What’s Wrong with Arbitration?

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When it comes to fairness in modern U.S. insurance and reinsurance arbitrations (hereafter “insurance arbitrations”), perception is arguably as important as reality. If the parties do not perceive the process to be fair, they will not embrace arbitration as an alternative to litigation regardless of whether it is cheaper or faster. Central to the parties’ perception of fairness is the composition and behavior of the arbitral panel, which is typically “tripartite” in nature, being comprised of two party-appointed arbitrators and one umpire. Absent a provision to the contrary in the arbitration agreement, the two party-appointed arbitrators are generally presumed to be “non-neutral”, while the umpire is required to be completely neutral and impartial. Understandably, the parties to insurance arbitrations will from the outset be acutely concerned with any economic or personal factors which might influence any of these three arbitrators, especially the umpire.

The market for private insurance arbitration services can be very lucrative, often allowing for hourly rates ranging from $400 to $900 largely unburdened by the overhead of office rent, secretaries, support staff, or similar expenses typically experienced by legal counsel charging equivalent hourly rates. This market has attracted a substantial number of professional insurance arbitrators and umpires. To outward appearances, a professional insurance arbitrator or umpire with a full docket of cases can do very well economically over the course of a year.

Competition for arbitrator appointments has become more and more robust in recent years as the number of professional arbitrators has increased significantly and the volume of disputes going to arbitration has either stayed the same or fallen. Some professional insurance arbitrators overtly market themselves through mass emails, brochures, articles, and direct personal contacts of various types. Newcomers abound and try hard to break into the ranks of regularly appointed insurance arbitrators. As in the rest of the legal marketplace, referrals can be very important.

Correctly or not, the parties in insurance arbitrations perceive that most professional arbitrators and umpires want to continue to receive future appointments. In other words, they perceive that professional arbitrators and umpires do not want their current arbitration to be their last. Because this market for arbitral services is dominated by a relatively small number of insurance company consumers, the prospect of “never working again” is perceived by
the parties, especially non-insurance companies and one time participants, as potentially affecting the behavior of professional arbitrators and umpires.

Accordingly, the process by which an insurance arbitration panel is initially selected is vitally important to the perception of fairness by party participants, especially non-insurance companies. Thereafter, the behavior and relationships of the seated arbitrators and umpire with each other, counsel, and the parties will strongly affect the perception of fairness by the participants.

I. SELECTING PARTY ARBITRATORS: WHAT EXACTLY IS A “NON-NEUTRAL” ARBITRATOR?

Insurance arbitrations typically begin with the parties sequentially appointing their own non-neutral arbitrators, thereby creating the primary market for professional arbitrator services. If the parties did not have this contractually conferred power of appointment, there would be no such market. For example, if arbitrators were randomly selected from a qualified pool, the parties would have no ability to influence the market with their selections. With the power of appointment, however, the parties are in a position to influence the behavior of professional arbitrators whose livelihoods may depend upon successive appointments. Non-insurance companies and one time participants do not wield as much economic influence in this market as regular consumers do.

There is an alarming lack of clarity in the case law as to what exactly it means to be a “non-neutral” arbitrator. To the uninitiated, the concept of a “non-neutral” arbitrator can seem contradictory and even unbelievable at first. There is an even more alarming lack of clarity for the parties concerning the practical consequences of this non-neutrality. What should appointing parties know about non-neutral arbitrators? How should the parties behave in the appointment process? Can a case be won or lost just in the process of appointing non-neutral arbitrators? If so, how can that be fair? Here again, the parties’ perceptions deserve as much attention as the realities.

There are thorny strategic concerns as well. What is a non-neutral arbitrator supposed to do upon being appointed? Should the non-neutral try to get an umpire appointed who will be most receptive to the appointing party’s case? Should the non-neutral try to get a friend appointed as umpire? How about someone who will be likely to reciprocate in some manner in future cases? It is not hard to imagine many more questions like these, and the parties typically imagine all of them. The whole arbitrator appointment and umpire selection process can take on the appearance of an ethical bramble bush. First time participants often understandably feel like they need an experienced guide.

