

# Best Practices for Conducting Arbitrations

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**Minnesota State Bar Association  
Continuing Legal Education**

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# Creative Approaches to Conducting the Hearing

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# Creative Approaches to Conducting the Hearing (and more!)

Panelists:

Madge S. Thorsen; Minneapolis (moderator)

Linda M. Mealey-Lohmann

David A. Allgeyer

## Innovations in Arbitration from Pre-Hearing to the End

Arbitrators can suggest, adopt or persuade parties and their counsel to use innovative techniques in arbitration with the goals of speeding the proceedings, reducing the costs, keeping the process efficient, and still working toward a fair outcome. The Panel will discuss some creative approaches to arbitration, both domestic and international, and pros and cons of each. An underlying concern is avoiding over-complicating the process and keeping a level playing field where there are imbalances of power/sophistication among the parties.

### Pre-hearing

1. Pre-Hearing Syllabus. Present possible innovative techniques to counsel prior to the pre-hearing conference so they will have the time and opportunity to consider using them.
2. Motion Limits. Establish limitations and guidelines on motion practice, from discovery to summary judgment.
3. Documents-only Winnowing. Winnow down the issues by asking the parties to reach “documents-only” agreements. The parties can agree that some issues will be presented only by documents, without any testimony; others will be presented at the hearing live. The arbitrator has a chance to see their documents-only agenda in advance in order to ask for oral presentations if desired.
4. Arbitrator Homework. Circulate a list of questions, especially legal questions, to the parties that you specifically want to see addressed at the hearing, in documents, in briefs. This could also be done orally during or at the close of hearing and before post-hearing briefs.
5. Stipulated Chronologies. Stipulations are often too cumbersome to be efficient, but often parties can agree at least on a time-line of events and that can shorten the hearing as well as increase understanding of the evidence.

6. **Separate Common Grounds.** Cut out the difficult and time-consuming aspects of trying to reach stipulations by asking each advocate to submit a list of their perceptions of the common grounds that they believe exist. Whether or not their lists agree, there will be some overlap and that can make the arbitrator's job easier.
7. **Core Bundle.** Similarly, the parties may have trouble agreeing on what documents should be presented, but they will very likely agree on a "core bundle" – e.g., the contract, the purchase order, key correspondence. Having an identified core bundle can cut down on duplication, while leaving the parties free to have their own contested "bundles" of other evidence.
8. **Self-executing Concessions.** In the pre-hearing management order, establish a series of rules that are self-executing, e.g., after a certain time from submission, documents will be deemed authentic, correspondence will be deemed received by the addressee, etc. unless an advocate has timely raised a question. This can cut off game-playing later.
9. **Scott Schedule.** Used in international arbitration, this is a tabular form which lists the parties' respective contentions and responses, prepared early on by the parties to clarify the issues. It can also help define genuine discovery needs/limits. Another variant might be to ask the parties to submit a "special verdict form" after the hearing.

## **Discovery**

10. **Protocols.** Apply discovery protocols of the forum; apply proportionality always. *See Fed. R. Civ. P. 26.*
11. **Cost-Shifting.** Shift the costs of requested discovery to the requesting party as a means of controlling and narrowing both requests and expenses.
12. **Deposition Time.** Apply a single time limit on all depositions, collectively, e.g., the parties have 20 hours altogether to depose whoever they choose.
13. **Redfern schedules.** Used in complex international cases, this is another tabular form that tracks pre-hearing disputes. It contains four columns: each request/contested procedure, the support for the request, objections, and the arbitrator's rulings.
14. **Call.** Easy access to the arbitrator to resolve disputes quickly by phone can save time and money.

## **Experts**

15. Concurrent Evidence (“hot-tubbing”). All of the experts on an issue appear at once and discuss their reports, question each other, and can be questioned by the arbitrator and the parties.
16. Written Direct. Expert reports are taken as the direct testimony; only cross is live.
17. Agree/disagree Lists. Ask the experts to prepare a tabulation of issues/facts on which they agree and disagree. Sorting that out at the hearing is then easier and may cut down hearing time.
18. Confer in Advance. The experts are required to meet with each other before they prepare their reports; it may be that they find their disagreements are very narrow. Or require them to exchange drafts of their reports.

## **Hearing procedures**

19. Witness Conferencing. Essentially the same as concurrent evidence, but consider expanding it to key fact witnesses as well.
20. Narrative. Witnesses are permitted to give direct testimony through an essentially unbroken narrative. Since objections are of less importance in arbitration, this may make sense.
21. Rolling Arguments. The advocates are encouraged to make their arguments about the meaning and significance of the testimony as each witness is completed, at the end of a day, or at other chosen intervals.
22. Rolling Summaries. The arbitrator tells the parties after each witness or from time to time what she thinks the testimony was intended to address and areas about which she still has questions. The parties can recall the witness or prepare to address the holes through other evidence. This may remove the “reading the tea leaves” aspect of arbitration and even speed the process.
23. Reed Retreat. The arbitrators in a three person panel meet with one another to identify the issues they want the parties to address at the hearing. This should occur when the case has been relatively well developed, such as a few weeks before the hearing. The parties are then advised of the areas the arbitrators identified.

24. Technology, Technology, Technology. Skype, power point, electronic presentation of evidence, testimony or site visits by video. E-briefs with hot links in large cases. Robots?
25. Chess Clock. The hearing time is divided between the parties and a chess clock is used to monitor that time for each side. Build-in “humanity breaks.”





# **Ethics Issues for Arbitrators: Those Pesky Disclosures**

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# **Ethics Issues for Arbitrators: Those Pesky Disclosures**

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Ethics for Minnesota Arbitrators

Disclosures by Arbitrators

Table 18 – Neutrals Conflicts of Interest: Disclosure Summary

AAA Disclosure Guidelines (Summary)



# ETHICS FOR MINNESOTA ARBITRATORS

The ethical and legal standards of conduct to which arbitrator's must adhere are set forth in a variety of rules, statutes, and codes. Some have been addressed in previous sections of this manual, and all are thoroughly addressed in Chapter 6 of the *MN ADR Handbook*. The complete text of the rules, statutes and codes are set forth in Appendices A, B and C.

## Essential Concepts

- Impartiality
- Disclosure of Conflicts of Interest
- Procedural Fairness
- Prohibition of Ex Parte Communication
- Neutral Arbitrators vs. Party Arbitrators

## Essential Standards

- Rule 114.10(a) Adjudicative Processes – no communication ex parte with neutral
- Rule 114 Code of Ethics
  - Rule I. Impartiality
  - Rule II. Conflicts of Interest – including disclosure
  - Rule III. Competence
  - Rule IV. Confidentiality
  - Rule V. Quality of the Process
  - Rule VI. Advertising and Solicitation
  - Rule VII. Fees
- FAA – grounds for vacatur
  - “evident partiality or corruption” - 9. U.S.C. §10(a)(2)
  - Misconduct in refusing to postpone, hear evidence or other - 9 U.S.C. §10(a)(3)
  - “exceeding their powers” - 9 U.S.C. §10 (a)(4)
- RUAA
  - Disclosure - neutral and party arbitrators – Minn. Stat. §572B.12
  - Grounds for vacatur
    - “evident partiality or corruption” - Minn. Stat. §572B.23(a)(2)
    - Misconduct in refusing to postpone, hear evidence or other - Minn. Stat. §572B.23(a)(3)
    - exceeded their powers – Minn. Stat. §572B. 23(a)(4)
- Minnesota Rules of Professional Conduct
  - Rule 1.12 – Former Judge, Arbitrator, Mediator, or other Third Party Neutral
  - Rule 2.4 – Lawyer Serving as Third-Party Neutral
- Code of Ethics for Arbitrators in Commercial Disputes (AAA/ABA 2003)
  - Fairness, impartiality, communication, party arbitrators
- Other Organizational Standards



## **DISCLOSURES BY ARBITRATORS**

(*MN ADR Handbook*, Chapter 3, p. 152-153; Chapter 6, p. 260-267, 297-308)

### **1. General Concepts**

The concepts of impartiality of neutrals and disclosures of conflicts of interest by neutrals are central to the integrity and fairness of arbitration, as well as other ADR processes. According to the United States Supreme Court:

[W]e should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review.

*Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 149 (1968). See Minn. Gen. R. Prac., Appendix, Code of Ethics Rule I. Impartiality and Rule II. Conflicts of Interest. See also Code of Ethics for Arbitrators in Commercial Disputes Canon I.B(1). See generally, *MN ADR Handbook*, p. 297-308. Because arbitrators may have had some contact with either or both attorneys, parties or witnesses in other cases or circumstances, the “anodyne for potential charges of partiality is disclosure.” *MN ADR Handbook*, p. 152.

### **2. Statutes and Rules: Evident Partiality and Disclosure**

Accordingly, under the FAA and the MN RUAA, arbitration awards may be vacated on grounds of “evident partiality” on the part of the arbitrators. 9, U.S.C. §10(a); Minn. Stat. §572B.23(a). Indeed, under the MN RUAA, a “neutral” arbitrator who fails to make required disclosures under the act is “presumed” to act with evident partiality...” Minn. Stat. §572B.12(e). Unlike the FAA, the MN RUAA and Rule 114 provide specifically for disclosures by neutrals. Minn. Stat. §572B.12; Minn. Gen. R. Prac. 114 Appendix, Code of Ethics Rule II. Conflicts of Interest. See also Code of Ethics for Arbitrators in Commercial Disputes Canon II.B. See *MN ADR Handbook*, p. 263-267.

