

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

February 9, 2004

RESOLVED, That the American Bar Association adopts the Code of Ethics for Arbitrators in Commercial Disputes – 2004 Revision.

The Code of Ethics for Arbitrators in Commercial Disputes — 2004 Revision

The Code of Ethics for Arbitrators in Commercial Disputes was originally prepared in 1977 by a joint committee consisting of a special committee of the American Arbitration Association and a special committee of the American Bar Association. The Code was revised in 2004 by an ABA Task Force and special committee of the AAA. Both the original 1977 Code and the 2004 Revision have been approved and recommended by both organizations.

Preamble

The use of arbitration to resolve a wide variety of disputes has grown extensively and forms a significant part of the system of justice on which our society relies for a fair determination of legal rights. Persons who act as arbitrators therefore undertake serious responsibilities to the public, as well as to the parties. Those responsibilities include important ethical obligations.

Few cases of unethical behavior by commercial arbitrators have arisen. Nevertheless, this Code sets forth generally accepted standards of ethical conduct for the guidance of arbitrators and parties in commercial disputes, in the hope of contributing to the maintenance of high standards and continued confidence in the process of arbitration.

This Code provides ethical guidelines for many types of arbitration but does not apply to labor arbitration, which is generally conducted under the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.

There are many different types of commercial arbitration. Some proceedings are conducted under arbitration rules established by various organizations and trade associations, while others are conducted without such rules. Although most proceedings are arbitrated pursuant to voluntary agreement of the parties, certain types of disputes are submitted to arbitration by reason of particular laws. This Code is intended to apply to all such proceedings in which disputes or claims are submitted for decision to one or more arbitrators appointed in a manner provided by an agreement of the parties, by applicable arbitration rules, or by law. In all such cases, the persons who have the power to decide should observe fundamental standards of ethical conduct. In this Code, all such persons are called “arbitrators,” although in some types of proceeding they might be called “umpires,” “referees,” “neutrals,” or have some other title.

Arbitrators, like judges, have the power to decide cases. However, unlike full-time judges, arbitrators are usually engaged in other occupations before, during, and after the time that they serve as arbitrators. Often, arbitrators are purposely chosen from the same trade or industry as the parties in order to bring special knowledge to the task of deciding. This Code recognizes these fundamental differences between arbitrators and judges.

In those instances where this Code has been approved and recommended by organizations that provide, coordinate, or administer services of arbitrators, it provides

ethical standards for the members of their respective panels of arbitrators. However, this Code does not form a part of the arbitration rules of any such organization unless its rules so provide.

Note on Neutrality

In some types of commercial arbitration, the parties or the administering institution provide for three or more arbitrators. In some such proceedings, it is the practice for each party, acting alone, to appoint one arbitrator (a “party-appointed arbitrator”) and for one additional arbitrator to be designated by the party-appointed arbitrators, or by the parties, or by an independent institution or individual. The sponsors of this Code believe that it is preferable for all arbitrators – including any party-appointed arbitrators – to be neutral, that is, independent and impartial, and to comply with the same ethical standards. This expectation generally is essential in arbitrations where the parties, the nature of the dispute, or the enforcement of any resulting award may have international aspects. However, parties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral and governed by special ethical considerations. These special ethical considerations appear in Canon X of this Code.

This Code establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise. This Code requires all party-appointed arbitrators, whether neutral or not, to make pre-appointment disclosures of any facts which might affect their neutrality, independence, or impartiality. This Code also requires all party-appointed arbitrators to ascertain and disclose as soon as practicable whether the parties intended for them to serve as neutral or not. If any doubt or uncertainty exists, the party-appointed arbitrators should serve as neutrals unless and until such doubt or uncertainty is resolved in accordance with Canon IX. This Code expects all arbitrators, including those serving under Canon X, to preserve the integrity and fairness of the process.

Note on Construction

Various aspects of the conduct of arbitrators, including some matters covered by this Code, may also be governed by agreements of the parties, arbitration rules to which the parties have agreed, applicable law, or other applicable ethics rules, all of which should be consulted by the arbitrators. This Code does not take the place of or supersede such laws, agreements, or arbitration rules to which the parties have agreed and should be read in conjunction with other rules of ethics. It does not establish new or additional grounds for judicial review of arbitration awards.

All provisions of this Code should therefore be read as subject to contrary provisions of applicable law and arbitration rules. They should also be read as subject to contrary agreements of the parties. Nevertheless, this Code imposes no obligation on any arbitrator to act in a manner inconsistent with the arbitrator’s fundamental duty to preserve the integrity and fairness of the arbitral process.

Canons I through VIII of this Code apply to all arbitrators. Canon IX applies to all party-appointed arbitrators, except that certain party-appointed arbitrators are exempted by Canon X from compliance with certain provisions of Canons I-IX related to impartiality and independence, as specified in Canon X.