Non-neutral arbitrators are generally expected by their appointing parties to be advocates and to use their most sophisticated means throughout the course of the arbitration to persuade the umpire ultimately to vote with them. Courts do permit advocacy by party-appointed arbitrators. See, e.g., Sphere Drake Ins. Ltd v. All Am. Life Ins. Co., 307 F. 3d 617, 620 (7th Cir. 2002) (“party-appointed arbitrators are supposed to be advocates”) (emphasis in original). Because the amount of money at stake is so large and careers all around are potentially on the line, the parties expect that appointed arbitrators will try very hard to win. Although the parties typically have confidence in the integrity of their own arbitrator, they are often extremely suspicious and skeptical about the conduct and ethics of their adversary’s arbitrator.

Ultimately, the performance of party-appointed non-neutral arbitrators is evaluated in the consumer marketplace by one simple consideration: How often do they win? Appointed arbitrators with perceived track records of success are in high demand. Those who are perceived to have poor records are shunned, and newcomers are usually avoided. Here too, perceptions are arguably more important than reality, since most insurance and reinsurance arbitrations are confidential, and information concerning success or failure rates often travels by uncorroborated word of mouth.

II. WHAT ARE THE RULES HERE?

There are not many firm and fast rules or ethical guidelines which apply to modern U.S. insurance arbitrations. Unless the parties have specifically agreed to submit their dispute to the American Arbitration Association (AAA) or some other similar convening authority, it will be case law construing and applying basic contract law principles and Federal Arbitration Act statutory provisions (or similar state law provisions) which must provide guidance concerning the constraints applicable to party-appointed arbitrators and umpires in insurance arbitrations. As a matter of contract law, if there is no arbitration rule or contractual provision to the contrary, the
default rule is that the parties may agree to designate non-neutral arbitrators, and the panel members that are directly selected by the parties in tripartite arbitration are typically presumed to be non-neutral. See Winfrey v. Simmons Foods, Inc., 495 F.3d 549, 552 (8th Cir. 2007); but see Borst v. Allstate Ins. Co., 717 N.W.2d 42, 2006 WI 70 ¶ 20 (2006) (permitting non-neutral arbitrators, but holding under Wisconsin law that party-appointed arbitrators are presumed to be neutral unless the contract or arbitration rules specify otherwise). Even where applicable, the AAA Commercial Arbitration Rules at Section R-17(a) specifically allow for the participation of non-neutral arbitrators:

Any arbitrator shall be impartial and independent and shall perform his 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. The parties may agree in writing, however, that arbitrators directly appointed by a party . . . shall be nonneutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.

AAA Commercial Arbitration Rules, R-17 (eff. Jun. 1, 2009) (emphasis added), available at www.adr.org. Under this rule, a non-neutral arbitrator is still required to perform his or her duties “with diligence and in good faith,” although it is quite uncertain what this means as applied to a partial arbitrator lacking independence. Section R-18(a) goes on to prohibit ex parte communications between a party and an arbitrator, but then relieves non-neutrals of this constraint. A similar approach is taken under the rules promulgated by JAMS, another major ADR provider. See JAMS Comprehensive Arbitration Rules & Procedures, Rules 7(c) & 14(c) (eff. Oct. 1, 2010), available at www.jamsadr.com.

Similarly, the Code of Ethics for Arbitrators in Commercial Disputes, which has been approved by both the Executive Committee of the AAA Board of Directors and the House of Delegates of the American Bar Association, provides only peripheral guidance. Canon X creates a number of thinly qualified exemptions from the Code of Ethics for party-appointed arbitrators who are serving as non-neutrals (referred to in the Code of Ethics as “Canon X arbitrators”) with only minimal remaining constraints:

- “Canon X arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness. For example, Canon X arbitrators should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statements to the other arbitrators.” Canon X(A)(1).
- Although full disclosures are required, a party does not have the right to require a Canon X arbitrator to withdraw because of partiality, relationships, or interests. Canon X(B)(2).
- A Canon X arbitrator is not exempt from:
  - Canon IV’s obligation to conduct the proceedings fairly and diligently. Canon X(D).
  - Canon V’s requirement to make decisions in a “just, independent and deliberate manner,” except that he or she may be predisposed to the appointing party. Canon X(E).
  - Canon VI’s requirement to be faithful to the relationship of trust and confidentiality inherent in the office. Canon X(F).
  - Canon VII’s requirement to act with integrity and fairness regarding arrangements for compensation. Canon X(G).
  - Canon VIII’s requirement that arbitrators who advertise or promote their arbitral services be truthful and accurate. Canon X(H).

