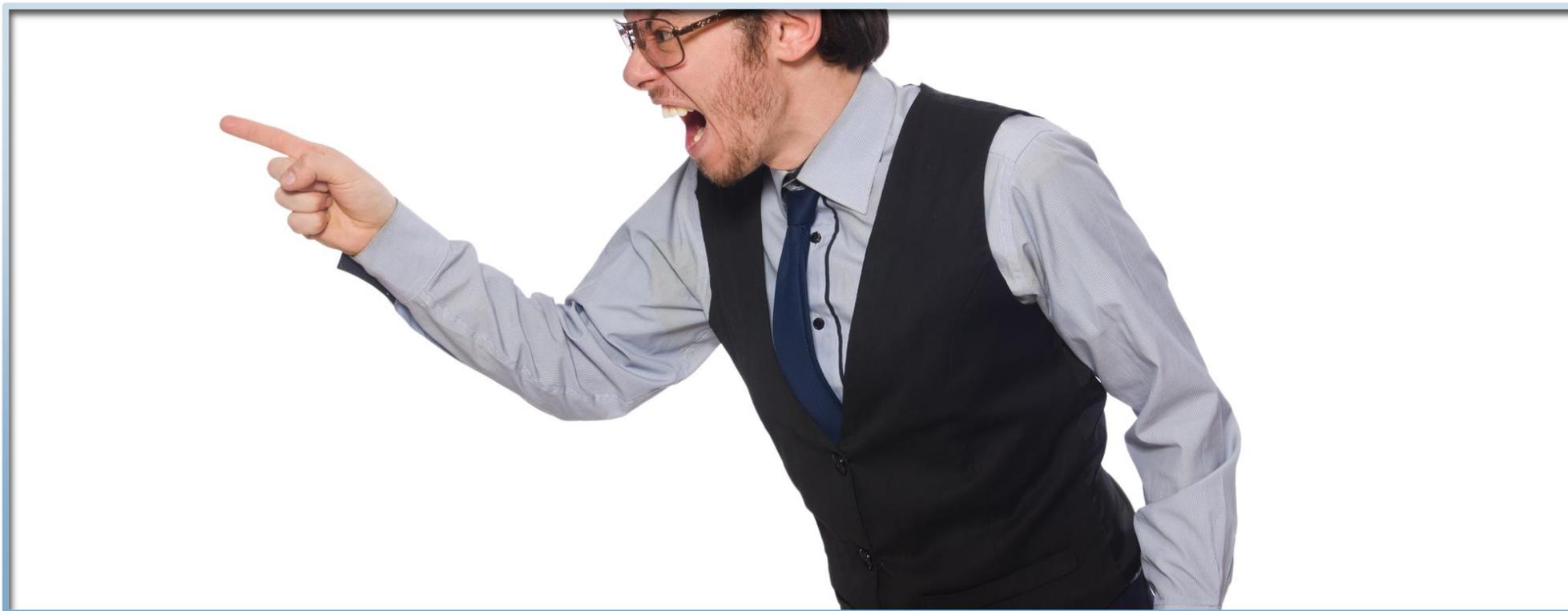
# Scene 2: The subpoena

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## *What should the arbitrator do?*

- a. Notify Apex Corporation that it is in contempt and will be fined \$100,000.
- b. Schedule a hearing and ask both counsel to brief the matter.
- c. Rule that the hearing will not be delayed but if Apex does not cooperate, an inference will be drawn that its documents would have supported Mr. Difficult's case.
- d. Google Apex Corporation to find out whether it is generally a bad actor.



# Scene 3: “Recuse yourself!”

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THE DEMAND.

# Scene 3: “Recuse yourself!”

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You are the sole arbitrator.

You are on a conference call with the lawyers to address Mr. Earnest’s request that Mr. Difficult’s client produce certain documents to back up Mr. Earnest’s damages claim.

You say the documents should be produced.

Mr. Difficult say, “You should recuse yourself. This is ridiculous. You are not fair or impartial, and are not even competent. You believe anything he says. You should recuse yourself right now!”



# Scene 3: “Recuse Yourself!”

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## *What should the arbitrator do?*

- a. Rule that she will not recuse herself.
- b. Issue a brief order directing all recusal requests to be directed to the case manager.
- c. Quit.
- d. Call Mr. Difficult privately and ask him to please cool off and stop being a jerk.