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

- A. An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator should recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding. This responsibility may include pro bono service as an arbitrator where appropriate.
- B. One should accept appointment as an arbitrator only if fully satisfied:
 - (1) that he or she can serve impartially;
 - (2) that he or she can serve independently from the parties, potential witnesses, and the other arbitrators;
 - (3) that he or she is competent to serve; and
 - (4) 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.
- C. 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 reasonably create the appearance of partiality. For a reasonable period of time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest. Existence of any of the matters or circumstances described in this paragraph C 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.
- D. Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, and fear of criticism or self-interest. They should avoid conduct and statements that give the appearance of partiality toward or against any party.
- E. An arbitrator's authority is derived from the agreement of the parties. An arbitrator should neither exceed that authority nor do less than is required to

- exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules. An arbitrator has no ethical obligation to comply with any agreement, procedures or rules that are unlawful or that, in the arbitrator's judgment, would be inconsistent with this Code.
- F. An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision. An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.
 - G. The ethical obligations of an arbitrator begin upon acceptance of the appointment and continue throughout all stages of the proceeding. In addition, as set forth in this Code, certain ethical obligations begin as soon as a person is requested to serve as an arbitrator and certain ethical obligations continue after the decision in the proceeding has been given to the parties.
 - H. Once an arbitrator has accepted an appointment, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue. When an arbitrator is to be compensated for his or her services, the arbitrator may withdraw if the parties fail or refuse to provide for payment of the compensation as agreed.
 - I. An arbitrator who withdraws prior to the completion of the arbitration, whether upon the arbitrator's initiative or upon the request of one or more of the parties, should take reasonable steps to protect the interests of the parties in the arbitration, including return of evidentiary materials and protection of confidentiality.

Comment to Canon I

A prospective arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved. Arbitrators may also have special experience or expertise in the areas of business, commerce, or technology which are involved in the arbitration. Arbitrators do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the arbitration, but an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration.

During an arbitration, the arbitrator may engage in discourse with the parties or their counsel, draw out arguments or contentions, comment on the law or evidence, make interim rulings, and otherwise control or direct the arbitration. These activities are integral parts of an arbitration. Paragraph D of Canon I is not intended to preclude or

limit either full discussion of the issues during the course of the arbitration or the arbitrator's management of the proceeding.

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

- A. Persons who are requested to serve as arbitrators should, before accepting, disclose:
 - (1) Any known direct or indirect financial or personal interest in the outcome of the arbitration;
 - (2) 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;
 - (3) The nature and extent of any prior knowledge they may have of the dispute; and
 - (4) 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.
- B. Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in paragraph A.
- C. The obligation to disclose interests or relationships described in paragraph A 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.
- D. Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure.
- E. Disclosure should be made to all parties unless other procedures for disclosure are provided in the agreement of the parties, applicable rules or practices of an institution, or by law. Where more than one arbitrator has been appointed, each should inform the others of all matters disclosed.

- F. When parties, with knowledge of a person's interests and relationships, nevertheless desire that person to serve as an arbitrator, that person may properly serve.
- G. If an arbitrator is requested by all parties to withdraw, the arbitrator must do so. If an arbitrator is requested to withdraw by less than all of the parties because of alleged partiality, the arbitrator should withdraw unless either of the following circumstances exists:
 - (1) An agreement of the parties, or arbitration rules agreed to by the parties, or applicable law establishes procedures for determining challenges to arbitrators, in which case those procedures should be followed; or
 - (2) In the absence of applicable procedures, if the arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can nevertheless act and decide the case impartially and fairly.
- H. If compliance by a prospective arbitrator with any provision of this Code would require disclosure of confidential or privileged information, the prospective arbitrator should either:
 - (1) Secure the consent to the disclosure from the person who furnished the information or the holder of the privilege; or
 - (2) Withdraw.

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

- A. If an agreement of the parties or applicable arbitration rules establishes the manner or content of communications between the arbitrator and the parties, the arbitrator should follow those procedures notwithstanding any contrary provision of paragraphs B and C.
- B. An arbitrator or prospective arbitrator should not discuss a proceeding with any party in the absence of any other party, except in any of the following circumstances:
 - (1) When the appointment of a prospective arbitrator is being considered, the prospective arbitrator:
 - (a) may ask about the identities of the parties, counsel, or witnesses and the general nature of the case; and
 - (b) may respond to inquiries from a party or its counsel designed to determine his or her suitability and availability for the appointment. In any such dialogue, the prospective arbitrator may receive information from a party

or its counsel disclosing the general nature of the dispute but should not permit them to discuss the merits of the case.

- (2) In an arbitration in which the two party-appointed arbitrators are expected to appoint the third arbitrator, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the choice of the third arbitrator;
- (3) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning arrangements for any compensation to be paid to the party-appointed arbitrator. Submission of routine written requests for payment of compensation and expenses in accordance with such arrangements and written communications pertaining solely to such requests need not be sent to the other party;
- (4) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the status of the arbitrator (i.e., neutral or non-neutral), as contemplated by paragraph C of Canon IX;
- (5) Discussions may be had with a party concerning such logistical matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the arbitrator should promptly inform each other party of the discussion and should not make any final determination concerning the matter discussed before giving each absent party an opportunity to express the party's views; or
- (6) If a party fails to be present at a hearing after having been given due notice, or if all parties expressly consent, the arbitrator may discuss the case with any party who is present.