ARIAS U.S., a highly successful private not for profit corporation formed to promote improvement in international and domestic insurance and reinsurance arbitration process, has also promulgated a Code of Conduct and a set of Ethics Guidelines for arbitrators. These can be found on its website at www.arias-us.org. Again, because this Code and its accompanying Guidelines lack any true enforcement mechanism, their efficacy in regulating arbitrator behavior is questionable.
All of these supposed constraints (AAA, JAMS, ABA, and ARIAS U.S.) appear very general, and even if applicable, would not seem to have any controlling impact upon the behavior of a non-neutral arbitrator. In any event, in most insurance arbitrations neither the AAA rules, nor the Code of Ethics, nor the ARIAS U.S. Code or Ethical Guidelines will be directly applicable to constrain the conduct of non-neutral arbitrators. Accordingly, the Federal Arbitration Act at § 10(a) will be the only source of any meaningful constraints:

In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where 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 may have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.


The United States Supreme Court has held that a neutral arbitrator acts with “evident partiality” under § 10(a)(2) by merely showing an “appearance” of partiality, and has construed this standard relatively broadly. See Commonwealth Coating Cor. v. Continental Cas. Co., 393 U.S. 145, 150 (1968). However, the Supreme Court has never directly addressed the issue of when a non-neutral arbitrator should be considered as acting with “evident partiality.” Lower courts have generally held, however, that for all practical purposes the “evident partiality” standard of § 10(a)(2) is ineffective as a challenge to the conduct of a non-neutral arbitrator.

New York courts in particular have long played an important role in defining the propriety of conduct by a non-neutral arbitrator: “As everyone knows, the party’s named arbitrator in [a tripartite arbitration] is an amalgam of judge and advocate.” Cia de Navegacion Omsil, S.A., v. Hugo Neu Corp., 359 F. Supp. 898, 899 (S.D.N.Y. 1973). In Astoria Medical Group v. Health Insurance Plan of Greater New York, 182 N.E.2d 85 (N.Y. 1962), a party’s appointed arbitrator was (1) its former president; (2) a current member of its board of directors; and (3) its paid consultant. Reversing the rulings both of the trial court and the Appellate Division, which had removed the appointed arbitrator, the New York Court of Appeals held that “the parties to an arbitration contract are completely free to agree upon the identity of the arbitrators and the manner in which they are to be chosen,” and further stated that:

Arising out of the repeated use of the tripartite arbitral board, there has grown a common acceptance of the fact that the party-designated arbitrators are not and cannot be “neutral,” at least in the sense that the third arbitrator or judge is.

Id at 87. (citations omitted). The Court declared that a party’s right to appoint an arbitrator to ensure adequate representation of its side on the panel was a valuable contractual right “not lightly to be disregarded.” Id. at 88. The Court then went on to qualify its decision in somewhat equivocal fashion:

Our decision that an arbitrator may not be disqualified solely because of a relationship to his nominator or to the subject matter of the controversy does not, however, mean that he may be deaf to the testimony or blind to the evidence presented. Partisan he may be, but not dishonest. Like all arbitrators, the arbitrator selected by a party must (unless the requirement is waived) take the prescribed oath that he will ‘faithfully and fully * * * hear and examine the matters in controversy and * * * make a just award according the best of (his) understanding’ (Civ. Prac. Act, s. 1455).
In *Stef Shipping Corp. v. Norris Grain Co.*, 209 F. Supp. 249 (S.D.N.Y. 1962), the court considered whether a non-neutral arbitrator’s pre-arbitration meeting with the appointing party about the case and subsequent engagement in partisan questioning at the hearing constituted “evident partiality.” The court refused to vacate the award and stated that non-neutral arbitrators “cannot be expected to play a wholly impartial part” in an arbitration because they “are partisans once removed from the actual controversy.” *Id.* at 253. The court explained that it would be unrealistic to expect a party engaged in an arbitration dispute to nominate an arbitrator without telling him what the dispute is about. . . . This is not the type of irregularity which the statute contemplates as being sufficient to vacate an otherwise valid arbitral award.

*Id.* at 253-54.

