

# INTENSIVE ARBITRATOR TRAINING WORKSHOP

**New York, NY**

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# Welcome and Overview

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# Ethics Responsibilities as Arbitrators

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# History and Evolution

- **ARIAS•U.S. Guidelines for Arbitrator Conduct (“Code of Conduct”)**
  - Originally drafted in 1998, with 10 Canons and Explanatory Comments
  
- **Additional ARIAS•U.S. Ethical Guidelines (“Additional Guidelines”)**
  - Created in 2010 to supplement the “Code of Conduct”
  
- **ARIAS•U.S. Code of Conduct**
  - Effective January 1, 2014
  - Merged the “Code of Conduct” (1998) and “Additional Guidelines” (2010)



# Introduction and Purpose

## ➤ Introduction

- Viability of arbitration depends on the quality and experience of arbitrators and their personal and professional integrity.

## ➤ Purpose

- To provide guidance to arbitrators as to ethical considerations and to set behavioral standards
- Not intended to override the parties' agreement, applicable law or arbitration procedures



# Definitions

## ➤ Affiliate, Arbitrator, Party and Umpire

- **Affiliate:** an entity whose ultimate parent owns a majority of both the entity and the party to the arbitration and whose insurance and/or reinsurance disputes, as applicable, are managed by the same individuals that manage the party's insurance and/or reinsurance disputes.
- **Party:** the individual or entity that is named as a petitioner or respondent in an arbitration, as well as the affiliates of the named party.



# Canons

- **Integrity (I)**
- **Fairness (II)**
- **Competence (III)**
- **Disclosure (IV)**
- **Communications (V)**
- **Confidentiality (VI)**
- **Advancing the Process (VII)**
- **Just Decision (VIII)**
- **Advertising (IX)**
- **Fee (X)**



# Canon I – Integrity

**Arbitrators should  
uphold the integrity of  
the arbitration process  
and conduct the  
proceedings diligently.**





# Canon I – Integrity

- **When Must An Arbitrator Refuse to Serve? (Comments, ¶ 3)**
  - a) **Material financial interest**
  - b) **Cannot render decision on evidence/arguments presented**
  - c) **Currently serves as a lawyer for one of the parties**
  - d) **Nominated for umpire, currently a consultant or expert for a party**
  - e) **Nominated for umpire, contacted by one side about this matter**
  - f) **Umpire in one matter, party solicits as party-appointed in another**



# Canon I – Integrity

## ➤ When Should An Arbitrator Refuse to Serve? (Comments, ¶ 4)

- Consider whether relationship would be likely to affect your judgment and, if so, decline the appointment. (¶ 4 (a)-(k))
  - Financial interest in a party
  - Currently in a non-neutral role and being proposed for umpire
  - Previously served as consultant, expert, attorney
  - Involvement with contracts, claims
  - Significant professional, familial or personal relationship
  - Significant percentage of appointments or revenue w/in the past 5 years from a party, firm or TPA/manager



# Canon I – Integrity

## ➤ Comment ¶5

- Explains relationship between ¶3 and ¶4.
- Where circumstances in which an arbitrator must decline an appointment exist as to . . .
  - an affiliate,
  - an affiliate that doesn't technically fall w/in definition of “party” or
  - entity w/the same TPA or manager as a party . . .

an arbitrator should decline to serve unless it is clear that the relationship to the party is sufficiently attenuated that the policies underlying ¶ 3 are not implicated (¶ 5)



# Canon II – Fairness

**Arbitrators shall conduct the dispute resolution process in a fair manner and shall serve only in those matters in which they can render a just decision. If at any time the arbitrator is unable to conduct the process fairly or render a just decision, the arbitrator should withdraw.**



# Canon II – Fairness

## ➤ Before accepting an appointment, identify . . . (¶1)

- ✓ the parties
- ✓ counsel
- ✓ other arbitrators
- ✓ witnesses
- ✓ general facts
- ✓ anticipated issues and positions

## ➤ Refrain from . . . (¶¶ 2, 3)

- ✓ offering assurances or predictions
- ✓ stating definitive positions
- ✓ committing to dissent or compromise



# Canon III – Competence

**Candidates for  
appointment as arbitrators  
should accurately  
represent their  
qualification to serve.**



# Canon IV – Disclosure

**Candidates for appointment as arbitrators should disclose any interest or relationship likely to affect their judgment. Any doubt should be resolved in favor of disclosure.**



# Canon IV – Disclosure

## ➤ What should be disclosed?

- Any interest or relationship that others could reasonably believe would be likely to affect an arbitrator's judgment (§1).