# Scene 4: Summary judgment

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WINNING ON PAPER

# Scene 4: Summary judgment

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Out of the blue, Mr. Earnest files a motion for summary judgment.

It is long and well supported by affidavits and exhibits. At first glance, it appears to have merit. If he is right on the law, there is no real need for a hearing.

Mr. Difficult points out this is arbitration and not court. You have no power to grant this. You better not refuse to hear evidence, or else!





# Scene 4: Summary judgment

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## ***What should the arbitrator do?***

- a. Check the parties' contract, the rules of the forum and the case law to determine if summary judgment is an available procedure.
- b. Grant summary judgment immediately.
- c. Set a briefing schedule for the motion.
- d. Deny the motion *pro forma* because granting summary judgment is grounds for vacating an award so why waste time and money hearing it?

# Scene 4 Epilog: Summary judgment

## Bonus question

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*What should you, the arbitrator, have done at the first conference?*





# Scene 5: One party won't pay

THE DEPOSIT ISN'T DEPOSITED

# Scene 5: One party won't pay

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You are the sole arbitrator. The hearing is in one week.

The case manager calls: "One party will not pay. I can't tell you who."

You have a pretty good idea of who. Claimant has a pretty good claim, and Respondent hasn't raised any real defenses so far.

You like arbitrating, but you also like being paid. And you want to be fair to everyone.



# Scene 5: One party won't pay

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## *What should the arbitrator do?*

- a. Ask the case manager to collect the full deposit including arbitrator fees from the willing party and go ahead with the case.
- b. Withdraw, because the arbitrator is now biased against the party he suspects did not pay.
- c. Rule that all deposits and fees will be taken out of the final award.
- d. Proceed as usual, even though just one party's share has been paid.
- e. Hold the arbitration hearing, but refuse to hear any evidence or argument from the party that didn't pay.



## Scene 5. One party won't pay

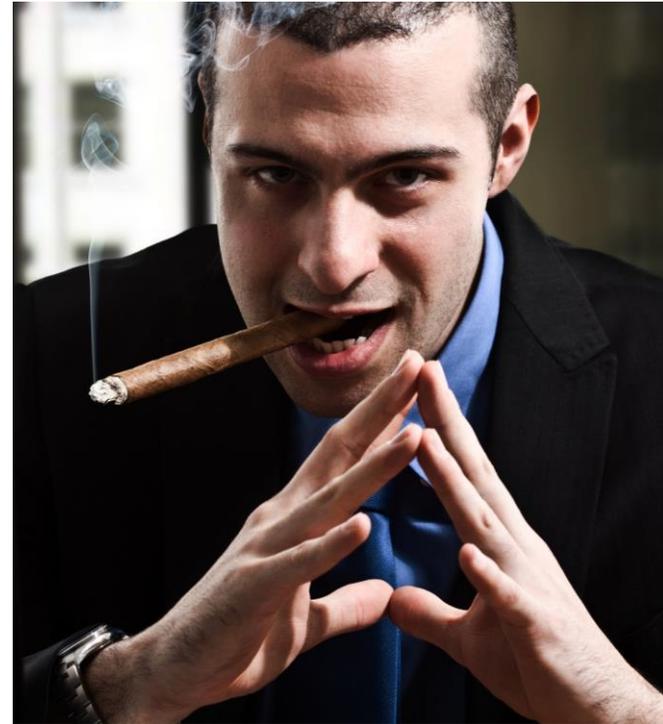
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- AAA Commercial Rule 57:
- A party may request the Arbitrator to take action for non-payment.
- Can include limiting a party's ability to pursue a claim, but it must be allowed to defend.
- Party must have an opportunity to respond to request before arbitrator rules.
- Arbitrator may suspend for non-payment. May terminate if not paid when required.