- C. Unless otherwise provided in this Canon, in applicable arbitration rules or in an agreement of the parties, whenever an arbitrator communicates in writing with one party, the arbitrator should at the same time send a copy of the communication to every other party, and whenever the arbitrator receives any written communication concerning the case from one party which has not already been sent to every other party, the arbitrator should send or cause it to be sent to the other parties.

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

- A. An arbitrator should conduct the proceedings in an even-handed manner. The arbitrator should be patient and courteous to the parties, their representatives, and the witnesses and should encourage similar conduct by all participants.
- B. The arbitrator should afford to all parties the right to be heard and due notice of the time and place of any hearing. The arbitrator should allow each party a fair opportunity to present its evidence and arguments.

- C. The arbitrator should not deny any party the opportunity to be represented by counsel or by any other person chosen by the party.
- D. If a party fails to appear after due notice, the arbitrator should proceed with the arbitration when authorized to do so, but only after receiving assurance that appropriate notice has been given to the absent party.
- E. When the arbitrator determines that more information than has been presented by the parties is required to decide the case, it is not improper for the arbitrator to ask questions, call witnesses, and request documents or other evidence, including expert testimony.
- F. Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes. An arbitrator should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all parties.
- G. Co-arbitrators should afford each other full opportunity to participate in all aspects of the proceedings.

Comment to paragraph G

Paragraph G of Canon IV is not intended to preclude one arbitrator from acting in limited circumstances (e.g., ruling on discovery issues) where authorized by the agreement of the parties, applicable rules or law, nor does it preclude a majority of the arbitrators from proceeding with any aspect of the arbitration if an arbitrator is unable or unwilling to participate and such action is authorized by the agreement of the parties or applicable rules or law.

CANON V. AN ARBITRATOR SHOULD MAKE DECISIONS IN A JUST, INDEPENDENT AND DELIBERATE MANNER.

- A. The arbitrator should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues.
- B. An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.
- C. An arbitrator should not delegate the duty to decide to any other person.
- D. In the event that all parties agree upon a settlement of issues in dispute and request the arbitrator to embody that agreement in an award, the arbitrator may do so, but is not required to do so unless satisfied with the propriety of the terms of settlement. Whenever an arbitrator embodies a settlement by the parties in an

award, the arbitrator should state in the award that it is based on an agreement of the parties.

**CANON VI. AN ARBITRATOR SHOULD BE FAITHFUL TO THE
RELATIONSHIP OF TRUST AND CONFIDENTIALITY
INHERENT IN THAT OFFICE.**

- A. An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.
- B. The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision. An arbitrator may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision if the arbitrator informs the parties of the use of such assistance and such persons agree to be bound by the provisions of this Canon.
- C. It is not proper at any time for an arbitrator to inform anyone of any decision in advance of the time it is given to all parties. In a proceeding in which there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone about the substance of the deliberations of the arbitrators. After an arbitration award has been made, it is not proper for an arbitrator to assist in proceedings to enforce or challenge the award.
- D. Unless the parties so request, an arbitrator should not appoint himself or herself to a separate office related to the subject matter of the dispute, such as receiver or trustee, nor should a panel of arbitrators appoint one of their number to such an office.

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

- A. Arbitrators who are to be compensated for their services or reimbursed for their expenses shall adhere to standards of integrity and fairness in making arrangements for such payments.
- B. Certain practices relating to payments are generally recognized as tending to preserve the integrity and fairness of the arbitration process. These practices include:
 - (1) Before the arbitrator finally accepts appointment, the basis of payment, including any cancellation fee, compensation in the event of withdrawal and compensation for study and preparation time, and all other charges, should be

established. Except for arrangements for the compensation of party-appointed arbitrators, all parties should be informed in writing of the terms established.

- (2) In proceedings conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, communication related to compensation should be made through the institution. In proceedings where no institution has been engaged by the parties to administer the arbitration, any communication with arbitrators (other than party appointed arbitrators) concerning payments should be in the presence of all parties; and
- (3) Arbitrators should not, absent extraordinary circumstances, request increases in the basis of their compensation during the course of a proceeding.

CANON VIII. AN ARBITRATOR MAY ENGAGE IN ADVERTISING OR PROMOTION OF ARBITRAL SERVICES WHICH IS TRUTHFUL AND ACCURATE.

- A. Advertising or promotion of an individual's willingness or availability to serve as an arbitrator must be accurate and unlikely to mislead. Any statements about the quality of the arbitrator's work or the success of the arbitrator's practice must be truthful.
- B. Advertising and promotion must not imply any willingness to accept an appointment otherwise than in accordance with this Code.

Comment to Canon VIII

This Canon does not preclude an arbitrator from printing, publishing, or disseminating advertisements conforming to these standards in any electronic or print medium, from making personal presentations to prospective users of arbitral services conforming to such standards or from responding to inquiries concerning the arbitrator's availability, qualifications, experience, or fee arrangements.