# Canon IV – Disclosure

- **Before accepting appointment, diligent effort should be undertaken to identify/disclose (¶1):**
  - ✓ Financial or personal interest in the outcome
  - ✓ Existing/past financial, business, professional, family or social relationship w/the parties
  - ✓ Where appropriate/known, current employer's financial interest
  - ✓ Where appropriate/known, current employer's existing/past financial or business relationship with the parties



# Canon IV – Disclosure

- **Candidates shall also disclose (¶2):**
  - ✓ relevant positions taken in published works/expert testimony
  - ✓ extent of previous appointments arbitrator
  - ✓ past or present involvement with the contracts or claims at issue



# Canon IV – Disclosure

- **Conflicting Duties to Disclose, Maintain Confidentiality**
  - Attempt to reconcile the two by providing substance of the information w/out revealing details, if possible (¶ 3)
  - When unable to disclose because of conflicting obligations, s/he should withdraw or obtain informed consent of both parties (¶ 4)
  
- **Withdrawal**
  - Arbitrator should not withdraw at his/her own instigation absent good reason (¶ 5)
  
- **Continuing Obligation (¶ 6)**



# Canon V – Communications with the Parties

**Arbitrators, in communicating with the parties, should avoid impropriety or the appearance of impropriety.**



# Canon V – Communications with the Parties

- **If there's a rule about communications, follow it!**
- **Where communications are permitted:**
  - Arbitrator may comment on usefulness of expert evidence, issues s/he feels are not being clearly presented, arguments to emphasize/abandon
  - Arbitrator may provide impressions as to how an issue might be viewed by the Panel, but may not disclose communications / deliberations
  - Arbitrator should not edit briefs, interview or prepare witnesses, or preview demonstrative evidence
- **Documents**
  - A party arbitrator should not review any documents that the party appointing him or her is not willing to produce to the opposition.



# Canon VI – Confidentiality

**Arbitrators should be faithful to the relationship of trust and confidentiality inherent in their position.**



# Canon VI – Confidentiality

## ➤ Position of Trust

## ➤ Arbitrators Shall Not...

- ✓ Use confidential information to gain personal advantage
- ✓ Inform anyone of a decision before given to all parties
- ✓ Assist in post-arbitral proceedings, except as required by law
- ✓ Inform anyone about the contents of the deliberations



# Canon VII – Advancing the Arbitral Process

**Arbitrators shall exert every reasonable effort to expedite the process and to promptly issue procedural communications, interim rulings, and written awards.**





# Canon VIII – Just Decisions

**Arbitrators shall make decisions justly, exercise independent judgment and not permit outside pressure to affect decisions.**



# Canon IX – Advertising

**Arbitrators shall be truthful  
in advertising their  
services and availability to  
accept arbitration  
appointments.**



# Canon X – Fees

**Prospective arbitrators shall fully disclose and explain the basis of compensation, fees and charges to the appointing party or to both parties if chosen to serve as the umpire.**





# Powers of the Arbitration Panel

**Joy L. Langford**

**Norton Rose Fulbright**



# Authority for Arbitration Panel Powers

- **Contract** – what does the arbitration agreement say?
- **Law**
  - **Federal Arbitration Act (FAA)** – 9 U.S.C. §§1-16
    - applicable to interstate/foreign commerce arbitration agreements
  - **(Revised) Uniform Arbitration Act (RUAA)**
    - state-specific laws, applicable to intra-state arbitration agreements
  - **International arbitration?**
    - International laws
    - United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL Rules)



# Contractual Authority

- **What powers are enumerated in the arbitration clause?**
  - **May not be very specific**
    - Possible powers
    - Possible limitations
  - **May reference institutional rules/procedures**
    - ARIAS-U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes
    - AAA Rules



# Contractual Authority

- **What powers are enumerated in the arbitration clause?**
  - May specify qualifications of arbitrators
  - May dispense with strict rules of evidence
  - May impose certain parameters or restrictions





# Authority Under the FAA

- **FAA does not explicitly discuss many powers.**
  - **Example: Witnesses – (9 U.S.C. § 7 )**
    - may summon any person to appear as a witness
    - may summon to bring any book, record, document, or paper
    - served in the same manner as court subpoenas

# Authority Under the FAA

- **Understanding the limitations is important!**
- **Court may vacate an award (9 U.S.C. § 10):**
  - Award was procured by corruption, fraud or undue means
  - Evident partiality or corruption in the arbitrators
  - Arbitrators refused to postpone hearing or refused to hear pertinent & material evidence (or other misbehavior)
  - Arbitrators exceeded their powers