### **3. Practice Tip: When in Doubt Disclose**

When in doubt, as soon as practicable, divulge information (in writing), no matter how remote, that a reasonable person could construe as having a bearing on your impartiality, including financial, business and social relationships. This obligation is continuing. *MN ADR Handbook*, p. 152-153; 297-308.

#### 4. **Note: “Neutral” v. “Party” Arbitrators**

A “neutral arbitrator” is an arbitrator selected by the court, by other arbitrators or by all the parties. A “party arbitrator” is an arbitrator selected by fewer than all the parties. A sole arbitrator is always “neutral” but panels may consist of all neutral arbitrators or a combination of the two. Rules for disclosure of conflicts of interest vary for the two in some cases. *See MN ADR Handbook*, p. 298. *See also* Code of Ethics for Arbitrators in Commercial Disputes, Canons IX. & X.; Minn. Stat. §572B.

#### 5. **After Disclosure**

- a. Decline to serve if any party requests withdrawal
- b. If all parties agree to continued service, make an independent assessment of whether you can go forward in an impartial manner
- c. If all parties agree, and arbitrator can remain impartial, continue to serve

*MN ADR Handbook*, p. 302-308.

#### 6. **Consequences for Failure to Disclose**

- a. Ethical Consequences – Discipline
- b. Legal Consequences – Vacatur of Award

*MN ADR Handbook*, p. 304-305.

For a complete summary of the disclosure requirements, refer to **Table 18. Neutrals Conflicts of Interest Disclosure Summary** on p. 307-308 of the *MN ADR Handbook*.

**TABLE 18.**  
**NEUTRALS CONFLICTS OF INTEREST DISCLOSURE SUMMARY**

<b>What to disclose</b>	Conflicts of interest “reasonably known” after “reasonable inquiry”
	Conflicts of interest – all facts that might create an appearance of partiality or bias
<b>When to disclose</b>	As soon as practicable, before appointment where possible
	Continuing obligation to disclose newly discovered facts throughout the process
<b>Whom to disclose to</b>	All parties and, in arbitration, other arbitrators
<b>How to disclose</b>	In writing, where possible, including: <ul style="list-style-type: none"> <li>• the general nature of the conflict</li> <li>• the frequency, timing and significance of the conflict</li> <li>• the “reasonable inquiry” to discover conflicts</li> </ul>
<b>What to do after disclosure</b>	Serve if all parties agree <i>and</i> neutral can remain impartial
	Decline to serve if any party requests withdrawal
	CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon II.G: <ul style="list-style-type: none"> <li>• If all parties agree, serve</li> <li>• If all parties request withdrawal, withdraw</li> <li>• If fewer than all parties request withdrawal, withdraw unless: <ul style="list-style-type: none"> <li>▪ challenge procedures apply; or</li> <li>▪ the objection is insubstantial and arbitrator can remain impartial</li> </ul> </li> </ul>
	Independently assess whether facts will affect impartiality or the appearance of impartiality
<b>What may happen after failure to disclose</b>	Discipline
	Vacation of award or setting aside or reformation of mediated settlement agreement



# DISCLOSURE GUIDELINES

for  
Neutrals serving on American Arbitration Association Cases

## General

1. The American Arbitration Association Rules and the *Code of Ethics* require you to make full disclosure.
2. Your duty to make disclosures is ongoing throughout all stages of the arbitration. The Case Manager may prompt you to conduct a subsequent conflict check during key points of the case, but you should conduct such checks and make disclosures on your own initiative whenever new information about the case participants comes to light.
3. Any doubt as to whether or not disclosure needs to be made should be resolved in favor of disclosure. You should not judge the significance of the potential conflict but rather you should make the disclosure and let the parties determine its significance.
4. As a guiding principle, *if a relationship or interest crosses your mind – disclose it.*
5. You must disclose:
  - Any circumstance likely to give rise to **justifiable doubt** as to your impartiality or independence (*per AAA rules*).
  - Any interest or relationship that might create an **appearance** of partiality (*per the Code of Ethics*).
  - Any applicable statutes pertaining to arbitrator disclosures.

## Financial

As to any party, attorney, witness and other arbitrator involved in **this** case, you must disclose any:

- Financial interest that is **direct** (existing or past) or **indirect** (existing or past).

## Relational

You must disclose any **relationships** you have with any party, attorney, witness and other arbitrator involved in **this** case – this includes relationships with their:

- Families or household members
- Current employers
- Partners
- Professional and/or business associates

## How to Disclose

When disclosing, **specificity** is extremely important. Provide enough detail in your disclosure so that the parties are fully informed of the potential conflict. Tell us:

- Who
- What
- When
- Where
- How

Failing to provide a sufficient level of detail will delay the confirmation of your appointment, as well as the progress of the case overall, since the Case Manager will need to contact you for additional information.

All disclosures must be provided in writing. In the rare situation where a disclosure comes to light at a hearing, you are obligated to excuse yourself from the proceeding and immediately contact the AAA who will facilitate the process for communicating the disclosure to the parties and obtaining their response. Pursuant to the AAA Rules, the AAA shall determine whether or not a challenge raised by a party to an arbitrator's continued service shall be granted or denied.



BEST PRACTICES  
FOR CONDUCTING ARBITRATIONS

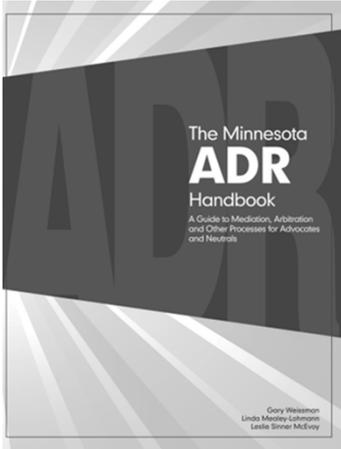
**ETHICS ISSUES FOR  
ARBITRATORS:**

**THOSE PESKY DISCLOSURES**

Leslie Sinner McEvoy, Esq. August 14, 2019

## Minnesota ADR Handbook

Materials for this course were drawn substantially from the Minnesota ADR Handbook, including specific excerpts.



The image shows the cover of the book 'The Minnesota ADR Handbook'. The cover features the title 'The Minnesota ADR Handbook' in a bold, sans-serif font. Below the title, it says 'A Guide to Mediation, Arbitration and Other Processes for Advocates and Neutrals'. At the bottom of the cover, the authors' names are listed: 'Dory Weisman, Linda Mackey Johnson, Leslie Sinner McEvoy'. The cover has a dark background with light-colored geometric shapes and lines.

# AGENDA



- Who are you?
- What's up with those pesky disclosures?
- Central Concepts
- Standards
- Best Practices for How to Disclose
- Consequences for Failure to Disclose
- ARS – Best Answer
  
- Disclosure Checklist

# Who are you?

- Arbitrators?
  - Less than 10 years
  - More than 10 years
- Advocates in arbitration?
  - Less than 10 years
  - More than 10 years



## What's Up with Disclosure?

- Why do we care?
- Why does it matter so much in arbitration?
- What rules govern and guide us?
- What are best practices?
  - How far do you go to investigate?
  - How and when do you make disclosures?
- What happens if you don't disclose?
  - What is the impact on the arbitrator?
  - What is the impact on the parties?



## Central Concepts: Impartiality



## Central Concepts

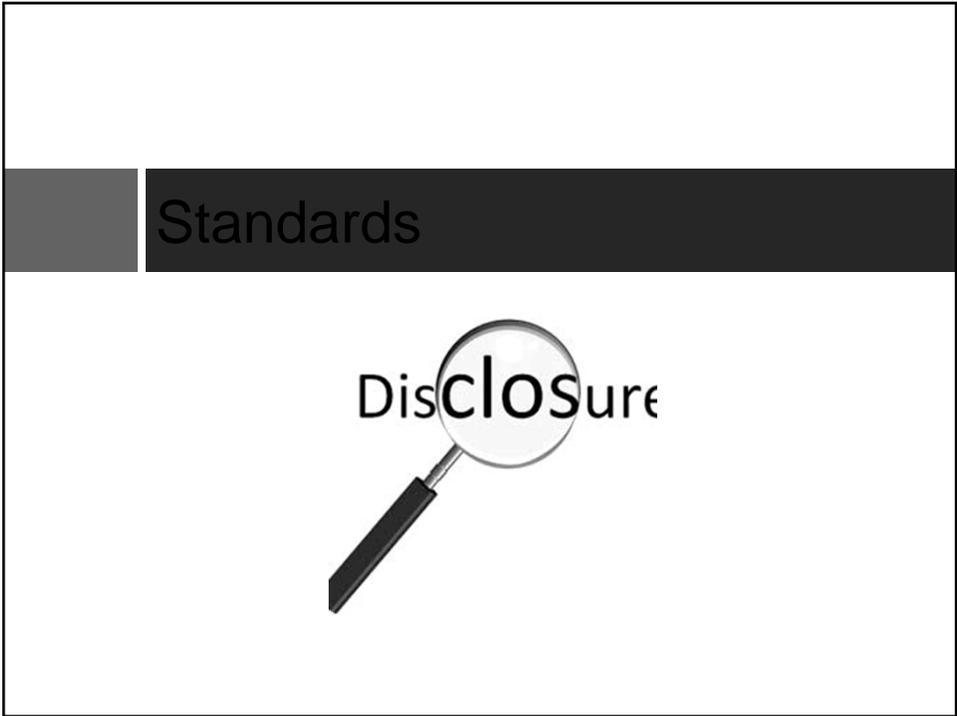
- **Impartiality of Arbitrators**
  - ▣ Fairness dictates an unbiased decision maker
- **Finality of Arbitration Awards**
  - ▣ No appeal, limited grounds to vacate
- **“Evident Partiality”**
  - ▣ Grounds to Vacate
- **Disclosure of All Potential Conflicts of Interest**
  - ▣ “Eye of the Beholder”
  - ▣ Durability of Awards



## Commonwealth Coatings

- “[W]e should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators **disclose** to the parties any dealings that may create an **impression of possible bias.**” (emphasis supplied)
- *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 149 (1968).





