



# Party-Appointed Arbitrators: Dealing with the Presumption of Partisanship

October 11, 2016 – 1:00 pm to 2:00 pm ET

## PROGRAM SUMMARY

**Speakers:** Robert Huber

Party-appointed arbitrators traditionally have been perceived as partisans for the party that appoints them. This presumption of bias, which is still recognized by many courts, creates practical and ethical issues for both arbitrators and parties. This 60-minute webinar will explore the peculiarities and challenges presented by the use of party-appointed arbitrators and how they can be addressed in the arbitration agreement and managed before and during the arbitration hearing.

## AGENDA

<b>1:00 p.m.</b>	<b>Welcome and Introduction of Speakers</b>	(5 minutes)
<b>1:05 p.m.</b>	<b>Party-Appointed Arbitrators</b> <ul style="list-style-type: none"><li>• The shift away from the common law presumption of non-neutrality to the current trend of presuming neutrality unless the arbitration agreement designates otherwise;</li><li>• Determining the role of an arbitrator: what should a party, an arbitrator, and the neutral chair do?;</li><li>• Arbitrator disclosure under the FAA, state statutes, and arbitration rules;</li><li>• The effect of ethics codes on disclosure;</li><li>• Conduct of party-appointed arbitrators;</li><li>• Grounds for vacating awards;</li><li>• The nexus between conduct and prejudice;</li><li>• Allowable contacts with non-neutrals</li></ul>	(45 minutes)
<b>1:50 p.m.</b>	<b>Conclusion and Questions</b>	(10 minutes)
<b>2:00 p.m.</b>	<b>Evaluation</b>	(5 minutes)
<b>2:05 p.m.</b>	<b>Adjourn</b>	



**Robert J. Huber, Esq.**  
Leonard Street & Deinard, PA

<b>Current Employer-Title</b>	Stinson Leonard Street LLP - Partner
<b>Profession</b>	Attorney
<b>Work History</b>	Partner, Stinson Leonard Street LLP, 2014-present; Shareholder, Leonard, Street & Deinard, P.A., 1991-13; Shareholder/Associate, Fabyanske, Svoboda, Westra & Hart, P.A., 1983-91; Assistant Attorney General, State of Iowa, 1979-83.
<b>Experience</b>	Civil trial lawyer since 1979 with practice limited to construction since 1983. Represents owners, contractors, subcontractors, sureties, and design professionals in disputes concerning both public and private projects, particularly with highway, paving, sewers and other underground facilities, and excavation projects. Experience with every kind of construction dispute, with emphasis on differing site conditions, constructive changes, delays, defective design, and construction defects. Has represented homeowners with construction claims against builders; these include both individuals (approximately eight to ten) and condominium town-home associations (approximately eight to ten). Has also represented (approximately ten to twelve) builders in disputes with homeowners. Speaker at numerous construction-related continuing legal education programs, including "Construction Claims in Minnesota" and "Architect/Engineer Liability in Minnesota."
<b>Alternative Dispute Resolution Experience</b>	Appointed to AAA Construction Panel of Arbitrators in 1986. Arbitrated construction disputes and represented parties in over 30 arbitration hearings and 75 mediations with claim amounts up to \$10 million.
<b>Alternative Dispute Resolution Training</b>	AAA Administered vs. Ad Hoc Arbitration: Which Should You Choose?, 2015; AAA Resolving Complex Business Disputes: Is the Promise of Arbitration Illusory?, 2015; AAA Getting it Right: Secrets to Writing Better Construction Awards 2015; AAA Getting it Right: Secrets to Writing Better Construction Awards 2015; AAA Webinar, What's a Respondent Like You Doing in a Place Like This? Confronting Arbitrability and Jurisdiction Issues in Arbitration, 2013; AAA Maximizing Efficiency & Economy in Arbitration: Challenges at the Preliminary Hearing, 2011; AAA Webinar, Consolidation and Joinder Issues in Construction Arbitration: What Construction Counsel Need to Know, 2011; AAA Green Construction Update: How Does ADR Apply to Green Construction? What is Changing, and What is Staying the Same?, 2011; AAA Webinar, Why Construction Mediations Fail: Avoiding Common Mistakes, 2011; AAA Chairing an Arbitration Panel: Managing Procedures, Process & Dynamics (ACE005), 2010, 2005; AAA Arbitration Roadmap: The Standard for Efficient and Cost Effective Arbitration, 2008; AAA Construction Mediation Conference, 2007; Minnesota CLE, Arbitration Series: Arbitration Clause Drafting, 2007; Ethical Considerations in Arbitration for Neutrals and Lawyer-Advocates, 2007; AAA Dealing with Delay

*Robert J. Huber, Esq.*  
*Neutral ID : 100620*

Tactics in Arbitration (ACE004), 2006; AAA Arbitration Awards: Safeguarding, Deciding & Writing Awards (ACE001), 2005; AAA Neutrals Conference, 2004; AAA Arbitrator Ethics and Disclosure (ACE003), 2004; AAA Arbitrator Update 2001; AAA Construction Industry Arbitrator II Training: Advanced Case Management Issues, 2002; AAA Construction Industry Arbitrator Training, 1997; Certified Arbitration Training, 1997; Mediation Center/Dispute Resolution Institute of Hamline University, Mediation Skills Training, 1996.

**Professional Licenses** Admitted to the Bar: Iowa; Minnesota; Wisconsin; Court of Federal Claims.

**Professional Associations** American Bar Association (Public Contracts Section; Construction Litigation Committee; Forum Committee on Construction Industry); Minnesota State Bar Association (Construction Law Section); Wisconsin State Bar (Construction and Public Contract Law Committee); Iowa State Bar Association; Board of Contract Appeals Bar Association; Hennepin County Bar Association. Firm membership in the following: Associated General Contractors-Minnesota; American Institute of Architects-Minnesota; Associated Builders and Contractors; Minnesota Asphalt Pavement Association; Minnesota Utility Contractors Association; Building Owners Management Association; National Association of Industrial and Office Parks; Construction Financial Management Association; The Roofing Institute.

**Education** Carleton College (BA-1975); University of Iowa (JD, with honors-1979).

**Publications and Speaking Engagements** Co-author, ARCHITECT-ENGINEER CLAIMS UNDER MINNESOTA LAW and CONSTRUCTION CLAIMS IN MINNESOTA.

**Citizenship** United States of America

**Languages** English

**Locale** Minneapolis, Minnesota, United States of America

*Robert J. Huber, Esq.*  
*Neutral ID : 100620*

The AAA provides arbitrators to parties on cases administered by the AAA under its various Rules, which delegate authority to the AAA on various issues, including arbitrator appointment and challenges, general oversight, and billing. Arbitrations that proceed without AAA administration are not considered "AAA arbitrations," even if the parties were to select an arbitrator who is on the AAA's Roster.



# The Code of Ethics for Arbitrators in Commercial Disputes

Effective March 1, 2004

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 2003 by an ABA Task Force and special committee of the AAA®.

## 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.** When 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. It also does not preclude *ex parte* requests for interim relief.

**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.



AMERICAN ARBITRATION ASSOCIATION®

[Click here to go to the Commercial Arbitration Rules](#)

[Click here to go to the Commercial Arbitration Rules](#)  
Effective 10/1/13

[Click here to go to the Construction Arbitration Rules](#)

[Click here to go to the Employment Arbitration Rules](#)

[Click here to go to the Labor Arbitration Rules](#)