# Authority Under the FAA

- **Court may modify/correct an award (9 U.S.C§ 11):**
  - Evident material miscalculation or mistake
  - Arbitrators decided a matter that was not submitted
  - Award imperfect in form

# Authority Under State Arbitration Acts

- **(Revised) Uniform Arbitration Act (RUAA) specifies certain powers such as:**
  - decide whether contract containing arbitration agreement is enforceable (§ 6)
  - issue interim/provisional awards (§ 8)
  - rule on requests for summary disposition (§ 15)
  - award punitive damages, attorneys' fees & expenses, and other relief (§ 21)
- **CAUTION: Need to look at law in particular state**

# COMMON ISSUES



# Arbitrability

- **What issues should be decided by the courts, and what issues should be decided by the arbitrators?**
  - **Gateway issues decided by the court:**
    - Was a contract formed between the parties that contains an arbitration clause?
    - Does the dispute fall within the contract's arbitration clause?
  - **Procedural issues decided by the arbitrators**



# Consolidation

➤ **Arises when there are multiple claims, multiple contracts (or layers), multiple reinsurers.**

- It may be more efficient, fair, & inexpensive to resolve in a single arbitration.

➤ **Some arbitration clauses expressly permit consolidation (check the specific language):**

*“If more than one reinsurer is involved in the same dispute, all such reinsurers shall constitute and act as one party...”*

➤ **If arbitration agreement is silent...**



# Consolidation

- **FAA** – Federal Arbitration Act is silent on consolidation issue
- **RUAA** – Revised Uniform Arbitration Act (2000), Section 10 (authorizing a court to order consolidating arbitrations where:
  - (1) there are separate agreements to arbitrate or separate arbitration proceedings between the same persons or one of them is a party to a separate agreement to arbitrate or a separate arbitration proceeding with a third person;
  - (2) the claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;
  - (3) the existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and
  - (4) prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation”. The RUAA has been adopted in 15 US states.





# Consolidation

- **General Rule** – Consolidation universally is treated today under arbitral statutes and rules as a procedural issue for arbitrators to decide rather than a substantive issue of arbitrability for the courts. See *Green Tree Financial Corp. v. Bazzle*, 539 US 444, 123 S. Ct. 2402, (2003); *Nath v Merrill Lynch, Pierce, Fenner & Smith Inc.* 2014 WL 2438435, \*4 (NY Sup, 21 May 2014) (“[T]he question of whether arbitration proceedings should (or should not) be consolidated is a procedural matter to be decided by the arbitrators, not by the court”). Most courts construe standard US arbitration clauses, arbitration statutes and arbitration rules broadly to authorize arbitrators or the arbitration administrator to order consolidation of arbitrations having common issues of fact or law. See, e.g., *Vigo Steamship Corp. v. Marship Corp.*, 26 N.Y.2d 157 (1970)
- **Alternative Rule** – Some courts, applying purely contract law, deny consolidation absent the express consent of all parties or of other contractual or statutory authorization. See, e.g., *Gvn’t of U.K. of Great Britain v. Boeing Co.*, 998 F.2d 68 (2d Cir. 1993). Thus, arbitration clauses written to require consent of all parties to consolidated proceeding can create major impediments to consolidation, particularly, where agreed arbitration rules also fail to address consolidation. See *Georgia Casualty & Surety Co v Excalibur Reinsurance Corp* 2014 WL 996388 (ND Ga, March 13, 2014) (denying motion to consolidate two arbitrations arising out of the same transaction, because neither of the respective arbitration clauses nor state statute nor the Federal Arbitration Act expressly authorized the court to order consolidation).



# Consolidation

- Consolidation's major legal issue is whether two or more arbitrations are consolidated merely for hearing by their separate tribunals sitting together to hear the evidence and then writing their own awards, or whether the arbitrations are consolidated for all purposes and with one of the tribunal panels selected to hear and decide all disputes, claims, cross-claims, and counterclaims asserted among all parties.
- Even where the issue is decided by courts, consolidation of arbitrations is granted where justified, see *Alpine Glass Inc. v. State Farm Fire and Casualty Co* 2014 WL 2481814 (D. Minn., 3 June 2014) (consolidating 140 claims into a single arbitration, and opining: "Courts consider several factors when determining whether to order consolidation of claims for arbitration, including the efficiencies of consolidation, the danger of inconsistent judgments if disputes are arbitrated separately, and the prejudice that parties may suffer as a result of consolidation").