CANON IX. ARBITRATORS APPOINTED BY ONE PARTY HAVE A DUTY TO DETERMINE AND DISCLOSE THEIR STATUS AND TO COMPLY WITH THIS CODE, EXCEPT AS EXEMPTED BY CANON X.

- A. In some types of arbitration in which there are three arbitrators, it is customary for each party, acting alone, to appoint one arbitrator. The third arbitrator is then appointed by agreement either of the parties or of the two arbitrators, or failing such agreement, by an independent institution or individual. In tripartite arbitrations to which this Code applies, all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator.
- B. Notwithstanding this presumption, 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.

C. A party-appointed arbitrator has an obligation to ascertain, as early as possible but not later than the first meeting of the arbitrators and parties, whether the parties have agreed that the party-appointed arbitrators will serve as neutrals or whether they shall be subject to Canon X, and to provide a timely report of their conclusions to the parties and other arbitrators:

- (1) Party-appointed arbitrators should review the agreement of the parties, the applicable rules and any applicable law bearing upon arbitrator neutrality. In reviewing the agreement of the parties, party-appointed arbitrators should consult any relevant express terms of the written or oral arbitration agreement. It may also be appropriate for them to inquire into agreements that have not been expressly set forth, but which may be implied from an established course of dealings of the parties or well-recognized custom and usage in their trade or profession;
- (2) Where party-appointed arbitrators conclude that the parties intended for the party-appointed arbitrators not to serve as neutrals, they should so inform the parties and the other arbitrators. The arbitrators may then act as provided in Canon X unless or until a different determination of their status is made by the parties, any administering institution or the arbitral panel; and
- (3) Until party-appointed arbitrators conclude that the party-appointed arbitrators were not intended by the parties to serve as neutrals, or if the party-appointed arbitrators are unable to form a reasonable belief of their status from the foregoing sources and no decision in this regard has yet been made by the parties, any administering institution, or the arbitral panel, they should observe all of the obligations of neutral arbitrators set forth in this Code.

D. Party-appointed arbitrators not governed by Canon X shall observe all of the obligations of Canons I through VIII unless otherwise required by agreement of the parties, any applicable rules, or applicable law.

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

Canon X arbitrators are expected to observe all of the ethical obligations prescribed by this Code except those from which they are specifically excused by Canon X.

A. *Obligations under Canon I*

Canon X arbitrators should observe all of the obligations of Canon I subject only to the following provisions:

- (1) 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; and
- (2) The provisions of subparagraphs B(1), B(2), and paragraphs C and D of Canon I, insofar as they relate to partiality, relationships, and interests are not applicable to Canon X arbitrators.

B. *Obligations under Canon II*

- (1) Canon X arbitrators should disclose to all parties, and to the other arbitrators, all interests and relationships which Canon II requires be disclosed. Disclosure as required by Canon II is for the benefit not only of the party who appointed the arbitrator, but also for the benefit of the other parties and arbitrators so that they may know of any partiality which may exist or appear to exist; and
- (2) Canon X arbitrators are not obliged to withdraw under paragraph G of Canon II if requested to do so only by the party who did not appoint them.

C. *Obligations under Canon III*

Canon X arbitrators should observe all of the obligations of Canon III subject only to the following provisions:

- (1) Like neutral party-appointed arbitrators, Canon X arbitrators may consult with the party who appointed them to the extent permitted in paragraph B of Canon III;
- (2) Canon X arbitrators shall, at the earliest practicable time, disclose to the other arbitrators and to the parties whether or not they intend to communicate with their appointing parties. If they have disclosed the intention to engage in such communications, they may thereafter communicate with their appointing parties concerning any other aspect of the case, except as provided in paragraph (3).
- (3) If such communication occurred prior to the time they were appointed as arbitrators, or prior to the first hearing or other meeting of the parties with the arbitrators, the Canon X arbitrator should, at or before the first hearing or meeting of the arbitrators with the parties, disclose the fact that such communication has taken place. In complying with the provisions of this subparagraph, it is sufficient that there be disclosure of the fact that such communication has occurred without disclosing the content of the communication. A single timely disclosure of the Canon X arbitrator's intention to participate in such communications in the future is sufficient;
- (4) Canon X arbitrators may not at any time during the arbitration:
 - (a) disclose any deliberations by the arbitrators on any matter or issue submitted to them for decision;
 - (b) communicate with the parties that appointed them concerning any matter or issue taken under consideration by

- the panel after the record is closed or such matter or issue has been submitted for decision; or
- (c) disclose any final decision or interim decision in advance of the time that it is disclosed to all parties.
- (5) Unless otherwise agreed by the arbitrators and the parties, a Canon X arbitrator may not communicate orally with the neutral arbitrator concerning any matter or issue arising or expected to arise in the arbitration in the absence of the other Canon X arbitrator. If a Canon X arbitrator communicates in writing with the neutral arbitrator, he or she shall simultaneously provide a copy of the written communication to the other Canon X arbitrator;
- (6) When Canon X arbitrators communicate orally with the parties that appointed them concerning any matter on which communication is permitted under this Code, they are not obligated to disclose the contents of such oral communications to any other party or arbitrator; and
- (7) When Canon X arbitrators communicate in writing with the party who appointed them concerning any matter on which communication is permitted under this Code, they are not required to send copies of any such written communication to any other party or arbitrator.