Courts in other states, however, have appeared somewhat less willing to allow non-neutral arbitrators to act as advocates for their appointing party. For example, New Jersey courts have repeatedly vacated awards where non-neutral arbitrators showed “evident partiality” either because: (1) an arbitrator had ongoing business dealings with the party that designated him; or (2) the arbitrator was previously the lawyer for the party that designated him in “the same general matter now the subject of the parties’ arbitration dispute.” See, e.g., *Barcon Associates, Inc. v. Tri-County Asphalt Corp.*, 430 A.2d 214, 219-220 (N.J. 1981) (ongoing business dealings); *Arista Marketing Assoc., Inc. v. Peer Group, Inc.*, 720 A.2d 659, 667 (N.J. Super. Ct. App. Div. 1998) (arbitrator was attorney in “the same general matter”).

Similarly, one Connecticut district court has held that a party-appointed arbitrator showed “evident partiality” where he had *ex parte* communications with the party that appointed him before the arbitration and failed to disclose such communications to other party. *Metropolitan Prop. & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co.*, 780 F. Supp. 885, 893 (D. Conn. 1991). In an older case that remains good law, the Colorado Supreme Court held that a non-neutral arbitrator was overtly partial by announcing his decision before the end of the arbitration and generally behaving as if “his conception of the function of his office was that of representation, rather than arbitration.” *Noffsinger v. Thompson*, 54 P.2d 683, 683-84 (Colo. 1936).

Indeed, even in New York, one appellate court has distinguished *Astoria* on the basis of the non-neutral’s “direct interest” in the outcome. *Crystal City Police Benevolent Assoc. v. City of Corning*, 458 N.Y.S.2d 401, 402-03 (N.Y. App. Ct. 1982). Specifically, one of the parties to the arbitration was a “benevolent association” for police officers, and the arbitrator designated by this party was a “member” of that association. *Id.* Even in this case, however, the court held that the other party’s right to disqualify this arbitrator was waived due to its participating in the arbitration with full knowledge of the arbitrator’s interest and without making any objection. *Id.; see also Daiichi Hawai’i Real Estate Corp. v. Lichter*, 82 P.3d 411, 433 (Haw. 2003) (holding that right to challenge arbitrator due to partiality was waived).

Just last year, a District Court in the Eastern District of Michigan took the unusual step of issuing a preliminary injunction to stop a reinsurance arbitration due to the likelihood that a party-selected arbitrator and the umpire were biased. *Star Ins. Co. v. Nat’l Union Fire Ins. Co. of Pittsburgh*, P.A., No. 13–13807, 2013 WL 5182745, *5–7* (E.D. Mich. Sept. 12, 2013). In *Star Insurance*, the treaty had an arbitration clause stating that each side of a dispute would choose one arbitrator, and that these two would then select an umpire. *Id.* at *1*. The arbitration clause further stated that all disputes were to be decided by the three-party panel, and that each arbitrator was to be “not under the control of any party.” *Id.* at *4*. After a dispute arose, and arbitration began, the panel issued a Scheduling Order stating that *ex parte* communications were to end. *Id.* at *2*. Even after this order, however, the reinsurer’s lawyer continued to have *ex parte* communications with his chosen arbitrator. *Id.* at *2*. Later in the proceeding, the umpire and the reinsurer’s arbitrator entered orders without the participation, consultation, or input of the reinsured’s arbitrator. *Id.* at *3*. Based on such findings, the court issued a preliminary injunction to allow time to further investigate whether the arbitrators were biased. *Id.* at *5–7*. An appeal is currently pending on this decision, but if it is upheld, the case may mark the beginning of a shift in how courts approach the problem of bias in arbitrations.
Despite these precedents, the general trend appears to be leaning in a more permissive direction. In particular, federal courts have generally taken an expansive view of the liberties allowed to a non-neutral arbitrator. In *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, the Eleventh Circuit declined to vacate an arbitral award on the basis of “evident partiality or corruption” of an appointed arbitrator where he (1) attended and participated in meetings with witnesses; (2) helped select one of the appointing party’s consultants; and (3) advised an expert witness on how to improve a chart. 10 F.3d 753, 759-60 (11th Cir. 1993). The court found that the arbitrator’s “conduct is not only unobjectionable, but commonplace.” *Id.* at 759. (citing *Stef Shipping*, 209 F. Supp. at 251).