# Consolidation

## ➤ Case law...3 key U.S. Supreme Court cases:

- *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002)
  - procedural matters are questions for the arbitrators
- *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003)
  - whether to allow class arbitration is a question for the arbitrators
- *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010)
  - did not directly address the issue, but calls into question whether arbitrators can decide the issue

# Consolidation

## ➤ *Stolt-Nielsen:*

- About class arbitration, not consolidation
- Arbitration panel had issued award saying that class arbitration was permissible, even though arbitration clause was silent and no evidence of parties' intent
- Supreme Court vacated the award, concluding that the arbitrators had exceeded their powers

# Consolidation

- Agreement to certain rules may mean the arbitrator has authority to decide the consolidation issue

# Consolidation

## ➤ *Recent Federal Court Cases*

- Indication that agreement to AAA rules confirms an arbitrator's authority to determine jurisdiction over claims to be decided in arbitration
  - *Gilman v. Waters*, 61 F. Supp. 3d (S.D. Ind. 2014)
  - *Fremont Cmty. Digester, L. L.C. v. Demaria Bldg. Co., Inc.*, 2015 WL 3917635 (Mich Ct. App. June 25, 2015)

# Consolidation

- *International Center for Dispute Resolution (ICDR):*
- Under Article 8 of the ICDR rules, a party can request the Administrator of the ICDR to appoint a consolidation arbitrator, who has the power to consolidate two or more arbitrations into a single arbitration. Consolidation may be ordered when (i) the parties have expressly agreed to consolidation (ii) all the claims are made under the same arbitration agreement or (iii) all the claims are made under more than one arbitration agreement, the arbitrations involve the same parties, the disputes in the arbitrations arise in the same legal relationship and the consolidation arbitrator finds the arbitration agreements to be compatible. The consolidation arbitrator is afforded broad powers. In particular, he or she has the power to stay any or all of the pre-existing arbitrations which are subject to potential consolidation. Further, when arbitrations are consolidated, whilst the default position is that they shall be consolidated into the arbitration that commenced first, the consolidation arbitrator has the discretion to decide otherwise. Therefore, theoretically, the consolidation arbitrator could decide to appoint an entirely new tribunal. Relevant circumstances which can be taken into account include the applicable law, whether one or more arbitrators have been appointed in more than one of the arbitrations, the progress already made in the arbitrations, whether the arbitrations raise common issues of law and/or facts, and whether the consolidation of the arbitrations would serve the interests of justice.

# Confidentiality

- **Do arbitrators have the power to issue a confidentiality or protective order where a contract is silent and absent complete agreement among the parties?**
  - **FAA – silent**
  - **RUAA §17(e)**

“An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this State.”



# Confidentiality

- **No uniform rule – must look to custom/practice, state law and governing arbitration rules, etc.**
  - Broad power of arbitrators to decide procedural issues and interpret arbitration rules (e.g., AAA rules).
  - Custom and practice of confidentiality in arbitrations (*i.e.*, implicit in arbitration because parties chose a resolution outside of a public court process).
- **Post-award judicial review**
  - confidentiality or protective order is subject to court's evaluation against the presumption of public access to documents.

*See City of Newark v. Law Dep't of City of N.Y.*, 754 N.Y.S.2d 141 (Sup. Ct. N.Y. Cnty. 2002).

# Discovery – General Discovery Disputes

- **Some arbitration clauses expressly address the panel's authority to resolve discovery dispute.**
- **If the arbitration clause is silent ...**
  - It is commonly recognized that arbitrators have broad authority to resolve procedural disputes, including the scope & nature of permissible discovery.

# Discovery – Third-Party Discovery

## ➤ **FAA (9 U.S.C§ 7)**

- arbitrators may summon witnesses to attend before them and bring documents with them

## ➤ **RUAA (§ 17)**

- arbitrators may issue subpoenas for attendance of witnesses and production of documents at a hearing
- can also permit depositions of witnesses who cannot attend the hearing