### Sources of Disclosure Standards

- Federal Arbitration Act
- Minnesota Revised Uniform Arbitration Act
- Rule 114 of the General Rules of Practice for the District Courts\*
- Rule 114 Code of Ethics\*
- AAA/ABA Code of Ethics for Arbitrators
- Other

**DISCLOSURE**

## Federal Arbitration Act

### □ Grounds to Vacate an Arbitration Award:

#### ■ ***Evident Partiality***

- “[W]here there was *evident partiality* or corruption in the arbitrators, or either of them”

- 9 U.S.C. Section 10 (a)

#### ■ ***Disclosure not mentioned specifically***



## “Evident Partiality”



- “Evident Partiality” is not defined in the statutes
- Disagreement among the federal circuits
  - 2d Circuit (1<sup>st</sup>, 3<sup>d</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>) a “reasonable person would have to conclude” there was bias
  - 9<sup>th</sup> Circuit (5<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>) there exists a “reasonable impression” of bias (*See Ploetz v. Morgan Stanley Smith Barney LLC*, 894 F.3d 894 (8th Cir. 2018))
    - Disclosures key to avoiding ‘evident partiality’ challenges ([https://www.hklaw.com/files/Uploads/Documents/Articles/08312017\\_DisclosuresKeyToAvoid.pdf](https://www.hklaw.com/files/Uploads/Documents/Articles/08312017_DisclosuresKeyToAvoid.pdf))
    - The Different Meanings of an Arbitrator’s “Evident Partiality” Under U.S. Law (<http://http://kluwarbitrationblog.com/2013/03/20/the-different-meanings-of-an-arbitrators-evident-partiality-under-u-s-law/>)

## MN Revised Uniform Arbitration Act - Disclosures

- Disclosures Before Appointment – 572B.12(a)
  - After making a “reasonable inquiry”
  - Disclose to all parties and arbitrators
  - Any known facts that a reasonable person would consider likely to affect *impartiality*
- Continuing Obligation to Disclose – 572B.12(b)
- Timely Objection to Appointment or Continued Service Based Upon Disclosure – **Grounds to Vacate**– 572B.12(c)
- Failure to Make Required Disclosure – **Grounds to Vacate** – 572B.12(d)



## MN Revised Uniform Arbitration Act – Evident Partiality

- Failure to disclose known interest in outcome of arbitration or substantial relationship with a party - **Presumption** of *Evident Partiality* – 572B.12(e)
- **Vacating Award** – if there was *Evident Partiality* by an arbitrator appointed as a neutral – 572B.23(a)



## Rule 114 Ethics Rule I. Impartiality

“A neutral shall conduct the dispute resolution process in an *impartial manner* and shall serve only in those matters in which she or he can remain impartial and evenhanded. If at any time the neutral is unable to conduct the process in an impartial manner, the neutral shall withdraw.”

WHEN TO  
WITHDRAW?

## Rule 114 Ethics Rule II. Conflicts of Interest

- Disclose all actual and potential conflicts of interest “*reasonably known*”
- After disclosure, “**decline to participate**” unless all parties choose to retain
  - CAVEAT: if all parties choose to retain, neutral may proceed, **unless the neutral believes** that the conflict of interest would inhibit the neutral’s impartiality
  - ALERT: New Rule 114 may **reverse** this presumption
- Governs conduct during and after the process

## **Caveat:** Rule 114 – **STILL** Under Revision

- Rule 114 is *still* under revision by the Rule 114 Ethics Board and the Minnesota Supreme Court.
- The revisions may be substantial
- Stay tuned.....



## AAA/ABA Code of Ethics

- Canon I. An Arbitrator Should Uphold the Integrity and Fairness of the Arbitration Process
  - ▣ *Shall serve impartially*
  
- Canon II. An Arbitrator Should Disclose Any Interest or Relationship Likely to Affect Impartiality or Which Might Create An Appearance of Impartiality
  - ▣ *Disclosure of conflicts of interest*

## CAVEAT: Party Arbitrators



- “*Neutral Arbitrator*” is appointed by the court, the other arbitrators, or all the parties
- “*Party Arbitrator*” is selected by fewer than all the parties
- A sole arbitrator is always “neutral” but some panels consist of some “party” arbitrators
- Rules of disclosure differ for “party” arbitrators
- “*Evident partiality*” is *not* cause to withdraw for party arbitrators
- See Minn. Stat. 572B.12 & AAA/ABA Code of Ethics for Arbitrators, Canon IX. & X.

*MN ADR Handbook*, 298, 321-322

## Disclosure Best Practices



## WHAT to Disclose



### Question #1: What to disclose?

- You receive a request to serve as arbitrator in an employment matter. You believe your background and experience are a good fit, and so you indicate your willingness to serve. The administrator asks for a routine disclosure before appointment. You review the lists of parties, witnesses, attorneys and firms, noting that one of the witnesses is a spouse of a girl scout leader who led your daughter's troop about 10 years ago. What, if anything, should you disclose?

## Question #1: What to disclose?

- What, if anything, should you disclose?
  - a. Nothing, this was very long ago.
  - b. Nothing, this does not directly involve the witness.
  - c. Nothing, as you do not recall ever meeting the witness – just the spouse.
  - d. Only that you might have met the witness years ago.
  - e. The nature of the relationship, including timing, frequency and duration.

## What: Facts Creating Appearance of Bias

- Facts Creating an Appearance of Bias
  - Any financial or personal interest in the outcome of the arbitration or any existing or past relationship with any of the parties, counsel, witnesses or arbitrators that a reasonable person would consider likely to affect the impartiality of the arbitrator. Minn. Stat. 572B. 12(a). See also, Rule 114 Ethics Rule II. Conflicts of Interest, Advisory Task Force Comment 1; AAA/ABA Code of Ethics for Arbitrators, Canon II.
- All doubts should be resolved in favor of disclosure.

### PRACTICE TIP FOR NEUTRALS

#### Disclosures

When in doubt, make a disclosure, even if the interest or relationship seems remote, as in, "You should know that my oldest daughter babysits for the next door neighbor of plaintiff's lawyer's brother and sister-in-law."

*MN ADR Handbook, 300*

## Conflicts of Interest: “in the *eyes of the parties*”

- AAA/ABA Code of Ethics for Arbitrators, Canon II.
  - “A. Persons who are requested to serve as arbitrators should, before accepting, disclose:
    - (1) any known or indirect financial or personal interest in the outcome of the arbitration:
    - (2) any known or existing past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the *eyes of any of the parties.*”



## What: Conflicts “*Reasonably Known*”

- Disclose actual and potential conflicts of interest “*reasonably known*” to the neutral. Rule 114 Ethics, Rule II.
- Make a “*reasonable inquiry*” to determine if such conflicts exist. Minn. Stat. Sec. 572B.12(a)
- Make a “*reasonable effort*” to discover conflicts. AAA/ABA Code of Ethics for Arbitrators, Canon II.B.



*MN ADR Handbook, 299*

## Reasonable Inquiry?

- What constitutes a “reasonable inquiry”?
  - Inquiring of parties
    - Subject matter
    - All parties
    - All counsel
    - All known witnesses
  - Previous contacts by parties and counsel with neutral and neutral’s firm
  - Internal conflicts check where applicable
  - Other? DEPENDS



*MN ADR Handbook, 299*

## In Sum – WHAT to Disclose

- Disclose ALL Conflicts of Interest – all facts that might create an appearance of partiality or bias – that are “reasonably known” after “reasonable inquiry”



## When to Disclose



## Question #2: When to disclose?

- Same scenario as #1, but this time you do not recognize the name of the witness when reviewing the lists and do not make a disclosure. But on Day 2 of the hearing, the witness appears, and you recall having met the witness in connection with the girl scout troop some 10 years ago. What should you do?

## Question #2: When to disclose?

- What should you do?
  - a. disclose potential conflict of interest, but can continue to serve if parties desire.
  - b. disclose potential conflict of interest and decline to continue to serve.
  - c. has discretion about what to do depending on how far along the arbitration has progressed.
  - d. should not disclose potential conflict of interest because it would negatively affect the quality of the process.

## When: As Soon as Practicable

- **Before accepting appointment**
  - AAA/ABA Code of Ethics, Canon II. A.
  - Minn. Stat. 572B.12(a)
- **“As soon as practicable”**
  - AAA/ABA Code of Ethics Canon II. C.
- **BEST PRACTICE** – “[D]isclose, as soon as practicable, any information that has the potential to affect the integrity of the process and the parties’ perception of the ability of the neutral to proceed in a fair and impartial manner.”


 The logo consists of the letters 'ASAP' in a bold, white, sans-serif font, set against a solid black rectangular background.

*MN ADR Handbook, 300*

## When: Continuing Obligation

- Arbitrator's obligation to disclose is ongoing throughout the process
- In addition to disclosures at the outset, as soon as practicable arbitrator must disclose any new facts discovered DURING the process or any newly discovered "old" facts.
- Rule 114 Code of Ethics Rule II; Minn. Stat. 572B.12(b); AAA/ABA Code of Ethics for Arbitrators Canon II.C.