More recently, in *Sphere Drake Insurance Ltd. v. All American Life Insurance Co.*, the Seventh Circuit held that the Federal Arbitration Act “makes arbitration agreements enforceable to the same extent as other contracts.” 307 F.3d 617, 620 (7th Cir. 2002). Accordingly, “Section 10(a)(2) just states the presumptive rule, subject to variation by mutual consent.” *Id.* “To the extent that an agreement entitles parties to select interested (even beholden) arbitrators, Section 10(a)(2) has no role to play.” *Id.* The court noted that “Arbitration differs from adjudication, among many other ways, because the ‘appearance’ of partiality ground of disqualification for judges does not apply to arbitrators; only evident partiality, not appearances or risks, spoils an award.” *Id.* The court concluded that “‘[e]vident partiality’ for a party-appointed arbitrator must be limited to conduct in transgression of contractual limitations.” *Id.* at 622.

Shortly thereafter, in *U.S. Care, Inc. v. Pioneer Life Insurance Co. of Illinois*, a district court in the Seventh Circuit relied on *Sphere Drake* to refuse to vacate an arbitral award due to the alleged “evident partiality” of a non-neutral arbitrator who had an ongoing business relationship with a subsidiary of the party appointing him. 244 F. Supp. 2d 1057, 1064 (C.D. Cal. 2002). Specifically, the court found that “discovery of a connection between a party-appointed arbitrator and a party’s subsidiary cannot alone be the grounds for setting aside an arbitration award on the basis of ‘evident partiality.’” *Id.*

In addition to the Seventh Circuit and Eleventh Circuit precedents noted here, at least three other federal circuit courts have taken a permissive approach when deciding whether an arbitrator showed “evident partiality.” *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 647-49 (6th Cir. 2005); *Delta Mine Holding Co. v. AFC Coal Prop., Inc.*, 280 F.3d 815, 821 (8th Cir. 2002); *Emp’rs Ins. of Wausau v. Nat’l Union Fire Ins. Co. of Pittsburgh*, 933 F.2d 1481, 1489 (9th Cir. 1991). Given this trend and the relative absence of countervailing precedent, it appears unlikely that the remaining federal circuits courts that have not yet ruled on this topic will take a more restrictive approach in the future.

In summary, it may reasonably appear to parties and their counsel that, in the non-neutral arbitrator arena, the only real rules are that there are no rules.

III. SELECTING AN UMPIRE: SHOULD THE PARTIES WORRY ABOUT FAIRNESS HERE?

Having appointed non-neutral arbitrators with predispositions in their favor subject only to ill-defined constraints, the parties often conclude that the umpire has the only vote that matters. Accordingly, the umpire selection process takes on critical importance. Unlike non-neutral party arbitrators, the umpire must be completely neutral and impartial. *See Commonwealth*, 393 U.S. at 150. The umpire is typically selected at least nominally by the party arbitrators according to a contractually prescribed process. As a practical matter, however, the parties often heavily influence or control the nomination of umpire candidates. In any event, professional umpires understand that their own appointments depend upon the willingness of party arbitrators to nominate or “vouch for” them, as well as the willingness of the parties and their counsel to accept them.

To the extent that the parties believe the umpire may be susceptible to outside influence of any kind, the perceived integrity of the entire arbitral process will be jeopardized. Although outside influence can come from many different sources, this paper will examine just three: (a) relations with the party-appointed arbitrators; (b) relations with counsel for the parties; and (c) relations with the parties. Compounding the concern of the parties here is the fact that even where there are grounds for challenging an umpire’s conduct and rulings during the course of an arbitration, typically this issue cannot be brought to a court until after a final award has been made. *See, e.g.*, *Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F. 3d 476, 487-88 (5th Cir. 2002); *but see Star Ins.*, 2013 WL 5182745, *5–7* (granting preliminary injunction to stop arbitration due to likelihood of bias).
A. AN UMPIRE’S RELATIONS WITH PARTY-APPOINTED ARBITRATORS CAN AFFECT THE PARTIES’ PERCEPTION OF FAIRNESS.