## ➤ **ARIAS-U.S. Rules for Resolution of U.S. Insurance and Reinsurance Disputes**



# Discovery – Third-Party Discovery

- Fundamental disagreement among the federal courts as to whether the FAA authorizes nonparty subpoenas outside of an actual arbitration hearing. Some The Second and Third Circuits have ruled that the FAA's plain language only authorizes arbitrators to subpoena a witness to appear before them in person, and the witness may provide any documents or testimony only at that time. Under this view, the FAA does not authorize any prehearing nonparty discovery whatsoever. *e.g. Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 212 (2d Cir. 2008) (holding that the FAA unambiguously limits nonparty-document discovery to the context of a hearing, where the nonparty may be summoned as a witness); *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004).
- The Sixth and Eighth Circuits have read Section 7 of the FAA to contain an implied power allowing arbitrators to order prehearing discovery. These courts have reasoned that if arbitrators can summon a witness to bring documents to a hearing, then they also have the less-intrusive power to order document production or deposition testimony outside of a hearing. *e.g. In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870-871 (8th Cir. 2000) (holding that Section 7 of the FAA grants arbitrators an implicit power to order a nonparty to produce documents in advance of a hearing); *Am. Fed'n of Television & Radio Artists, AFL-CIO v. WJBK-TV*, 164 F.3d 1004 (6th Cir. 1999)



# Discovery – Third-Party Discovery

- The Fourth Circuit has held that prehearing non-party discovery is allowed only on a showing of a “special need or hardship.” *COMSAT Corp. v. Nat’l Sci. Found.* , 190 F.3d 269 (4th Cir. 1999).
- May also consider the applicability of state arbitration law to the extent it is not preempted by the FAA. State law may be helpful because some states allow prehearing discovery from non-parties. Like the FAA, however, the law in many states is unclear about whether prehearing non-party discovery is available.



# Interim Rulings

- Unless prohibited or limited by arbitration agreement, arbitrators generally have the authority to enter interim awards as appropriate.
- RUAA – expressly provides that arbitrators can issue interim/provisional awards (§ 8)
- FAA – silent as to interim/provisional rulings
- **Examples:**
  - Pre-hearing security
  - Discovery rulings
  - Claim or issued-dispositive motions



# Final Awards – Reasoned Awards

- **Arbitration clauses typically...**
  - require only that awards be in writing.
  - do not require the panel to explain the basis of its decision.
- **Parties may agree that they want a reasoned award.**
- **FAA & RUAA – silent**
- **ARIAS-U.S. Practical Guide to Reinsurance Arbitration Procedure**



# Final Awards – Remedies

## ➤ What Remedies Are Available?

- Compensatory Damages
- Declaratory judgment
- Specific performance
  - How to handle future claims
- Interest
- Attorneys' fees, costs and punitive damages if not precluded by arbitration agreement





# Final Awards – Remedies

- FAA – silent
- RUAA – arbitrators can award punitive damages, attorneys' fees & expenses, and other just & appropriate relief, must justify basis for punitive damages (§ 21)



# After the Award

## ➤ “Functus officio”

- “A task performed”... a doctrine that limits a panel’s ability to revisit issues once it has ruled

*“Arbitrators exhaust their power when they make a final determination on the matters submitted to them. They have no power after having made an award to alter it; the authority conferred on them is then at an end.”*

*Bayne v. Morris, 68 U.S. (1Wall.) 97, 99 (1863)*

- Once the panel makes a final award, it no longer has any authority.



# *Functus Officio*

## ➤ Two elements:

- There must be a final award executed by the arbitrator; and
- That final award must be delivered or declared.



# *Functus Officio*

## ➤ Exceptions:

Possible exceptions to the *functus officio* rule are:

- (1) correcting a mistake apparent on the face of the award;
- (2) where the award does not adjudicate an issue submitted to the panel; and
- (3) where the award, although seemingly complete, contains an ambiguity as to whether the submission has been fully dealt with





# Effective Service as an Arbitrator Part I

**Mark Wigmore**

**Avalon Consulting LLC**

**ARIAS•U.S. Certified Arbitrator and Umpire**



# The Arbitrator's Contribution to the Process

- **Arbitrators assist in resolving disputes that the parties cannot resolve themselves...**
  - Efficiently and fairly
  - Without appearance of impropriety
  - Reach a just resolution
  
- **Arbitrators should honor the parties' agreements**
  - Follow the law and/or contract, as appropriate
  
- **Arbitrators must afford the parties' basic due process**



# A Brief Tour

- ❑ Arbitrator Appointments
- ❑ Organizational Meeting
- ❑ Preliminary Motions
- ❑ Discovery
- ❑ Summary Disposition
- ❑ Final Hearing
- ❑ Post-Hearing Matters





# Arbitrator Roles

## ➤ Umpire

- **Strictly Neutral**
- **Usually appointed after two party-appointed arbitrators**
- **No communications except including both parties**
- **Avoid independent communications with party arbitrators**
- **Has to take the lead in running the arbitration**