**CONTINUE ►**

*MN ADR Handbook, 300*

## To Whom to Disclose



### Question #3: To whom to disclose

- Same scenario as #2, except that you are on a three-person arbitration panel. You decide to make the disclosure. To whom do you disclose?

### Question #3: To whom to disclose

- To whom do you disclose?
  - a. Only your co-arbitrators; they will ensure impartiality and the arbitration won't be derailed.
  - b. Co-arbitrators, administrator and the parties; all should have this knowledge as soon as practicable.
  - c. Only the parties; they will be making the decision as to whether to move forward and don't need others' influence.
  - d. Only the administrator; that way the arbitration can go forward without delay.

## To Whom: All



- All Parties
  - Rule 114 Code of Ethics, Rule II.
  - Minn. Stat. 572B.12 (a)
  - AAA/ABA Code of Ethics for Arbitrators, Canon II.E.
- Other Arbitrators
  - Minn. Stat. 572B.12(a) & (b)
  - AAA/ABA Code of Ethics for Arbitrators, Canon II.E.

*MN ADR Handbook, 300-301*

## How to Disclose



## Question #4: How to disclose?

- Same scenario as #1. You recognize the name on the witness list and decide to make the disclosure. You should:
  - a. Call the administrator and outline the general details.
  - b. Put the general outline of the details in an email to the parties.
  - c. In writing, provide facts that indicate possible conflict, frequency of contacts, timing, significance of relationship and your belief that facts will not affect impartiality.

## How: In Writing

- Facts
- Reasonable Inquiry
- Timing of Disclosure
- Consent to Proceed



## How: Details

- General nature of the conflict(s)
- Frequency
- Timing
- Significance of relationships or circumstances
- Assertion that facts disclosed will not affect impartiality – if believe can proceed
- “Reasonable Inquiry”
- **CAVEAT: Do Not Disclose Confidential Information** from another proceeding or attorney-client relationship.

**DETAILS**

*MN ADR Handbook, 301*

## How: Format

- Disclosure of Potential Conflict
  - Retention Agreement
  - Administrator’s Form
  - Letter to All
- Acknowledgement & Consent to Proceed
  - May be incorporated in above documents
  - May be in a separate writing



*MN ADR Handbook, 301*

## After Disclosure



## Question #5: After disclosure?

- Same scenario. You have made the appropriate disclosures in writing under the rules. What now? Do you serve or withdraw?
  - a. Serve, since the disclosure has been made.
  - b. Withdraw, since you have identified a possible conflict of interest.
  - c. Serve if parties desire; withdraw if any party requests.
  - d. Serve if parties desire and you can be impartial.
  - e. Withdraw if co-arbitrators decide you should.

## After Disclosure: Serve or Withdraw?

- To serve or not to serve?
  - **Rule 114 Code of Ethics, Rule II:** “Decline to participate unless the parties choose to retain the neutral”
  - **AAA/ABA Code of Ethics for Arbitrators**
    - Serve if all agree – Canon II.F.
    - Withdraw if all request – Canon II.G.
    - If fewer than all request withdrawal, withdraw *unless* –
      - There are procedures in place to challenge - follow - OR
      - Arbitrator determines challenge is not substantial and can be fair and impartial – Canon II.G.
    - **QUERY:** Is it a good idea to continue?



*MN ADR Handbook, 302-303*

## After Disclosure: Independent Assessment

### WHEN TO WITHDRAW?

- An arbitrator must decline to serve or withdraw if unable to remain impartial
- Even if the parties agree to retain or continue, an arbitrator “must make an *independent assessment* of whether he or she can proceed in an *impartial* manner. If [he or she] believes that the conflict of interest would inhibit his or her impartiality, [he or she] should decline the appointment or withdraw from the process.” See Rule 114 Code of Ethics. Rule I. & II. Advisory Task Force Comment 1.

*MN ADR Handbook, 301-302*

## Consequences : Failure to Disclose or Withdraw



### Question #6: Failure to disclose

- Same scenario as #2, but you decide NOT to disclose the discovered relationship, so as not to derail the process mid-stream, and because you do not believe that it will impact your impartiality. The decision is, incidentally, favorable to the party with the witness you are connected to. A few weeks later at a girl scout leader reunion, the losing party discovers the connection. Now what?

## Question #6: Failure to disclose

Which of the following are possible consequences:

- ❑ a. The losing party moves to vacate the award.
- ❑ b. The award is vacated for evident partiality.
- ❑ c. The parties incur more time and expense.
- ❑ d. Your reputation as an arbitrator is affected.
- ❑ e. All of the above.

## Consequences: Failure to Disclose or Withdraw

- ❑ **Parties**
  - ❑ Vacation of Award
  - ❑ Increased expense & inefficiency
  - ❑ Decline in confidence in the process
- ❑ **Arbitrator**
  - ❑ Personal –
    - Reputation for good process
    - Professional integrity
  - ❑ Ethical - Discipline





## Arbitrator Disclosures - Checklist

TABLE 18. NEUTRALS CONFLICTS OF INTEREST DISCLOSURE SUMMARY	
<b>What to disclose</b>	Conflicts of interest "reasonably known" after "reasonable inquiry" Conflicts of interest – all facts that might create an appearance of partiality or bias
<b>When to disclose</b>	As soon as practicable, before appointment where possible Continuing obligation to disclose newly discovered facts throughout the process
<b>Whom to disclose to</b>	All parties and, in arbitration, other arbitrators
<b>How to disclose</b>	In writing, where possible, including: <ul style="list-style-type: none"> <li>• the general nature of the conflict</li> <li>• the frequency, timing and significance of the conflict</li> <li>• the "reasonable inquiry" to discover conflicts</li> </ul>

*MN ADR Handbook, 307-308*

## Arbitrator Disclosures – Checklist

	Serve if all parties agree <i>and</i> neutral can remain impartial
	Decline to serve if any party requests withdrawal
<b>What to do after disclosure</b>	CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon II.G: <ul style="list-style-type: none"> <li>• If all parties agree, serve</li> <li>• If all parties request withdrawal, withdraw</li> <li>• If fewer than all parties request withdrawal, withdraw unless:                         <ul style="list-style-type: none"> <li>▪ challenge procedures apply; or</li> <li>▪ the objection is insubstantial and arbitrator can remain impartial</li> </ul> </li> </ul>
	Independently assess whether facts will affect impartiality or the appearance of impartiality
<b>What may happen after failure to disclose</b>	Discipline Vacation of award or setting aside or reformation of mediated settlement agreement

*MN ADR Handbook, 308*

## Practice Tip – Higher Ground

- ❑ Make a reasonable inquiry in all cases
- ❑ Document the inquiry
- ❑ As soon as practicable, disclose all facts - that may create an impression of bias - to all
- ❑ Document the disclosure
- ❑ Proceed only if all agree
- ❑ Make an independent assessment
- ❑ Durability of awards is at stake
- ❑ Professional integrity is at stake



## When in Doubt.....

- Disclose, Disclose, Disclose
- Withdraw, Withdraw, Withdraw







# **How to Handle the Tricky Stuff: Difficult Questions Arbitrators Face**

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# How to Handle the Tricky Stuff: Difficult Questions Arbitrators Face

David A. Allgeyer



## How to Handle the Tricky Stuff: Difficult Questions Arbitrators Face <sup>1</sup>

### Prequel: The “Investigation”

You are on a panel of arbitrators. You haven’t done this much before, but are gratified that you are finally getting the recognition you deserve as a member of a large, prestigious law firm. One of the parties has asked you to serve. You graciously accept. During the initial stages of the arbitration, you learn that one of the witnesses is Joe Doe. You know Joe has been a client of the firm, but only through hallway talk. You don’t quite know what kind of work the firm did or does for him. He is not an important client of the firm; of that you are sure. As to the other names, you haven’t heard of any of them. No point in going into all that, you figure. It could only raise problems. Besides, you know you are fair down to your very soul and know you can be impartial. You’ll just apply the law to the facts.

Any problem with this approach?

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<sup>1</sup> Special thanks to Madge Thorsen, who contributed to the problems and the questions presented.

## **Scene 1: The Scheduling Conference**

You are the sole arbitrator. The scheduling conference begins. Mr. Difficult, Esq., representing the respondent begins by noting, “I object to this proceeding. This arbitration should never have been filed, and I’ve complained about jurisdiction. But the AAA got it all wrong. In any event, this case has no merit. And I’ll tell you why. This claim that we breached the contract is completely false and scurrilous. I should sue them for even bringing it . . . [5 more minutes of invective . . .]”

When you move to the point of determining dates for the hearing and other dates, Mr. Difficult says, “I haven’t even had a chance to talk to my client yet, so I can’t possibly set any dates. I object to this whole proceeding.”

The discussion turns to any discovery to be done. Mr. Earnest suggests that, while interrogatories are normally limited, in this case he needs to fully develop the key facts, so he suggests the interrogatories, document requests, and requests for admissions have no limit. He also says that, “Because we will need to get fact discovery done before we can select experts, we should have another conference to schedule that and the depositions of each expert. The Rule 26 disclosures will take a while, but could probably be done in a month.” Mr. Difficult interrupts to say that, “This is arbitration! I object to any discovery at all! They told me this was supposed to be cheaper. This won’t be cheap if they do discovery. This will cost more than court. And I even have to pay the arbitrator. No way!”

What discovery can you allow? What should you allow?

## **Scene 2: The Subpoena**

Mr. Earnest arranges a conference call a few days before the hearing. “We have to postpone the hearing,” he says. “I brought a motion to enforce my subpoena on Apex Corporation, and the court hasn’t ruled. We need to get a ruling. I don’t know when the court will rule, but we need the information to fully and fairly present our position.” Mr. Difficult objects. He already bought his airline tickets to come to your office for the hearing. They are non-refundable, he says.