If the umpire is a personal friend of a party-appointed arbitrator, the other party will believe both that (1) the umpire will not want to embarrass a friend with a harsh result; and (2) the umpire will be inclined to help a friend to build a track record of success as an appointed arbitrator and to avoid being perceived as ineffective. Accordingly, in the umpire selection process, the parties and counsel often discuss and evaluate personal relationships between the appointed arbitrators and potential umpire candidates. Such discussions and evaluations can unfortunately degrade the entire process from the beginning in the minds of both the parties and their counsel.

If an umpire also sits on a second arbitral panel with one of the same party-appointed arbitrators, the other party will believe that the umpire may be influenced by potential trade-offs between arbitrations, especially if roles are reversed with the party-appointed arbitrator being the umpire in the second arbitration. The parties believe that the temptation to make each other “look good” is strong in a market where a non-neutral arbitrator’s ineffectiveness can lead to future unemployment. It is especially disconcerting to the parties when appointed arbitrators or umpires accept subsequent appointments on panels together, even where the matters are completely unrelated.

B. AN UMPIRE’S RELATIONS WITH COUNSEL FOR THE PARTIES WILL HAVE A STRONG EFFECT UPON THE PERCEPTION OF ARBITRAL FAIRNESS.

Parties often believe that certain law firms which regularly appear as counsel in insurance arbitrations can exercise market power over the nomination and selection of umpires, either by recommending candidates or vetoing them when nominated by others. It is therefore upsetting to a party when the umpire is sitting in a second arbitration where the opposing party’s law firm is appearing as counsel. It can be even more disconcerting to a party when an umpire is contacted during the pendency of the arbitration by a different lawyer from the opposing party’s law firm and asked to accept an appointment in a second unrelated arbitration, particularly when the umpire makes this disclosure and asks if anyone objects.

Rightly or wrongly, parties perceive that professional arbitrators view lawyers and law firms as important sources of referrals and future appointments. The number of times an arbitrator or umpire has been appointed in matters with the same law firm does make a difference to the parties’ perception of fairness. For example, a party might be highly concerned if an umpire candidate had previously served as an appointed arbitrator in several matters on behalf of clients represented by its adversary’s law firm. Similarly, a party will believe that an umpire regularly appearing in arbitrations in which opposing counsel’s firm also appears will be unlikely to embarrass that firm with a harsh result, thereby risking an end to that relationship.

C. AN UMPIRE’S RELATIONS WITH A PARTY WILL HAVE A STRONG EFFECT UPON THE PERCEPTION OF FAIRNESS BY THE OTHER PARTY.

The market for insurance arbitrations is dominated by a relatively small number of key repeat players. Outsiders and one-time participants perceive that if a professional arbitrator is favored by one or more of these key players, then appointments and referrals can flow. On the other hand, if a professional arbitrator is unacceptable to these key players, it can have a significant negative impact on appointments and referrals. For this reason, outsiders and one time participants are usually very skeptical of the entire process to the extent it involves professional arbitrators or umpires.

The party appointment process enables in house counsel to have direct in-depth discussions with prospective arbitrators about their views and predispositions in general. During these vetting sessions, it is possible for party arbitrators and in house counsel to get to know one another very well. The potential presented here for long term understandings beyond a single arbitration profoundly affects the perception of fairness, again especially by outsiders and one-time participants.
In our view, all of these ethical issues and perceptions are directly rooted in (1) the party appointment process; and (2) the non-neutrality of party-appointed arbitrators. There may at one time have been some very valid reasons for structuring the insurance arbitration panel selection process this way. However, the time has come for a re-examination. If the parties do not have the power to appoint arbitrators, their ability to influence them is significantly reduced. If all arbitrators were as neutral as the umpire, there would be little incentive to do anything other than justice. If the arbitrators had no power to nominate or approve the umpire, then there would be no worries about personal relationships, trade-offs, or influence peddling through referrals.

Modern insurance arbitrations often involve eight, nine, and even ten figure disputes. The amount of money at stake can be staggering. Is the current contractually mandated arbitrator selection process up to this challenge? Will the parties to future disputes perceive insurance arbitrations to be fair, or will the losing party believe it was unfairly victimized and pursue litigation focused upon the relations of the umpire, the prevailing party, the non-neutral arbitrator, and counsel?

There is a way out of this ethical bramble bush, but it can only occur if the parties reform the arbitrator selection process specified in their original contracts. Although this is much easier said than done, nothing worthwhile is ever easily achieved.