# Arbitrator Roles

## ➤ Party-Appointed Arbitrator

- **Neutral**

- Held to same standards of neutrality as umpires
- No predisposition, typically no *ex parte* communications
- Less common in U.S., but some movement towards neutrality

- **Non-Neutral**

- More common in U.S. reinsurance/insurance arbitrations
- Can be initially predisposed towards the position of a party
- Should avoid reaching judgment on any issue in advance (Canon II)
- *Ex Parte* communications typically permitted
- **Challenges of service as party-appointed arbitrator**
  - Expectations of parties and counsel
  - Dealing with umpire and other party arbitrator
  - Effectively serving in this role



# Arbitrator Appointment

## ➤ Appointment as Non-Neutral

- Initial call with counsel or the party representative about the case
  - How to handle
- Consideration of conflicts; whether “disinterested”
- Availability
- Requests for assistance in selection of the umpire
- Requests for assistance in development of the case

## ➤ Appointment as Neutral

- Initial contact by both parties
- Neutrality standard – likely that a questionnaire is required
- Understand the role the parties have agreed you will take



# Organizational Meeting

## ➤ Initial Activities

- Initial panel conference
- In-Person or Telephonic Organization Meeting
- Arrangements/agenda for organizational meeting with parties
  - Organization letter and OM agenda from umpire

## ➤ Organizational Meeting

- Typically the first “stage” of the arbitration
- Topics generally covered at the OM:
  - Disclosures
  - Hold Harmless
  - Confidentiality (and Confidentiality Agreement)
  - Arbitration Schedule
  - Motion Practice
  - Discovery Issues



# Organizational Meeting

- **“Best practices” in Preparing for the OM**
  - Prepare/submit disclosures in writing, in advance
  - Work out hold harmless/confidentiality issues in advance
  - Position statements
  - Refer to ARIAS-US Practical Guide
  
- **Other Considerations:**
  - Independent research?
  - Getting to know the umpire and other arbitrator
  - Pre-meeting communications with counsel



# Organizational Meeting

## ➤ At the Organizational Meeting...

- Acceptance of panel and execution of hold harmless and confidentiality agreements
- Discussion of the issues
- Discussion of motions and procedure for briefing
- Set schedule for the hearing and interim steps



# Deliberations

- **Weighing in on the Issues (as a non-neutral)**
  - **Must be fair and objective (Canon I)**
  - **Must avoid reaching judgment until the Panel has fully deliberated, after both parties have had a full and fair opportunity to present their positions (Canon II)**



# Deliberations

## ➤ Weighing in on the Issues (as a non-neutral)

- **Parties/counsel who appoint you may have different expectations.**
  - Does the party who appointed you expect you to support its positions and advance those positions to the umpire?
- **It can be difficult to balance complying with your obligations under the Code of Conduct and dealing with your appointing party's/counsel's expectations.**
  - **For example, the dispute over confidentiality in the hypothetical. . .**
    - ✓ What outcome is fair/just and makes sense in these circumstances?
    - ✓ What outcome does your party want?
    - ✓ Does the law or contract require a particular outcome?
    - ✓ What outcome is “sellable” to the rest of the Panel?





# Deliberations

## ➤ Possible Approaches

- Always be prepared
- Know your other arbitrators
- At the hearing and during deliberations...
  - You may ask questions, but do so carefully
  - Most counsel do not need you to develop their case
  - Overt advocacy rarely works well
  - What does work well?
  - Reasonable concessions and compromise may build credibility



# Deliberations

## ➤ Dealing with Difficult Issues

- What happens when . . .
  - ✓ the case is not as clear-cut as counsel represented it would be
  - ✓ the umpire is skeptical or even seems pre-disposed
  - ✓ the other arbitrator is aggressive, difficult, or seems to disproportionately influence the umpire
- You will have a chance to practice some of this in the context of an organizational meeting and a hearing on the merits in the mock arbitrations to follow ...





# Disclosures and Recordkeeping

**Elaine Caprio**

**Caprio Consulting LLC**

**ARIAS•U.S. Certified Arbitrator**



# Getting “the Call”

- **Be familiar with the ARIAS Code of Conduct!**
  
- **What the caller should expect to learn from you....**
  - Can you fairly serve in the matter? (Canon II)
  - Are you competent to serve in the matter? (Canon III)
  - Preliminarily, do you have any conflicts of interest? (Canon IV)
  
- **What you should expect to learn from the caller....**
  - Names of the parties, parents, affiliates, client reps
  - Names of other arbitrators and counsel
  - Contracts, business or accounts involved
  - Names of potential witnesses



# Getting “the Call”

## ➤ What does the Arbitration Clause say?

- Do you qualify?
- Time frames? Can you accommodate the schedule?
- Neutral or non-neutral arbitrators?
- Other relevant provisions?
- Get a copy of the arbitration clause!

