



Ethics Committee Responses to Member Survey Questions

ARIAS·U.S. Ethics Committee

To: ARIAS·U.S. Members

From: ARIAS·U.S. Ethics Committee

Re: Ethics Committee Responses to Member Survey Questions

Date: April 22, 2016

To the valued members of the ARIAS·U.S. community:

In 2015, the ARIAS·U.S. Ethics Committee (the "Ethics Committee") conducted a membership survey. Certain themes emerged from the responses. We address these below. The responses are grounded in the ARIAS·U.S. Code of Conduct (the "Code") and are focused on the ethical responsibilities of party-appointed arbitrators and umpires and not the specific facts and circumstances that might arise in a dispute. Note, however, that the Purpose section of the Code states:

Though these Canons set forth considerations and behavioral standards only for arbitrators, it is expected that the parties and their counsel will conform their own behavior to the Canons and will avoid placing arbitrators in positions where they are unable to sit or are otherwise at risk of contravening the Canons.

These responses are intended to assist members with a better understanding of the Code as drafted, and are not meant to be relied upon, cited or otherwise used by parties in any disputes or by courts in construing disputes. Below are the questions, followed by our responses.

1. What happens when an opponent nominates 3 umpire candidates, but 2 of these candidates have been talked to by the opponent, forcing the coin flip to the 3rd and favorite candidate?

In this instance, the umpire candidates who have been "talked to" by the "opponent" (whether counsel or the party he or she represents) about the matter for which the candidate is nominated as umpire must decline to serve as the umpire in the proceeding. This answer is made clear by Canon I titled Integrity and which specifies that "Arbitrators should uphold the integrity of the arbitration process and conduct the proceedings diligently."

Comment 3 to Canon I provides:

The parties' confidence in the arbitrator's ability to render a just decision is influenced by many factors, which arbitrators must consider prior to their service.

There are certain circumstances where a candidate for appointment as an arbitrator must refuse to serve

* * *

(e) where the candidate is nominated for the role of umpire and the candidate was contacted prior to nomination by a party, its counsel or the party's appointed arbitrator with respect to the matter for which the candidate is nominated as umpire.

If the umpire candidates do not voluntarily comply with this clear mandate, the party other than the one denominated as the "opponent" may request that the candidates withdraw and that the "opponent" nominate two other candidates, of course, copying the "opponent" on all correspondence. Nothing in this response affects either party's rights under the Federal Arbitration Act.

To the extent the conduct of the "opponent" was intentional— that is, the "opponent" deliberately disqualified two of its umpire candidates to get a 50% chance that its third candidate will be selected—it is a violation of the Purpose section of the Code quoted above. Such conduct, if engaged in by counsel, may be subject to state attorney disciplinary proceedings.

2. What is the scope of permissible ex parte communications? When and how can one communicate with party appointed arbitrators? Before/after Interim Awards? During Deliberations? How does one respond when a party appointed arbitrator clearly has engaged in those discussions?

In most instances counsel will agree to the timing of the ex parte communication cut-off and will disclose this agreement at the organizational meeting. If not, the panel should take care to clearly provide a firm date for ex parte communications cut-off. Other circumstances may arise when ex parte communications are cut off, including during motion practice or other submissions to the panel. Also, ex parte communications may re-open following issuance of the Final Award, so long as the Panel's deliberations are not disclosed. These questions underscore how important it is to be precise

in addressing the timing of ex parte cut-off early in the arbitration proceeding. For example, if counsel and/or the parties want to resume ex parte contact following an award, they should so specify. The same is true for ex parte contact before motions are submitted, either in support of/opposing Interim Awards or in presenting other issues.

Generally speaking, the umpire may have no ex parte communications with the parties or their counsel or the party-appointed arbitrators at any time during the proceeding. The only times during which an umpire may discuss the case with a single arbitrator, party or party's counsel, in the absence of other counsel, are set forth in Comment 8 to Canon V entitled Communications. These are: (a) discussions about ministerial matters (such as time of a hearing), provided that the umpire then promptly informs the other arbitrator, party or party's counsel of the discussion and allows expression of views before any final decision is made or (b) if all parties so request or consent to the contact. Also, if a party fails to be present at hearing after having been given due notice the entire panel may discuss the case with any party or its counsel who is present and the arbitration may proceed.

Within specified parameters, each party-appointed arbitrator may speak to the party who appointed him or her up to the time of the deadline for ex parte communications. Again, these circumstances are specified in the Comments to Canon V. These are:

- Party-appointed arbitrators may communicate with the party who is considering appointing them about their fees and, excepting those who by contract are required to be "neutral" or the equivalent, may also communicate about the merits of the case prior to acceptance of the appointment until the date determined for the cessation of ex parte communications. (Comment 2)
- Except as provided above, party-appointed arbitrators may only communicate with a party concerning the dispute provided all parties agree to such communications or the Panel approves such communications, and then only to the extent and for the time period that is specifically agreed upon or ordered. (Comment 4) When party-appointed arbitrators communicate in writing with a party concerning any matter as to which communication is permitted, they are not required to send copies of any such written communication to any other party or arbitrator. (Comment 5)
- Where communications are permitted, a party-appointed arbitrator may (a) make suggestions to the party that appointed him or her with respect to the usefulness of expert evidence or issues he or she feels are not being clearly presented; (b) make suggestions about what arguments or aspects of argument in the case to emphasize or abandon; and (c) provide his or her impressions as to how an issue might be viewed by the Panel, but may not disclose the content or substance of communications or deliberations among the Panel members. An arbitrator should not edit briefs, interview or prepare witnesses, or preview demonstrative evidence to be used at the hearing.(Comment 6)

3. Is it appropriate for a law firm to select an individual as a party appointed arbitrator for a client one week before a hearing where that individual is serving as an umpire in a case in which the same law firm is counsel for another client?