D. *Obligations under Canon IV*

Canon X arbitrators should observe all of the obligations of Canon IV.

E. *Obligations under Canon V*

Canon X arbitrators should observe all of the obligations of Canon V, except that they may be predisposed toward deciding in favor of the party who appointed them.

F. *Obligations under Canon VI*

Canon X arbitrators should observe all of the obligations of Canon VI.

G. *Obligations Under Canon VII*

Canon X arbitrators should observe all of the obligations of Canon VII.

H. *Obligations Under Canon VIII*

Canon X arbitrators should observe all of the obligations of Canon VIII.

I. *Obligations Under Canon IX*

The provisions of paragraph D of Canon IX are inapplicable to Canon X arbitrators, except insofar as the obligations are also set forth in this Canon.

REPORT

Introduction

Although the history of arbitration as a dispute resolution mechanism can be traced back for thousands of years, its use in new commercial and institutional settings is expanding geometrically. With each new use, there come not only new substantive issues, but also legal challenges and expressions of justified and unjustified concern. Arbitrators, and those concerned with the administration of arbitration, require clear and unequivocal ethical guidance in order that they may preserve the indispensable integrity and the appearance of the integrity of the process as it happens. The undersigned Sections of the American Bar Association and the Senior Lawyers Division recommend the adoption of the Code of Ethics for Arbitrators in Commercial Disputes – 2004 Revision (the “2004 Revision”) as an essential step toward this end. A copy of the 2004 Revision is attached to this report.

The 2004 Revision will replace the 1977 Code of Ethics for Arbitrators in Commercial Disputes (the “1977 Code”). The 1977 Code was developed by committees of the American Bar Association and the American Arbitration Association and was approved by both organizations. It was widely disseminated by its sponsors. It has provided invaluable ethical guidance for arbitrators and others involved in the dispute resolution process for over 25 years, and has been cited with approval by many federal and state courts.

Starting in 1997, working committees of the American Bar Association, including close participation by the American Arbitration Association and the CPR Institute for Dispute Resolution, began to review whether changes in the laws governing arbitration, increasing globalization of commercial transactions, and changes in the public perception of arbitration required revisions to the 1977 Code to incorporate “best practices” for the Twenty-First Century. Committees of the Section of Dispute Resolution and the Section of International Law & Practice were intensely involved, as were the Sections of Business Law, Labor and Employment Law, Litigation, Torts and Insurance Practice, and the Senior Lawyers Division, all of whom served on an ABA Task Force launched to obtain an American Bar Association consensus draft on needed changes. These committees and task forces cumulatively spent nearly seven years analyzing and drafting the 2004 Revision. These groups received guidance from the American Arbitration Association and CPR Institute at each stage. The College of Commercial Arbitrators and National Arbitration Forum also provided additional support and expressed interest in being co-sponsors of the final document. The 2004 Revision reflects a consensus achieved on all issues by these working groups, the ABA Task Force, and the undersigned ABA entities.

The Executive Committee of the American Arbitration Association approved the 2004 Revision at its September 2004 meeting, and the American Arbitration Association will implement the 2004 Revision in its procedures effective March 1, 2004. The CPR Institute is also expected to provide its formal approval and sponsorship. The American Arbitration Association, National Arbitration Forum and CPR Institute are expected to publish and distribute the 2004 Revision to every arbitrator proposed for their institutional arbitrations, just as they have distributed the 1977 Code.

The 2004 Revision preserves the style and format of the 1977 Code, and much of the language of the 1977 Code. It is called a revision, rather than a new document, to preserve continuity with unchanged provisions of the 1977 Code. Some of the language of the 1977 Code has been modified simply for clarity or consistency. Other changes are fundamental. The 2004 Revision contains many important provisions that differ markedly from those of its predecessor. Some of these changes merely update the Code to conform to existing practice. Others will effect a fundamental modification to the day-to-day practices of commercial arbitrators.

The principal changes are described below. As a matter of construction, all provisions of the 2004 Revision are subject to contrary principles reflected in the agreement of the parties, governing law or applicable arbitration rules.

Summary And Comparison Of The 1977 Code Of Ethics And The 2004 Revision

1. Presumption of Neutrality

The most fundamental and far-reaching change contained in the 2004 Revision is the application of the presumption of neutrality to all arbitrators, including party-appointed arbitrators. The concept of neutrality embodied in the 2004 Revision encompasses both independence and impartiality. By contrast, the 1977 Code applied a presumption of nonneutrality to party-appointed arbitrators. Under the 1977 Code, in all tripartite arbitrations, the two party-appointed arbitrators were to be considered “nonneutral unless both parties inform the arbitrators that all three arbitrators are to be neutral or unless the contract, the applicable arbitration rules, or any governing law requires that all three arbitrators be neutral.” (1977 Code, Canon VII, Introductory Note). The 1977 Code thus reflected the “partisan” character of tripartite arbitrations that had developed in the United States in an earlier era. Under the 1977 Code, absent contrary indications in the contract, governing law or arbitral rules, nonneutrality was the default status applied to party-appointed arbitrators in tripartite arbitrations.