# Scene 6: Problem at the hearing

## The disbarred lawyer

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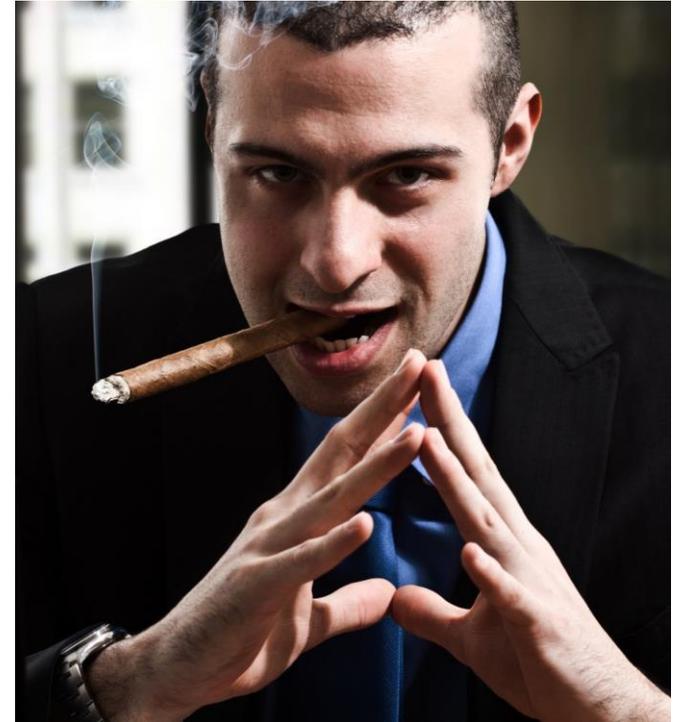
# Scene 6: Problem at the hearing

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You are on the third day of the hearing.

Mr. Earnest points out at the beginning, “Mr. Difficult, I learned last night, was disbarred in his home state of New York. And he doesn’t have local counsel and no Minnesota license either. This must stop!”

Mr. Difficult: “You don’t need to be a lawyer to be in arbitration. And you aren’t the ethics board. He’s just losing. This is outrageous!”





# Scene 6: Problem at the hearing

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What should the arbitrator do?

1. Grant a default to Mr. Earnest's client.
2. Ignore it. Mr. Earnest is always upset about something. And he is always looking for some procedural advantage.
3. Declare a "mistrial," or whatever you call it in arbitration. You are a lawyer and cannot be complicit in an ethical violation.
4. Adjourn the hearing, and meet with counsel. Ask for briefing and argument on the issue. *See materials re various state's laws, ethics rules, and other issues.*
5. Resign.

# Scene 6: Problem at the hearing

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AAA Comm'l Rule 26. Party can have any representative it likes if not prohibited by applicable law and gives notice.

Non-lawyer representatives:

- Depends, in part, on view of arbitration. Is it practicing law? Some courts say yes, some say no.
- Some state statutes specifically permit non-lawyers, e.g. in labor matters. Cal.
- Others forbid non-lawyer representation in arbitration. Az.

Out of state lawyers

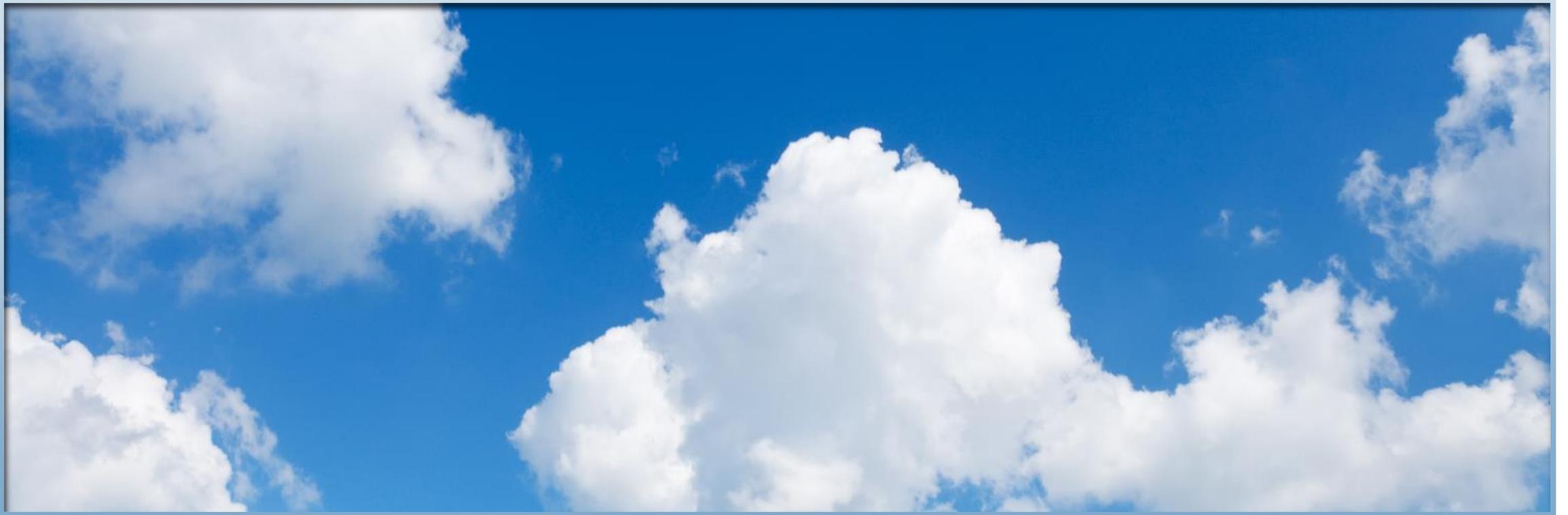
ABA model rules generally allow if related to home-state practice