The timing of the offered party-appointment is not the issue. The issue is whether an umpire may accept a party-appointment involving a law firm currently appearing before the umpire in a different matter. If the new matter involves parties appearing before an umpire in a pending matter the umpire must decline the proffered party appointment as indicated in Canon I, Comment 3(f). If the new matter involves different parties, the Code does not prohibit the umpire from accepting the appointment, but leaves it to his/her discretion. In deciding whether to take the new appointment, the umpire should consider whether the new appointment would hinder the umpire's ability to render a just decision in either the existing matter or the new matter. The decision should be made after consideration is given to the factors indicated in Canon I, Comment 4.

4. What can ARIAS-U.S. do to police and deal with those who violate our Code of Ethics?

Although there has been discussion and debate about whether ARIAS-U.S. should establish a formal ethical grievance and sanctioning body and procedure, no such body or procedure exists. Article II, Section 5 of the By-Laws provides:

A member may be suspended for a period, or expelled, for cause such as violation of any of the by-laws or rules of The Society or for conduct prejudicial to the best interests of The Society. Suspension or expulsion shall be by a two-thirds vote of the membership of the Board of Directors, provided that a statement of the reasons for the contemplated action shall have been mailed by registered mail to the affected member at the address last given to The Society by the member at least thirty (30) days before final action is taken thereon; this statement shall be accompanied by a notice of the time when and place where the Board of Directors is to take action in the premises. The member shall be given an opportunity to present a statement at the time and place mentioned in such notice.

5. What if the parties disagree as to the application of the ethical rules?

If the parties disagree about the application of the Code in a particular arbitration and a workable compromise cannot be reached, they should raise the issues with the Panel for resolution and, if necessary, preserve any objections for judicial intervention if appropriate.

6. Should we be concerned about multiple appointments of party appointed arbitrators by the same party?

It is the arbitrator himself or herself who must weigh whether repeated appointments by the same party will affect his or her ability to rule fairly or would affect confidence in the process. Parties may

choose to appoint the same arbitrators repeatedly, whether because of favorable perceptions about their industry expertise or their ability to work effectively with other arbitrators. The candidate who receives repeated appointments from the same party must consider Canon I, Comment 4 (g), which states that, in determining whether he or she can render an impartial decision, an arbitrator should consider whether a "significant percentage" of his or her appointments for the past five years come from the party in question. Should the arbitrator determine that repeated appointments by the same party would likely affect his or her judgment the appointment should be declined.

7. Is it a breach of ethics for an arbitrator or umpire to handle an arbitration for one party while also handling a different arbitration for the opposing party or attorney?

Party-appointed arbitrators are not prohibited from accepting an appointment by one party in a particular arbitration proceeding after having accepted an appointment from the opposing party in that proceeding. However, Comment 3(f) of Canon I makes clear that, because of his or her neutral role, the umpire in a proceeding may not accept a subsequent appointment as a party-appointed arbitrator from one of the parties in that proceeding.

8. When asked, are arbitrators required to disclose the percentage of income derived from appointments by same party/law firm/ third party/administrator or manager?

While Canon IV encourages complete disclosure on the part of arbitrators, Comment 2 (b) focuses on the number of appointments by the same party/law firm/ third party administrator or manager, rather than the percentage of income generated by those appointments. There are two primary reasons for this focus. First, participants in the arbitral process should strive to obtain necessary information about fairness and impartiality of an arbitrator without causing an undue invasion of his or her privacy. Second, while numbers of appointments are simply and objectively verifiable, it is less likely that percentage of income generated by the same party/law firm/ third party administrator/manager may be so verified.

9. Should we educate umpires not to voice their opinions to arbitrators before testimony is given, especially when the two party appointed arbitrators are serving on other panels to connected arbitrations that have been bifurcated or trifurcated?

In order to preserve the parties' confidence in the fairness and objectivity of the arbitral process, all arbitrators, including the umpire, should refrain from reaching a judgment, including on individual issues, until the parties have had an opportunity to present all the evidence related to those issues and the panel has fully deliberated. See Comment 2 to Canon II.

10. Are there any circumstances in which an arbitrator is permitted to disclose Panel communications or deliberations?

Arbitrators may disclose certain communications if so agreed by the parties or if otherwise required or allowed by law as set forth in Canon VI, Comment 2. Although this should be a very infrequent occurrence, Canon VI, Comment 3 also makes an allowance for an arbitrator to place Panel deliberations or communications on the record or in a communication to all parties and panel members in the event of the need to expose serious wrongdoing on the part of one or more of the other panel members.

11. What is an umpire's duty to disclose in an umpire questionnaire prior involvement at his or her prior company (ies) with the substantive issues involved in a dispute?

While Canon IV specifies that arbitrators should disclose any interest or relationship likely to affect their judgment and that all doubts should be resolved in favor of disclosure, it is true that certain issues are endemic to our industry. For example, given the number of disputes that involved number of occurrences under a treaty, it is not necessary for an umpire candidate to disclose his or her involvement with these generic issues. However, if the precise issue involves an account, policyholder or contract with which the umpire had experience while employed at his or her former company, that involvement should be disclosed. See Comment 1 to Canon IV.

The members of the Ethics Committee thank you for your thoughtful questions and continuing interest.