The principle of nonneutrality embodied in the 1977 Code is incompatible with prevailing modern practices, international norms, and most modern arbitral rules. Its application has generated problems for the administration of arbitrations in the United States, including those arising from (a) differing legal standards imposed by the laws or judicial decisions of various states, (b) the failure of parties to disclose the status of their party-appointed arbitrators, and (c) party disagreements in the absence of express contract language or applicable institutional arbitration rules. In some cases the result has been an imbalanced panel, in which one party arbitrator operates as a neutral and another as a partisan. These conditions have created potential grounds for challenges to arbitral awards.

The 2004 Revision reverses the presumption of nonneutrality that the 1977 Code established for party-appointed arbitrators and establishes instead a presumption of neutrality for all arbitrators. This presumption appears in the Preamble – Note on Neutrality: “This Code establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies unless the parties’ agreement, the arbitral rules agreed to by the parties or applicable laws provide otherwise.” The presumption is reaffirmed in Canon IX.A: “In tripartite arbitrations to which this Code applies, all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator.”

The principle of arbitrator neutrality is increasingly important in the age of globalization. The 2004 Revision recognizes that the expectation of neutrality “is essential in arbitrations where the parties, the nature of the dispute, or the enforcement of any resulting award may have international aspects.” Preamble – Note on Neutrality. International standards of conduct can have a direct bearing on arbitrations conducted in the United States, especially those in which enforcement of the award is sought in a foreign country, or those involving foreign parties, international commerce, or the prospect of foreign discovery. The principle of nonneutrality applied to party-appointed arbitrators under the 1977 Code is incompatible with international norms, which universally require the neutrality of all arbitrators. The presumption of neutrality

embodied in the 2004 Revision brings the ethical standards applied in the United States into line with international norms, thereby enhancing the international stature of the American practice and American arbitrators, and promoting the enforceability in foreign jurisdictions of arbitral awards rendered in the United States.

The concept of neutrality embodied in the 2004 Revision is codified in Canon I, providing that one should accept appointment as an arbitrator only if fully satisfied that he or she can serve both “impartially” and “independently from the parties potential witnesses, and the other arbitrators ...” Canon I.B. The Comment to Canon I clarifies the meaning of impartiality, providing that arbitrators do not contravene the Canon if by virtue of experience or expertise they have views on certain general issues likely to arise in an arbitration, but emphasizes that “an arbitrator may not have prejudged any of the specific legal or factual determinations to be addressed during the arbitration.” Comment to Canon I. As with all other provisions of the 2004 Revision, the presumption of neutrality is subject to contrary principles established by agreement of the parties, governing law or applicable arbitration rules.

Notwithstanding the presumption of neutrality, parties in certain domestic arbitrations in the United States continue to prefer that their party-appointed arbitrations be nonneutral. Recognizing this to be the case, the 2004 Revision permits party-appointed arbitrators to act as nonneutrals, but only when it is shown that “all parties” expect that the two arbitrators appointed by the parties may be “predisposed” toward the party appointing them. Canon IX.B. The 2004 Revision refers to arbitrators who are determined to be nonneutral as “Canon X arbitrators” because Canon X establishes the special ethical obligations of party-appointed arbitrators who are not expected to meet the standards of neutrality. These provisions permit the continuation of the domestic practice historically applied in some types of tripartite arbitrations in the United States.

Canon X arbitrators are expected to observe all of the ethical obligations prescribed by the 2004 Revision except those from which they are specifically excused by Canon X. Their ethical obligations differ from those of neutral party-appointed arbitrators in several respects. Canon X Arbitrators can be “predisposed” toward the parties who appointed them. Canon X.A. Canon X Arbitrators are not obliged to withdraw because of alleged partiality at the request of the party who did not appoint them. Canon X.B. Canon X Arbitrators may engage in broader *ex parte* communications with the parties who appointed them. Canon X.C. On the other hand, Canon X Arbitrators are in all other respects obligated to act in good faith and with integrity and fairness, are required to make the same disclosures of interests and relationships required of neutral arbitrators, and are subject to specific limitations on the scope of their *ex parte* communications with the parties who appointed them or with the third arbitrator. Canon X.A., B. and C.

In order to avoid any doubt about the status of party-appointed arbitrators, all party-appointed arbitrators have a duty at the outset of the proceeding to ascertain and disclose as soon as practicable whether the parties intended for them to serve as neutrals or as Canon X arbitrators.

2. Duty of Party-Appointed Arbitrators to Ascertain and Disclose Their Status

The 2004 Revision imposes upon all party-appointed arbitrators a duty to ascertain and disclose their status either as neutral or as nonneutral (i.e., as “Canon X arbitrators”), and provides that in the event of doubt or uncertainty, the party-appointed arbitrators should serve as neutrals until doubt or uncertainty is resolved. This ethical requirement is new. A party-appointed arbitrator has an obligation to ascertain his or her status as early as possible but not later than the first meeting of the arbitrators and parties, and to provide a timely report to the parties and other arbitrators. Canon IX.C.