Do you delay? Indefinitely?

## **Scene 3: The Recusal Demand**

You are on an arranged conference call with counsel for both parties regarding discovery issues. You orally grant Mr. Earnest’s request that Mr. Difficult’s client produce certain corporate records to back up Mr. Earnest’s damages claim. Mr. Difficult objects to your ruling and says, “You should recuse yourself. You are not being fair and impartial. You believe anything he says. I move that you recuse yourself for bias now!”

Now what?

#### **Scene 4: Summary Judgment**

Out of the blue, Mr. Earnest files a motion for summary judgment. It is quite lengthy and has a number of affidavits and exhibits. It actually appears to be well done and may have merit. Mr. Difficult sends an e-mail, noting that this is arbitration and not court, so arbitrators don't have authority to grant summary judgment. He doesn't plan to respond any further.

What next?

#### **Scene 5: One Party Won't Pay**

The case manager calls. One of the parties won't pay the deposit for the hearing. He can't tell you which party it is under the rules. You, of course, have a pretty good idea it is the respondent. Your choice is to go ahead and only get paid by one party, or go ahead without being paid. From what you have seen, the claimant's case looks pretty good and the respondent hasn't raised any viable defenses so far. (Does that make a difference?)

What can you do? What should you do? What will you do?

#### **Scene 6: Problem at the hearing: disbarred and unadmitted lawyer**

You are on the third day of your hearing. It is expected to go most of the week. The claim is over \$1 million dollars.

You are ready to start. "Please call your next witness," you say. Mr. Earnest then says, "There is something that has come to my attention of a very serious nature that jeopardizes our hearing. I have just learned that Mr. Difficult was actually disbarred last year in his home state of New Jersey. I also have learned he has never been licensed in Minnesota, nor did he associate local counsel. That was bad enough, but this is intolerable!"

Mr. Difficult responds, "This is a clear ploy to sabotage this hearing, which I am winning! You don't have to be a lawyer to participate in an arbitration or even be an arbitrator! Besides, you aren't the ethics board, which is where any complaints belong. Not before you. Our contract says arbitrate, so he has to arbitrate!!"

What do you, the arbitrator, do?

### **Scene 7: A Conflict of Interest Surfaces**

Claimant has just called an important rebuttal witness. He wasn't on the list because the parties didn't anticipate the evidence coming out the way it did, and a new issue has arisen. This is an important issue in the arbitration. The witness is a former partner of your law firm and still an acquaintance.

What do you do?

### **Scene 8: The Damages**

You are the sole arbitrator. One of the reasons you went to law school is you had little interest in math. Being an accountant was definitely out. The case involves alleged damages for increased sales expenses caused by the Respondent failing to deliver certain widgets at all as promised, providing widgets that were defective under another contract, resulting in repair expense, and lost profits on lost sales. Claimant also asks for prejudgment interest on various losses. You are not in a position to make a final decision until you have reviewed all the evidence and come to a decision on liability and damages. But experience tells you it is possible some of the claims and means of computing them are better than others.

How do you arrange things so that you can enter a mathematically correct damages award and get the interest right if you do decide to rule for the claimant at all on something less than all the claimed damages?

### **Scene 9: Post-Arbitration Discussion**

Mr. Earnest didn't do as well in the arbitration as he hoped he would, but didn't do poorly either. In an effort to improve his performance in future arbitrations, he calls to schedule a session to meet with you about the arbitration and how he could have been more effective. He did quite well, but you do have some ideas about ways to help him. Also, there are some issues in the case that were kind of interesting and you are curious about those.

Can you meet with him? Should you?

## Handling the Most Difficult Questions Arbitrators Face: Legal Background

### I. Scheduling

A. AAA Commercial Rules (go to ([adr.org/rules](http://adr.org/rules) and [forms/search](http://adr.org/forms/search) rules/commercial arbitration rules and mediation procedures))

#### 1. P-1. General

- a. In all but the simplest cases, holding a preliminary hearing as early in the process as possible will help the parties and the arbitrator organize the proceeding in a manner that will maximize efficiency and economy, and will provide each party a fair opportunity to present its case.
- b. Care must be taken to avoid importing procedures from court systems, as such procedures may not be appropriate to the conduct of arbitrations as an alternative form of dispute resolution that is designed to be simpler, less expensive and more expeditious.

#### 2. P-2. Checklist

- a. The following checklist suggests subjects that the parties and the arbitrator should address at the preliminary hearing, in addition to any others that the parties or the arbitrator believe to be appropriate to the particular case. The items to be addressed in a particular case will depend on the size, subject matter, and complexity of the dispute, and are subject to the discretion of the arbitrator:
  - i. the possibility of other non-adjudicative methods of dispute resolution, including mediation pursuant to R-9;
  - ii. whether all necessary or appropriate parties are included in the arbitration;
  - iii. whether a party will seek a more detailed statement of claims, counterclaims or defenses;
  - iv. whether there are any anticipated amendments to the parties' claims, counterclaims, or defenses;
  - v. which

- a) arbitration rules;
  - b) procedural law; and
  - c) substantive law governs the arbitration;
- vi. whether there are any threshold or dispositive issues that can efficiently be decided without considering the entire case, including without limitation,
- a) any preconditions that must be satisfied before proceeding with the arbitration;
  - b) whether any claim or counterclaim falls outside the arbitrator's jurisdiction or is otherwise not arbitrable;
  - c) consolidation of the claims or counterclaims with another arbitration; or
  - d) bifurcation of the proceeding.
- vii. whether the parties will exchange documents, including electronically stored documents, on which they intend to rely in the arbitration, and/or make written requests for production of documents within defined parameters;
- viii. whether to establish any additional procedures to obtain information that is relevant and material to the outcome of disputed issues;
- ix. how costs of any searches for requested information or documents that would result in substantial costs should be borne;
- x. whether any measures are required to protect confidential information;
- xi. whether the parties intend to present evidence from expert witnesses, and if so, whether to establish a schedule for the parties to identify their experts and exchange expert reports;
- xii. whether, according to a schedule set by the arbitrator, the parties will

- a) identify all witnesses, the subject matter of their anticipated testimonies, exchange written witness statements, and determine whether written witness statements will replace direct testimony at the hearing;
  - b) exchange and pre-mark documents that each party intends to submit; and
  - c) exchange pre-hearing submissions, including exhibits;
- xiii. the date, time and place of the arbitration hearing;
- xiv. whether, at the arbitration hearing,
  - a) testimony may be presented in person, in writing, by videoconference, via the internet, telephonically, or by other reasonable means;
  - b) there will be a stenographic transcript or other record of the proceeding and, if so, who will make arrangements to provide it;
- xv. whether any procedure needs to be established for the issuance of subpoenas;
- xvi. the identification of any ongoing, related litigation or arbitration;
- xvii. whether post-hearing submissions will be filed;
- xviii. the form of the arbitration award; and
- xix. any other matter the arbitrator considers appropriate or a party wishes to raise.
- b. The arbitrator shall issue a written order memorializing decisions made and agreements reached during or following the preliminary hearing.

3. R-22. Pre-Hearing Exchange and Production of Information

- a. Authority of arbitrator. The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute,

while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses.

- b. Documents. The arbitrator may, on application of a party or on the arbitrator's own initiative:
  - i. require the parties to exchange documents in their possession or custody on which they intend to rely;
  - ii. require the parties to update their exchanges of the documents on which they intend to rely as such documents become known to them;
  - iii. require the parties, in response to reasonable document requests, to make available to the other party documents, in the responding party's possession or custody, not otherwise readily available to the party seeking the documents, reasonably believed by the party seeking the documents to exist and to be relevant and material to the outcome of disputed issues; and
  - iv. require the parties, when documents to be exchanged or produced are maintained in electronic form, to make such documents available in the form most convenient and economical for the party in possession of such documents, unless the arbitrator determines that there is good cause for requiring the documents to be produced in a different form. The parties should attempt to agree in advance upon, and the arbitrator may determine, reasonable search parameters to balance the need for production of electronically stored documents relevant and material to the outcome of disputed issues against the cost of locating and producing them.
- 4. AAA Complex Rules ([adr.org/rules](http://adr.org/rules) and [forms/search](http://forms/search) rules/commercial arbitration rules and mediation procedures)

### L-3. Management of Proceedings

- a. The arbitrator shall take such steps as deemed necessary or desirable to avoid delay and to achieve a fair, speedy and cost-effective resolution of a Large, Complex Commercial Dispute.

- b. As promptly as practicable after the selection of the arbitrator(s), a preliminary hearing shall be scheduled in accordance with sections P-1 and P-2 of these rules.
- c. The parties shall exchange copies of all exhibits they intend to submit at the hearing at least 10 calendar days prior to the hearing unless the arbitrator(s) determines otherwise.
- d. The parties and the arbitrator(s) shall address issues pertaining to the pre-hearing exchange and production of information in accordance with rule R-22 of the AAA Commercial Rules, and the arbitrator's determinations on such issues shall be included within the Scheduling and Procedure Order.
- e. The arbitrator, or any single member of the arbitration tribunal, shall be authorized to resolve any disputes concerning the pre-hearing exchange and production of documents and information by any reasonable means within his discretion, including, without limitation, the issuance of orders set forth in rules R-22 and R-23 of the AAA Commercial Rules.
- f. In exceptional cases, at the discretion of the arbitrator, upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator may order depositions to obtain the testimony of a person who may possess information determined by the arbitrator to be relevant and material to the outcome of the case. The arbitrator may allocate the cost of taking such a deposition.
- g. Generally, hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.