## ➤ Communications about the substantive case

- Neutral arbitrators should not discuss merits of case with the parties
- Non-neutral arbitrators may discuss merits of case prior to accepting appointment



# Getting “the Call”

## ➤ Canon I, Integrity

- Do any of the circumstances described in Comment 3 prevent you from accepting the appointment?
- If not, do any of the circumstances described in Comment 4 exist and, if so, should you decline the appointment?

## ➤ Other considerations....

- Are there philosophical or intellectual reasons that would prevent you from voting for the party contacting you?
- Are you right for this assignment?
- Are you qualified for this assignment?



# Getting “the Call”

➤ **How do you handle the dreaded question:**

“Will you vote my way?”

➤ **Canon II, Fairness:**

Arbitrators should refrain from offering any assurances, or predictions, as to how they will decide the dispute and should refrain from stating a definitive position on any particular issue.

\* \* \* Arbitrators should advise the appointing party, when accepting an appointment, that they will ultimately decide issues presented in the arbitration objectively. \* \* \* (Comments 2)





# Disclosures

- **Conduct a careful conflicts check**
  - Be familiar with requirements of Code of Conduct, Canon IV
  - Review your records
  
- **Review relevant documents**
  - Arbitration demand
  - Contracts
  - Other non-confidential documents
  
- **If you have to think about it – disclose it!**



# Disclosures – Fees and Retainer

- **When confirming the appointment, agree to the conditions of service in writing.**
  - **Must fully disclose basis of compensation, fees, charges (Canon X)**
  - **Confirm fee/retainer in writing at time appointment is accepted**
  - **Establish an understanding about these items, at least:**
    - ❑ *Hourly rate (including rate increases)*
    - ❑ *Retainers/minimum fees (refundable or not, when applied)*
    - ❑ *Expenses to be charged (e.g., travel)*
    - ❑ *Billing cycle and requested payment interval*
    - ❑ *Whether bills are to be submitted to counsel or party for payment*
    - ❑ *Cancellation fees, if applicable*



# Record Keeping

## ➤ Conflicts/Arbitration Log

- **Disclosure obligation requires that you record relevant information to screen for conflicts of interest**  
(Canon IV, Disclosure)
- **How will you record the relevant information?**
  - ❑ *Searchable spreadsheet*
  - ❑ *Handwritten log*
  - ❑ *Conflicts database*

# Record Keeping

## ➤ Conflicts/Arbitration Log

- What information should be recorded?
  - Parties (including parents, affiliates, TPAs, etc.)*
  - Lawyers (individuals, law firms, in-house counsel)*
  - Other panelists*
  - Date of appointment*
  - Disposition (e.g., settlement, final award)*
  - Disposition date*
  - Your role (party appointed (for which party) vs. umpire)*



# Record Keeping: Conflicts/Arbitration Log

- **What other information might you record?**
  - Witnesses
  - Arbitration status (e.g., served through award, etc.)
  - Type of dispute/controversy
  - Amount in dispute



# Record Keeping

- **Consult your legal, tax and financial advisors**
  - Should you operate as a sole proprietorship, an LLC, a corporation?
  - Will you name your business?
  - Understand the legal, tax, accounting and record keeping obligations and options available.
  
- **Do you need insurance?**
  - Commercial and/or professional liability?
  - Is the Hold Harmless agreement enough?



# Record Keeping

## ➤ Essential Equipment and Skills:

- ❑ *Computer (with anti-virus and security)*
- ❑ *High speed internet access*
- ❑ *Ability to receive/send emails, with documents*
- ❑ *Ability to create documents (e.g., orders and awards) and email*
- ❑ *Phone*
- ❑ *Conference call capability (free services are available)*
- ❑ *Scanner (and/or fax)*
- ❑ *Calendar system or method*
- ❑ *Time keeping system*
- ❑ *Arbitration log system*



# Record Keeping

## ➤ Additional, Helpful Equipment and Skills:

- ❑ *Smart phone (voice and data) for when you are on the road*
- ❑ *Basic word processing skills to draft orders and awards*
- ❑ *Basic Excel skills to aid in record keeping (time; arbitration log)*
- ❑ *Accounting software (e.g., QuickBooks)*
- ❑ *LiveNotes*
- ❑ *E-transcript viewer*
- ❑ *Litigation management software*
- ❑ *Industry and subject matter websites*