The 2004 Revision imposes on arbitrators a duty of investigation in the discharge of their obligation to ascertain and disclose their status. Canon IX. Their investigation should include a review of the agreement of the parties, applicable arbitration rules, and any applicable law bearing upon arbitrator neutrality. In reviewing the agreement of the parties, party-appointed arbitrators should consult any relevant express terms of the written or oral arbitration agreements. If the agreement of the parties is not expressed, the party-appointed arbitrator may appropriately inquire into agreements that have not been expressly set forth, but which may be implied from an established course of dealings of the parties or well-recognized custom and usage in their trade or profession. Canon IX.C.(1). The status of the party-appointed arbitrator as neutral or nonneutral is one of the subjects that party-appointed arbitrators are expressly permitted to discuss with the party who appointed them in the absence of the other party. Canon III.B(4).

The determination by a party-appointed arbitrator that the parties intended party-appointed arbitrators not to serve as neutrals may be overridden by the agreement of the parties, by a determination of any administering arbitral institution, or by the arbitral panel. Canon IX.C.(2). Until party-appointed arbitrators conclude that they were not intended by the parties to serve as neutral, or if the party-appointed arbitrators are unable to form a reasonable belief as to their status from the referenced sources, and pending any decision by the parties, any administering institution or by the arbitral panel, they should conduct themselves as neutrals. Canon IX.C.(3).

3. Disclosure of Interests and Relationships

The 2004 Revision subjects all arbitrators to the same obligations of disclosure of interests or relationships likely to affect impartiality or which might create an appearance of partiality. This is new. Under the 1977 Code, nonneutral arbitrators were required to disclose only information sufficient to describe the general nature and scope of any interest or relationship, but they were not required to provide the detail expected of neutral arbitrators. Under the 2004 Revision, all arbitrators, including party-appointed arbitrators who qualify as Canon X arbitrators, are required to disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality. Canon X.B. The duty of disclosure encompasses “any known” interests or existing or past relationships. The 2004 Revision applies a new standard for disclosure, casting the duty in terms of those existing or past financial, business, professional or personal relationships that might reasonably affect impartiality or lack of independence “in the eyes of any of the parties.” Canon II.A. Prospective

arbitrators are required to make a reasonable effort to inform themselves of relevant interests or relationships, and any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure. Canon II.B. and D.

4. Communications With the Parties and the Other Arbitrators

The 2004 Revision expands and clarifies the guidelines on permissible communications between arbitrators and the parties, and establishes new guidelines on communications between party-appointed arbitrators and the chair of the tribunal in tripartite arbitrations. The 2004 Revision establishes new guidelines, absent in the 1977 Code, on the subjects that a prospective arbitrator may discuss with any party in the absence of the other concerning potential appointment as an arbitrator. The discussion may include the identities of the parties, counsel or witnesses, and the general nature of the case, and inquiries about the arbitrator's suitability or availability for the appointment. Discussion of the merits of the case is specifically prohibited. Canon III.B(1). In addition, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the status of the arbitrator, that is, as neutral or nonneutral, in connection with the discharge of the arbitrator's duty to ascertain and disclose the arbitrator's status. Canon III.B.(4).

The 2004 Revision also permits *ex parte* communications regarding arrangements for compensation, including the submission of routine requests for payment. It also allows both neutral and Canon X arbitrators to discuss with the party who appointed them the selection of the third arbitrator. Canon III.B.(3) and (4). By contrast, the 1977 Code expressly allowed only nonneutral party appointed arbitrators to discuss selection of the third arbitrator with the party who appointed them. As with the 1977 Code, the 2004 Revision permits *ex parte* communications between arbitrators and the parties who appointed them regarding logistical matters and discussions with any party who appears at a noticed hearing in the absence of a party who fails to appear. Canon III.B.(5)and (6).

If they have disclosed the intention to engage in such communications, the 2004 Revision permits Canon X arbitrators to communicate with their appointed parties concerning "any other aspect of the case," subject to enumerated exceptions. Canon X.C.(2). If such communications occurred prior to the time they were appointed as arbitrators, or prior to the first hearing or other meeting of the parties with the arbitrators, Canon X arbitrators are required at or before the first hearing or meeting to disclose the fact that such communication has taken place. It is sufficient that there be disclosure of the fact that such communication has occurred without disclosing the content of the communication. A single timely disclosure of the Canon X arbitrator's intention to participate in such communications in the future is sufficient. Canon X.C.(3). These provisions parallel those of the 1977 Code that applied to nonneutral party-appointed arbitrators.

The 2004 Revision clarifies that Canon X arbitrators may not at any time during the arbitration communicate with the party who appointed them "concerning any matter or issue taken under consideration by the panel after the record is closed or such matter or issue has been submitted for decision." Canon X.C.(5). The 2004 Revision also carries forward the prohibition contained in the 1977 Code against disclosure of the deliberations of the arbitrators or of any decision in advance of the time it is given to all parties. Canon X.C.(4).