## **II. Discovery**

- A. *See* rules, above.
- B. Discovery of e-mail and electronic documents
  - 1. Considerations:
    - a. Expense
    - b. Places that must be searched
    - c. Nature of search

- d. Format of production (native format, .tif, .pdf, etc.)
  2. See CPR, *Protocol on Disclosure of Documents* (available at <https://www.cpradr.org/resource-center/protocols-guidelines/protocol-on-disclosure-of-documents-presentation-of-witnesses-in-commercial-arbitration>)
- C. Third party discovery
1. Generally.

In their arbitration agreement, two parties can agree to the scope of any pre-hearing discovery that they might obtain from each other. The power to compel non-parties to participate in arbitration, however, must be found in a source other than the contracting parties' arbitration agreement. *National Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184, 187 (2d Cir. 1999). Under the FAA, applicable to cases involving interstate commerce, arbitrators may issue subpoenas to require third parties to be witnesses at the arbitration hearing and to produce documents at the hearing. See 9 U.S.C. § 7. The FAA does not, however, specifically authorize arbitrators to issue subpoenas compelling non-parties to appear for pre-hearing depositions or produce documents before the hearing. Needless to say, "open questions" remain about the ability of arbitrators to compel discovery from non-parties under both acts. *National Broadcasting Co.*, 165 F.3d at 188.

Minnesota's Arbitration Act, Minn. Stat. § 572B.17, appears to permit third-party discovery at the arbitrator's discretion: "An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective." No cases are reported under this provision. Of course, most commercial arbitrations will likely involve interstate commerce, so the FAA will apply and not Minnesota's Act.

2. Documents

The FAA does not expressly authorize arbitrators to compel pre-hearing discovery from third-party witnesses, but the Eighth Circuit has held that "implicit in an arbitration panel's power to subpoena documents for production at a hearing is the power to order the production of relevant documents by a party prior to the hearing." *Security Life Ins. Co. of Am. v. Duncanson & Holt, Inc.*, 228 F.3d 865, 870-871 (8th Cir. 2000). "There is no territorial limitation on the panel's authority to order the production of documents." *Id.* at 872. This is in line with the weight of

authority interpreting Section 7 to authorize subpoenas to compel pre-hearing document production. *See Stolt-Nielsen S.A. v. Celanese AG*, 430 F.3d 567 (2nd Cir. 2005); *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 408 (3rd Cir. 2004); *American Fed'n of Television and Radio Artists AFL-CIO v. WJBK-TV*, 164 F.3d 1004, 1009 (6th Cir. 1999).

Other courts, however, reject the idea that discovery is generally available in arbitration. *See, e.g., Application of Deiulemar Compagnia Di Navigazione S.P.A. v. M/V Allegra*, 198 F.3d 473 (4th Cir. 1999); *Comsat Corp. v. National Science Foundation*, 190 F.3d 269, 278 (4th Cir. 1999); *Burton v. Busch*, 614 F.2d 389 (4th Cir. 1980). According to these cases, “a federal court may not compel a third party to comply with an arbitrator's subpoena for pre-hearing discovery, absent a showing of special need or hardship.” *Comsat*, 190 F.3d at 278. Those courts have not defined “special need or hardship” but, “at a minimum, a party must demonstrate that the information it seeks is otherwise unavailable.” *Deiulemar*, 198 F.3d at 480.

A number of courts have focused on the language of section 7 of the FAA to hold that document subpoenas are limited to circumstances where a non-party is called to appear in the presence of an arbitrator. *E.g., Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004).

In *Odfjell ASA v. Celanese*, 2004 WL 2922152 (S.D.N.Y. 2004), the arbitrators issued subpoenas ordering third parties to produce documents at a special arbitration session convened for the purpose of receiving a return of the subpoena. The procedure was challenged as a sham, since the proceeding was not an actual evidentiary hearing. The Court disagreed and upheld the subpoena.

This sort of procedure is now commonly used in a number of jurisdictions where arbitrators are convinced the information in the documents is important to determining the case.

### 3. Depositions

Whether the FAA authorizes an arbitrator to subpoena a third party to a pre-hearing deposition is uncertain. *See* Timothy C. Krsul, *The Limits on Enforcement of Arbitral Third-Party Subpoenas*, 57 Disp. Resol. J. 30 (Nov. 2002-Jan. 2003); Sean T. Carnahan, *Discovery in Arbitration? Well, it Depends. . . .*, 10-APR Bus. L. Today 22, \*26 (2001). Some courts hold that it does not. *Integrity Ins. Co. v. American Centennial Ins. Co.*, 805 F. Supp. 69 (S.D.N.Y. 1995). Others have recognized the authority. *Stanton v. Paine Webber Jackson & Curtis Inc.*, 685 F. Supp. 1241, 1242

(S.D. Fla. 1988); *Amgen, Inc. v. Kidney Ctr. of Delaware County Ltd.*, 885 F. Supp. 878, 882 (N.D. Ill. 1995), *rev'd on other grounds*, 95 F.3d 562 (7th Cir. 1996). One court has allowed a special proceeding at which the three arbitrators were present and could hear and see the witness testify. *See Stolt-Nielsen SA v. Celanese A.G.*, 430 F.3d 567 (2d Cir. 2005). The Eighth Circuit has not ruled on the question. *See Security Life Ins.*, 228 F.3d at 870 (declining to rule on the issue). One federal district court judge in Minnesota, however, has refused to enforce a subpoena for pre-hearing depositions. *ShlumbergerSema, Inc. v. Xcel Energy, Inc.*, 2004 WL 67647 (D. Minn. 2004) (unpublished) (Magnuson, J.) (“the Court does not have the power to enforce the panel’s subpoena purporting to compel the pre-hearing deposition of a non-party witness”).

4. Subpoenas to non-parties for hearing

Arbitrators are authorized to enforce subpoenas under the FAA and Minnesota’s RUAA.

Under the FAA, a motion to enforce an arbitral subpoena must be brought in the “United States district court for the district in which such arbitrators, or a majority of them, are sitting.” 9 U.S.C. § 7. If the subpoena is issued to a witness who is beyond the 100-mile territorial limit of a federal subpoena, the first step is to move the court in the district where the arbitration is pending to determine the subpoena’s validity and to direct the re-issuance of the subpoena by the federal district court in for the district in which the witness resides; and the second step is to move the second court for actual enforcement of the subpoena. *Amgen, Inc. v. Kidney Ctr. of Delaware County Ltd.*, 885 F. Supp. 878, 882 (N.D. Ill. 1995), *rev'd on other grounds*, 95 F.3d 562 (7th Cir. 1996). To enforce a subpoena, however, the federal court must have a basis for subject matter jurisdiction independent of the FAA. *Stolt-Nielsen SA v. Celanese A.G.*, 430 F.3d 567 (2d Cir. 2005).

Arbitral subpoenas are addressed under Minn. Stat. § 572B.17, which also requires a trip to court.

AAA Commercial Rule 35(b) provides:

If a witness whose testimony is represented by a party to be essential is unable or unwilling to testify at the hearing, either in person or through electronic or other means, either party may request that the arbitrator order the witness to appear in person for examination before the arbitrator at a time and location where the witness is

willing and able to appear voluntarily or can legally be compelled to do so. Any such order may be conditioned upon payment by the requesting party of all reasonable costs associated with such examination.

### III. Impartiality, ethics and recusal of arbitrators

#### A. Necessary impartiality of arbitrators and other ethical considerations

##### 1. Sources of ethical rules for arbitrators

a. Code of Ethics for Arbitrators in Commercial Disputes, revised effective March 1, 2004. Joint Committee of American Bar Association and American Arbitration Association (search under rules at [www.adr.org](http://www.adr.org)).

i. Courts have looked to this code for providing the standard of conduct for arbitrators. *E.g., Lifecare Int'l Inc. v. CD Medical, Inc.* 68 F.3d 429, 435 (11<sup>th</sup> Cir. 1995)(court notes arbitrator's conduct was in violation of Canon II of the American Arbitration Association's Code of Ethics requiring disclosure of matters likely to affect impartiality or which might reasonably create any appearance of partiality or bias); *Burlington Northern R.R. v. Tuco, Inc.*, 960 S.W.2d 629, 636-37 (Tex. 1997)(same).

ii. The code does not, however, have the force of law. *See Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 680 (7<sup>th</sup> Cir. 1983) (“Although we have great respect for the Commercial Arbitration Rules and the Code of Ethics for Arbitrators, they are not the proper starting point for an inquiry into an award's validity under section 10 of the United States Arbitration Act and Rule 60(b) of the Federal Rules of Civil Procedure. The arbitration rules and code do not have the force of law.”); *see Life Care Int'l, Inc.* 68 F.3d at 435 (even though conduct violated Cannon of Code, violation did not merit vacating arbitration award.)

##### b. The Federal Arbitration Act

i. Although not, strictly speaking, ethical rules, there are legal consequences for what would be unethical conduct under the ABA/AAA code.

ii. Section 10 of the FAA, 9 U.S.C. § 10, empowers courts to vacate an award where:

- a) the award was procured by corruption, fraud, or undue means;
  - b) there was evident partiality or corruption in one or more arbitrators;
  - c) the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced; or
  - d) the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final, and definite award upon the subject matter was not made.
- c. State Arbitration Acts (often the Uniform Arbitration Act or variations thereof)
- i. *E.g.*, Minnesota Arbitration Act. Under Minn. Stat. § 572B.23, subd. 1, a court may vacate an arbitration award under a limited set of circumstances:
    - a) The award was procured by corruption, fraud, or other undue means.