Some states require *pro hac vice admission*, e.g. Fla.

Others require a certification, e.g. Ca.

Is all that really pre-empted by the FAA?





# Scene 6: A conflict of interest arises

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OUT OF THE BLUE

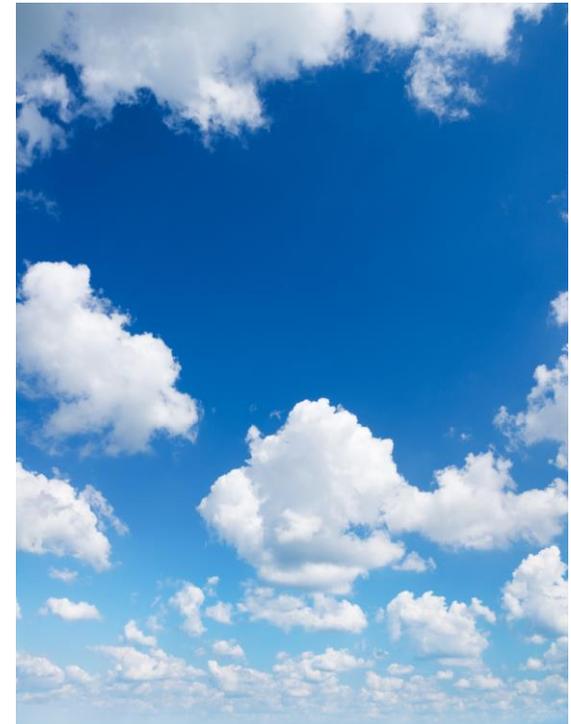
# Scene 7: A conflict of interest

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It is the last day of the hearing.

Claimant calls an important rebuttal witness. She wasn't on the list because issues evolved during the hearing. The issue is important.

The witness is a former partner of your law firm and still an acquaintance.



# Scene 7: A conflict arises

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## *What does the arbitrator do?*

- a. Keep quiet about it.
- b. Disclose the relationship then and there at the hearing and assure everyone that she remains impartial.
- c. Take a break and call the case manager to disclose, and let the case manager contact the parties to handle the matter.
- d. Withdraw then and there.



# Scene 8: The damages

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MATH AT WORK

# Scene 8: The damages

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You are the arbitrator.

You have dealt with lots of damages, but are no accountant.

The case involves damages for defective widgets. Claims are for repair, lost profits on lost sales and other matters. Also prejudgment interest.

Some claims are likely better than others.

How do you make it easier to enter the right decision on the merits and also get the damages right of claimant is entitled to some but not all things claimed?





# Scene 8: The damages

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***How do you arrange things so that you can enter a mathematically correct damages award and get the interest right if you do rule for claimant on some or all claims?***

- a. Advise the parties at the prehearing conference that you need damages and interest to be covered by expert testimony.
- b. Make something up, since you'll never be overturned anyway.
- c. Bring in your own expert to be paid for by the parties.
- d. Suggest that the parties break their damages calculations down by claim, item or time as appropriate, including any interest on that part of the damages.



# Scene 9: Let's talk

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HOW'D I DO?

# Scene 9: Let's talk

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After the arbitration, Mr. Earnest calls you, the arbitrator.

He didn't do as well as he hoped. But he'd like to improve.

He asks to schedule a session with you to see how he could do better.

You are curious about some issues in the case and how they were presented. It might be fun to meet.





# Scene 9: Let's talk

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## *Can you meet? Should you?*

- a. Wait a reasonable time and then meet with him.
- b. Decline politely.
- c. Send him written notes on his performance.
- d. Suggest he take a CLE on arbitration advocacy.



## Bonus scenes

If time allows . . .



# Thanks for watching!

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