Moreover, the 2004 Revision imposes new restrictions that apply to communications between Canon X arbitrators and the neutral arbitrator. The 2004 Revision prohibits Canon X arbitrators from communicating orally with a neutral arbitrator concerning “any matter or issue” arising or expected to arise in the arbitration in the absence of the other Canon X Arbitrator. If the Canon X Arbitrator communicates in writing with the neutral arbitrator, that arbitrator shall simultaneously provide a copy of the written communication to the other Canon X Arbitrator. Canon X.C.(5). These provisions reflect a fundamental reform designed to preserve the impartiality and independence of the neutral chair of the arbitral tribunal in tripartite arbitration proceedings in which the two-party-appointed arbitrators are acting as nonneutrals.

5. Arbitrator Suitability and Party Autonomy

The 2004 Revision establishes new guidelines requiring a prospective arbitrator to accept an appointment only if fully satisfied (1) that he or she can serve impartially, (2) that he or she can serve independently from the parties, potential witnesses, and the other arbitrators, (3) that he or she is competent to serve, and (4) that he or she can be available to commence the arbitration in accordance with its requirements and thereafter to devote appropriate time and attention to its completion. Canon I.B. In addition to imposing the standards of impartiality and independence that form the bedrock of the presumption of neutrality, the 2004 Revision also imposes an obligation on the arbitrator to determine that he or she is competent to serve in the case in question. The 1977 Code contained only the admonition that prospective arbitrators should not accept an appointment if unavailable to conduct the proceeding promptly.

Consistent with the principle of party autonomy, the 2004 Revision expressly states that the existence of any relationship or interest “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 the Code. Canon I.C. So long as the arbitrator makes a full disclosure of the interest or relationship, the parties are free to consent to continued service or appointment and the arbitrator may ethically accept the appointment or continue to serve.

6. Advertising and Promotion

The 2004 Revision eliminates the prohibition that the 1977 Code imposed upon solicitation of employment as an arbitrator. The 2004 Revision provides that advertising and promotion of an individual’s willingness or availability to serve as an arbitrator must be accurate and truthful, and must not imply any willingness to accept appointment other than in accordance with its provisions. The 2004 Revision does not preclude an arbitrator from distributing conforming advertisements in electronic or print medium, from making personal presentations to prospective users of arbitral services, or from responding to inquiries concerning the arbitrator’s availability, qualifications, experience or fee arrangements. Canon VIII.

CONCLUSION

The Code of Ethics for Arbitrators in Commercial Disputes – 2004 Revision is the product of nearly seven years of effort by representatives of the concerned areas of practice within the American Bar Association, the American Arbitration Association, CPR Institute, and

others engaged in service as arbitrators, representatives of parties in arbitration, and members of the academic community. It comes before the House of Delegates with the full support of those who were involved in its preparation. Like its predecessor – the 1977 Code – the 2004 Revision will provide invaluable guidance to arbitrators and others concerned with the administration of arbitration for many years to come.

Respectfully Submitted,

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Senior Lawyers Division

February 2004

GENERAL INFORMATION FORM

Submitting Entities: Sections of Dispute Resolution, International Law and Practice, Business Law, Labor and Employment Law, Litigation, Tort Trial and Insurance Practice, and Division of Senior Lawyers

Submitted By: Richard Chernick, A. Joshua Markus, Steven Owen Weise, Stephen D. Gordon, Patricia Lee Refo, Linda A. Klein, and Lizabeth A. Moody

1. Summary of Recommendation.

The recommendation proposes that the American Bar Association adopt the Code of Ethics for Arbitrators in Commercial Disputes – 2004 Revision (the “2004 Revision”).

2. Approval of Submitting Entities.

The Councils of the Sections of Dispute Resolution, International Law and Practice, Business Law, Labor and Employment Law, Litigation, Tort Trial and Insurance Practice, and the Senior Lawyers Division have approved the recommendation.

3. Has this or a similar recommendation been submitted to the House or Board previously?

The Section of Dispute Resolution submitted a different proposal for consideration by the House of Delegates at its February 2000 Mid-Year Meeting. However, the proposal was withdrawn to allow consideration of newly voiced concerns with various provisions, leading to the formation of the multi-section Task Force that ultimately produced the 2004 Revision, for which approval is now sought.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The 2004 Revision will replace the 1977 Code of Ethics for Arbitrators in Commercial Disputes promulgated by the American Bar Association and the American Arbitration Association.

5. What urgency exists which requires action at this meeting of the House?

Immediate action is required on this matter because the principal co-sponsor of the 2004 Revision, The American Arbitration Association, has approved the 2004 Revision to take effect March 1, 2004.

6. Status of legislation.

Not applicable.

7. Cost to the Association.

None.

8. Disclosure of interest (if applicable)

Not applicable.

9. Referrals.

Simultaneous with this submission, referral is being made to all other ABA Sections and Divisions.

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