# Record Keeping

## ➤ Calendar

- **It is essential to have a system to track key dates and milestones for each arbitration.**

(Canon VII, Advancing the Arbitral Process; Comment 2)

- **Electronic calendars, notes, and lists with reminders can be cheap and effective tools.**



# Record Keeping

## ➤ Billing Practices

- Parties entitled to know time incurred and for what services.
- Keep a contemporaneous record.
- Invoices should describe services rendered (w/revealing confidential panel deliberations).
- Expenses should be tracked w/suitable documentary support.
- Follow-up on unpaid bills after a reasonable interval.



# Record Keeping

## ➤ Maintenance of arbitration materials

- Maintain paper and/or electronic files in an organized manner so that you can readily find position statements, motion submissions and panel rulings
- No obligation to maintain arbitration records post arbitration
- You may want to keep records if the Final Award is appealed
- Record destruction should be done consistent w/confidentiality of proceedings (i.e., shred or return paper copies for proper destruction)
- Unless otherwise agreed, arbitrators are not obligated to return/retain notes taken during the arbitration. (Code of Conduct, Canon V; Comment 4)
- Consult w/tax and financial professionals regarding maintenance of billing records





# Effective Service as an Arbitrator Part II

**Susan S. Claflin**

**Claflin Consulting Services LLC**

**ARIAS•U.S. Certified Arbitrator and Umpire**



# Comments On Mock Arbitration

- **Difficult balance between advancing a position and keeping an open mind**
  
- **Observations...**
  - **Weighing in on the issues**
  - **Possible approaches**
  - **Dealing with difficult issues**



# Panel Involvement – Case Development

## ➤ Discovery

- Competing issues of efficiency and fairness
- Disputes between parties (e.g., scope, timing, privilege)
- Discovery hearings or submissions “on the papers”
- *Ex parte* communications with counsel on discovery issues
- How do you deal with “legal” issues of relevance, privilege?
- How do you deal with an umpire that wishes to make determinations herself?
- Other issues?



# Panel Involvement – Case Development

## ➤ Dispositive Motions

- Timing?
- The challenge of applying a summary judgment standard
- Means for efficiency (e.g., pre-filing conference, page limitations, hearing v. submissions “on the papers”)
- Is there a different approach to deliberation on summary adjudication?





# Panel Involvement – Case Development

## ➤ **Cut-Off of *Ex Parte* Communications**

- As agreed in advance
- What does the cut-off really mean?

(See *Star Ins. Co. v. National Union Fire Ins. Co.*, (6<sup>th</sup> Cir. Aug. 18, 2016).)

- When in doubt seek clarification.



# Hearing on the Merits

## ➤ Preparing for the Hearing

- Do your homework!
- Pre-hearing conference call

## ➤ Questioning witnesses (effective approaches)

- You are an arbitration, not an attorney
- When is the best time to ask questions?
- Never ask a question if you do not know the answer?

## ➤ Evidence issues



# Hearing On The Merits

- **Is It Appropriate/Advisable To...**
  - help counsel understand the issues that are important to the Panel?
  - help counsel to understand if settlement might be prudent?
  - assist counsel in mediating the dispute?



# Hearing On The Merits

## ➤ Deliberations

- Fairly and justly decide the issues (Canon VIII)
- Do not delegate duty to decide to others (Canon VIII)

## ➤ Scope of authority

- Addressing and staying within

## ➤ Preparing an award

- Reasoned or not?

## ➤ Awards of interest or fees

- Case specific
- Calculation

## ➤ Dissents



# After The Hearing

## ➤ Confidentiality

- Panel may agree to discuss the basis of the award with the parties
- Practical Guide, 5.5

## ➤ Dealing with counsel/party queries

## ➤ Possible role in post-arbitral proceedings

- None is best!
- Canon VI



# Other Issues

## ➤ Challenges to Arbitrators

- Umpire challenged
- Umpire withdraws
- Requests that you withdraw

## ➤ Withdrawal

- When you might need to withdraw and
- how to handle that



# Other Issues

- **Additional work offered by parties, during pendency of arbitration**
  - What is appropriate to take
  - What you should disclose
  
- **Non-neutral appointments may impact ability to serve as neutral or umpire under the ARIAS rules**







# Feedback and Q&A

**Charles W. Fortune**

**Cohn Baughman & Martin**

**ARIAS•U.S. Education Committee**