To invalidate an award, any inadequacy must be so gross as to justify a legitimate inference and finding of fraud that is established by clear allegations and proof. *See Beebout v. St. Paul Fire & Marine Ins. Co.*, 365 N.W.2d 271, 273 (Minn. Ct. App. 1985).

- b) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the right of any party.

“Evident partiality” generally arises when the arbitrator has contacts with a party or another arbitrator that might create an impression of possible bias. *Aaron v. Illinois Farmers Ins. Group*, 590 N.W.2d 667 (Minn. Ct. App. 1999). *See also L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 377 (Minn.1989).

- c) The arbitrators exceeded their powers.

Under this circumstance, the only question reviewable is whether the arbitrator addressed an arbitrable issue. *Liberty Mut. Ins. Co. v. Sankey*, 605 N.W.2d 411 (Minn. Ct. App. 2000).

- d) There was no agreement to arbitrate, unless the party proceeded without objection;

- e) The arbitration was conducted without notice so as to prejudice substantially the rights of a party.

- d. Court rule codes. *E.g.* Appendix to Minn. Gen. R. Prac. 114, Code of Ethics.

- i. Code addresses impartiality, conflicts of interest, competence, confidentiality, quality of process, advertising and fees.

- ii. There is a code of ethics enforcement procedure for court-appointed neutrals by the ADR Review Board. Provides for process and sanctions which can include the following, if violations are shown by clear and convincing evidence:

- a) Issue a private reprimand.

- b) Designate the corrective action necessary for the neutral to remain on the roster.

- c) Notify the appointing court and any professional licensing authority with which the neutral is affiliated of the complaint and its disposition.

- d) Publish the neutral's name, a summary of the violation, and any sanctions imposed.

- e) Remove the neutral from the roster of qualified neutrals, and set conditions for reinstatement if appropriate.

Appendix to Rule 144, Enforcement, Rule III.

- e. Other statutes, *e.g.* California Statute.

- f. State ethical rules for attorneys who serve as arbitrators. *E.g.*, Minnesota Rules of Professional Conduct.

2. Impartiality requirements for arbitrators

- a. Arbitrators must actually be impartial, and disclose any interest or relationship likely to affect impartiality or create an appearance of impropriety
  - i. Canon I of the ABA/AAA Code requires actual impartiality, subject to waiver by the parties:
  - ii. One should accept appointment as an arbitrator only if one is fully satisfied:
    - a) that he or she can serve impartially;
    - b) that he or she can serve independently from the parties, potential witnesses, and the other arbitrators;
    - c) that he or she is competent to serve; and
    - d) that he or she can be available to commence the arbitration in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the parties are reasonably entitled to expect.
- b. After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest. Existence of any of the matters or circumstances described in this paragraph . . . does not render it unethical for one to serve as an arbitrator where the parties have consented to the arbitrator's appointment or continued services following full disclosure of the relevant facts in accordance with Canon II.

- c. Canon II requires disclosure before and during appointment as an arbitrator of:
  - i. any known direct or indirect financial or personal interest in the outcome of the arbitration;
  - ii. any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective arbitrators should disclose any such relationships which they personally have with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts;
  - iii. the nature and extent of any prior knowledge they may have of the dispute; and
  - iv. any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.
- d. The obligation to disclose interests or relationships is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, as soon as practicable, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.
- e. “Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure.”
- f. AAA rules, incorporated into arbitration agreements adopting AAA as the arbitral body are similar. *See, e.g.* Commercial Rule R-17:
  - i. Any person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator’s impartiality or independence, including any bias or any financial or

personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration. Failure on the part of a party or a representative to comply with the requirements of this rule may result in the waiver of the right to object to an arbitrator in accordance with Rule R-41.

- ii. Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.
- iii. Disclosure of information pursuant to this Section R-17 is not an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence.

g. Cases:

- i. Duty to investigate. *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132 (2d Cir. 2007). The Court finds that, under the “evident partiality” standard of the Federal Arbitration Act, where an arbitrator has reason to believe that a nontrivial conflict of interest might exist, he must: (1) investigate the conflict, which may reveal information that must be disclosed; or (2) disclose his reasons for believing there might be a conflict and his intention not to investigate. While disclosing that discussions were ensuing between the arbitrator’s company and a party, the arbitrator chose to erect a “Chinese wall” instead of investigating the situation. If he had investigated, he would have learned the parties had a significant contract in place. The award was vacated.
- ii. Duty to investigate. *New Regency Productions, Inc. v. Nippon Herald Films, Inc.* 2007 WL 2472467 (9<sup>th</sup> Cir. 2007). The case was reviewed under the FAA, not California law. An Arbitrator's failure to disclose a substantial conflict of interest as executive officer of a film group negotiating to finance a film developed by a party to the arbitration, during arbitration proceedings between the film production company and the film distribution company constituted “evident partiality” requiring a

reversal of the award. The arbitrator didn't have actual knowledge of the facts he failed to disclose, but had a duty to make a reasonable effort to inform himself of potential conflicts. The award was vacated.

- iii. No partiality shown. *Markman v. O'Hare*, 2007 WL 915108 (Cal. App. 4dist. 2007). Upon the arbitrator's appointment JAMS sent out a "Generic Disclosure of Client Activity" for the prior five years showing it had found no cases involving the parties or their lawyers in which the arbitrator had acted as arbitrator. The arbitrator checked a box on this preprinted disclosure form stating that, while the current arbitration was pending, he would entertain offers of employment as an arbitrator or mediator from a lawyer or law firm involved in the current matter. During the course of the matter a lawyer entered as counsel of record. Later his office hired the arbitrator to mediate a new matter, and this was disclosed. The Court held there were no grounds to vacate this award. Given the disclosures made, the arbitrator was not subject to disqualification.
- iv. Timely objection necessary. *Dealer Computer Services, Inc. v. Michael Motor Co., Inc.*, 485 Fed. Appx. 724, 2012 WL 3317809 (5th Cir. 2012). A party must object to seeking to vacate an arbitration award based on evident partiality must object during the proceeding. Failure to object waives the right. The district court this rule "paradoxical" because the objecting party couldn't know of the failure to disclose a potential conflict. But the Fifth Circuit found that arbitrator had generally disclosed she had been in an arbitration involving one of the parties, putting the objecting party on inquiry notice. That was enough to foreclose the late objection.
- h. Minnesota has always had at least some requirement of disclosure. Evident partiality of the arbitrator is a ground for vacating an arbitration award. "Evident partiality" generally arises when the arbitrator has contacts with a party or another arbitrator that might create an impression of possible bias. *See Aaron v. Illinois Farmers Ins. Group*, 590 N.W.2d 667 (Minn. Ct. App. 1999). *See also, L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 377 (Minn. 1989) (impression of bias arising from one arbitrator's prior business relationship with one of the parties).

### 3. Party Arbitrators

- a. Typically, party appointed arbitrators were, by default, treated as non-neutral.
- b. With revision of the ABA/AAA Code of Ethics in 2004, neutrality of all arbitrators is assumed, including party-appointed arbitrators. The Code provides:

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 three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator.

Code, Canon IX.A.

- c. Yet the Code also allows for non-neutral arbitrators, known as “Canon X Arbitrators.” It states:

Notwithstanding [the presumption of neutrality], there are certain types of tripartite arbitration in which it is expected by all parties that the two arbitrators appointed by the parties may be predisposed toward the party appointing them. Those arbitrators, referred to in this Code as “Canon X arbitrators,” are not to be held to the standards of neutrality and independence applicable to other arbitrators. Canon X describes the special ethical obligations of party-appointed arbitrators who are not expected to meet the standard of neutrality.

Code, Canon IX.B.

- d. Canon X provides the specifics on what Canons non-neutral arbitrators do and do not need to follow. The key requirement is that they ascertain and reveal that they are Canon X arbitrators.
- e. Non-neutral arbitrator provisions are also in AAA rules:

Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Section R-18 with respect to impartiality and independence unless the parties have specifically agreed pursuant to Section R-18(b) that the party-appointed arbitrators are to be non-neutral and need not meet those standards.

Rule 13, AAA Commercial Rules.

- f. The Eighth Circuit affirms that the parties may have non-neutral arbitrators.
  - i. *Winfrey v. Simmons Food, Inc*, 495 F.3d 549 (8<sup>th</sup> Cir. 2007). A party to an arbitration moved to vacate the award for “evident impartiality” under the FAA, 9 U.S.C. § 10(a). The Court held that the arbitration panel's conclusion that the party selected arbitrator did not need to be neutral was consistent with the text of the arbitration agreement. The party arbitrator's failure to disclose his relationship with a party did not create an impermissible appearance of bias because he was not required, under the agreement, to be neutral. Even if the arbitrator was partial, his apparent partiality did not have a prejudicial impact on the arbitration award.

4. Neutral Competence

- a. Although not in the context of arbitration, a Minnesota case highlights the importance of arbitrators making a fair disclosure of competence and background and possibly even conflicts of interest.
- b. *Kuberka v. Anoka County Mediation*, No.C2-04-11963 (Minn. App. January 2, 2007). Plaintiff retained Ms. Brandvold, an employee of Anoka County Mediation, as a mediator for a marital-dissolution proceeding. Unable to agree on custody, the court appointed Branvold as a custody evaluator. Plaintiff claimed that Branvold misrepresented her qualifications to the court and the parents to serve as a custody evaluator, and sued Branvold for financial losses from the cost of her services. The Court of Appeals rejected a defense that quasi-judicial immunity and vicarious quasi-judicial immunity protected to a court-appointed custody evaluator. While finding that a court-appointed custody evaluator would normally enjoy judicial immunity, the court found misconduct in securing the position could form the basis for liability. Immunity would attach only after the position was secured. Factual issues as to whether Brandvold was qualified to perform a custody evaluation and whether she misrepresented her qualifications needed to be resolved.

- c. Consider the impact of the decision on arbitrator assertions of background and experience and, possibly, regarding any conflicts of interest.

## B. Recusal and challenge procedure

1. *See, e.g.*, AAA Commercial Rules

### R-18. Disqualification of Arbitrator

- a. Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for:
  - i. partiality or lack of independence,
  - ii. inability or refusal to perform his or her duties with diligence and in good faith, and
  - iii. any grounds for disqualification provided by applicable law.
- b. The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-13 shall be non-neutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.
- c. Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

## IV. Summary Judgment and Motion Practice

A. Authority for an arbitrator to entertain a motion for summary judgment had been a matter of debate. At least one court found that arbitrators have no such authority and found that granting summary judgment was contrary to the “bedrock principle” of arbitration that a party must have a “full opportunity to present [a] case at a hearing on the evidence,” and vacated an award on the ground that an arbitration panel had refused to hear material evidence. *Chem-Met Co. v. Metaland Intern., Inc.*, 1998 WL 35272368 (D. D.C. 1998). On the other hand, other courts have found summary judgment permissible in arbitration because questions of procedure are submitted to the arbitrator along with the merits of the

dispute. *See Campbell v. American Family Life Assur. Co.*, 613 F. Supp.2d 1114 (D. Minn. 2009).

B. AAA Commercial Rules now specifically allow for summary disposition, although somewhat grudgingly:

#### R-33. Dispositive Motions

The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case.

C. The issue still remains unclear if no rules apply that address the issue.

### V. Representation at the Arbitration

A. The issue of whether or not a non-lawyer can represent a party in arbitration remains in flux.

1. Arbitration began as an informal alternative to litigation, historically involving decisions by non-lawyer merchants. Drawing on these origins and the nature of arbitration, some courts have found that a non-lawyer is not practicing law when representing a client in arbitration. *See, e.g., In re Town of Little Compton*, 37 A.3d 85, 95 (R.I. 2012) (Union's business agent, although a lawyer, did not engage in the unauthorized practice of law by representing union at labor arbitration hearing, presenting arguments, examining and cross-examining witnesses, submitting evidence to the arbitrator, and objecting to evidence and arguments presented); *see generally*, Cole, *Blurred Lines: Are Non-Attorneys Who Represent Parties in Arbitrations Involving Statutory Claims Practicing Law?*, 48 U.C. Davis Law Rev. at 921, 949 (2015).

2. But some state ethics commissions have applied the standards to determine whether the representative is practicing law and found representation in arbitration is the unauthorized practice of law. *See, e.g., Ill. State Bar Ass'n Standing Committee on Prof'l Conduct*, Advisory Op. 13-03 at 7 (2013) (representation in FINRA arbitration is unauthorized practice of law); Fla. Bar *re* Advisory Op. on Nonlawyer Representation in Sec. Arb., 696 So.2d 1178, 1180 (Fla. 1997); *see generally*, Cole, at 949 - 50.

3. The Arkansas Supreme Court has found that a corporate officer not authorized as a lawyer engaged in unauthorized practice of

law by representing a corporation in an arbitration matter. *NISHA, LLC v. TriBilt Constr. Grp., LLC*, 388 S.W.3d 444, 451 (Ark. 2012).

4. Some state statutes specifically permit non-lawyers to represent parties in labor arbitration. *E.g.*, Cal. Civ. Proc. Code § 1282.4(h)(2014); Wis. Sup. Ct. R. 23.02 (2)(e). Others specifically forbid non-lawyer representation in arbitration. *E.g.*, Ariz. Rev. Stat. Sup. Ct. R. 31(a)(2)(A)(3).
- B. The issue of whether a lawyer must be admitted to practice in the state in which the arbitration is held depends on the jurisdiction.
1. ABA Model Rule 5.5 says that an out-of-state lawyer's representation of a client is not unauthorized practice of law so long as the proceedings arise out of or are reasonably related to the lawyer's home state practice and the jurisdiction does not require *pro hac vice* admission.
  2. Other states take a somewhat different approach. Florida allows out-of-state lawyers to represent clients in arbitration under the circumstances of the model rule, but also requires filing a verified statement and places a numerical limit of the number of arbitrations counsel can handle in Florida.
  3. California requires filing a certificate, but does not require that the arbitration arise out of a home state practice.
  4. Some commentators suggest that the Federal Arbitration Act may pre-empt any substantive or procedural provisions forbidding out-of-state lawyers from representing parties in arbitration. *See*, Spector and Romero, *Arbitration and the Unauthorized Practice of Law*, ARIAS Quarterly U.S., Vol. 13, No. 1, at 16 - 19 (2006), available <http://www.schiffhardin.com/Templates/media/files/archive/binary/spector-arbitration.pdf>
- C. So far, representation by an out-of-state lawyer in an arbitration has not been found to be a ground for vacating an award. *Superadio Ltd. Partnership v. Winstar Radio Productions, LLC*, 844 N.E.2d 246 (Mass. 2006)( Even if representation in an arbitration by an out-of-state attorney, not licensed to practice in Massachusetts, constituted the unauthorized practice of law, the conduct did not provide a basis to vacate arbitration award. There was no evidence that attorney procured the award in an underhanded, conniving, or unlawful manner similar to

corruption or fraud as those terms were used in arbitration law and practice.); *Colmar, LTD. v. Fremantledmedia North America, Inc.*, 801 N.E.2d 1017 (Ill. App. 2003)(Arbitrator did not exceed his authority by permitting out-of-state attorney to participate in arbitration proceedings. No authority prohibited participation by an out-of-state attorney in arbitration proceedings. Arbitrator’s decision was therefore reasonable, whether or not it was correct.); *Geowitz v. Noll*, 2003 WL 17111279 (Cal. App. 2003); This seems sensible insofar as the grounds for vacating an award are quite limited under the Federal Arbitration Act and most state acts. *See Hines v. Everest Institute*, 2014 WL 2779722 (E.D Mich. 2014)(“Granting a motion to vacate on an opposing counsel’s unauthorized practice alone, without evidence it was part of an attempt to commit a fraud on [the claimant] or the Arbitrator, would be an impermissible expansion of the grounds to vacate provided for by the FAA.”)

D. The AAA Commercial Rules address the issue of representation in favor of allowing representation by a non-lawyer, so long as it isn’t illegal and there is advance notice. Rule 26 of the Commercial Rules provides:

Any party may participate without representation (pro se), or by counsel ***or any other representative of the party’s choosing, unless such choice is prohibited by applicable law.*** A party intending to be so represented shall notify the other party and the AAA of the name, telephone number and address, and email address if available, of the representative at least seven calendar days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given. (Emphasis added.)

## VI. Payment issues

AAA Commercial Rule 57 provides as follows:

If arbitrator ***compensation or administrative charges have not been paid in full,*** the AAA may so inform the parties in order that one of them may advance the required payment.

(a) Upon receipt of information from the AAA that payment for administrative charges or deposits for arbitrator compensation have ***not been paid in full,*** to the extent the law allows, a party may ***request that the arbitrator take specific measures*** relating to a party’s non-payment.

(b) Such measures may include, but are not limited to, *limiting a party's ability to assert or pursue their claim. In no event*, however, shall a party be *precluded from defending a claim or counterclaim*.

(c) The arbitrator *must provide* the party opposing a request for such measures with the *opportunity to respond* prior to making any ruling regarding the same.

(d) In the event that the arbitrator grants any request for relief which limits any party's participation in the arbitration, the arbitrator shall require the party who is making a claim and who has made appropriate payments to submit such evidence as the arbitrator may require for the making of an award.

(e) Upon receipt of information from the AAA that full payments have not been received, the arbitrator, on the arbitrator's own initiative or at the request of the AAA or a party, may order the *suspension of the arbitration*. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.

(f) If the arbitration has been suspended by either the AAA or the arbitrator and the parties have failed to make the full deposits requested within the time provided after the suspension, the arbitrator, or the *AAA if an arbitrator has not been appointed, may terminate the proceedings*.

(Emphasis added.)

## VII. The Award

### AAA Commercial Rule 46. Form of Award

1. Any award shall be in writing and signed by a majority of the arbitrators. It shall be executed in the manner required by law.
2. The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.

Other rules or statutes may require reasoned awards.

1. AAA Employment Rules 39(c) ("The award shall be in writing and shall be signed by a majority of the arbitrators and shall provide the written reasons for the award unless the parties agree otherwise.")
2. AAA Construction Rules 47(b) (" In all cases, unless waived by agreement of the parties, the arbitrator shall provide a concise written financial breakdown of any

monetary awards and, if there are non-monetary components of the claims or counterclaims, the arbitrator shall include a line item disposition of each non-monetary claim or counterclaim.”)

3. See rules of CPS, JAMS and other providers.
4. *See, e.g.* Crop Insurance Policy forms for Federally Insured programs, stating “the arbitrator must provide to you and us a written statement describing the issues in dispute, the factual findings, the determinations and the amount and basis for any award and breakdown by claim for any award. The statement must also include any amounts awarded for interest. Failure of the arbitrator to provide such written statement will result in the nullification of all determinations of the arbitrator.”



