

The ARIAS Code in Practice

Panel: Peter Gentile, ARIAS-U.S. Certified Arbitrator
Mark Gurevitz, MG Arbitrator & Mediator Services
Jeanne Kohler, Carlton Fields Jordan Burt, P.A.
Mark Megaw, ARIAS-U.S. Certified Arbitrator
Steve Schwartz, Chaffetz Lindsey LLP

ARIAS Fall Conference · November 3, 2017

10/9/2017



Conflicts

Pertinent Code sections?

Focus is Canon I, sections 3 (Mandatory) and 4 (Judgment Call)

10/9/2017



Canon I, Section 3: the mandatory conflicts:

- a) material financial interest in a party;
- b) cannot render a decision based on the evidence ... to all members of the panel;

Practice Point: Evidence cannot be evidence from a different proceeding. Look carefully at the issue summary. If you can expect to have to decide the new case based upon what you learned in a separate, confidential arbitration, you have a problem: the key evidence is not coming to all members of the panel.

10/9/2017



4

Canon I, Section 3: the mandatory conflicts:

c) serves as a lawyer for one of the parties;

d) nominated as umpire and is currently a consultant for a party;

ARIAS

10/9/2017

5

Canon I, Section 3: the mandatory conflicts:

e) contacted prior to an umpire 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; or

Practice Point: Don't talk about possible appointments with counsel, or other arbitrators.

ARIAS

10/9/2017

6

Canon I, Section 3: the mandatory conflicts:

f) where the candidate sits as an umpire in one matter and the candidate is solicited to serve as a party-appointed arbitrator or expert in a new matter involving a new matter by a party to the matter where the candidate sits as an umpire.

Practice Point: This requires you to refuse the proposed arbitral appointment. It does not require you to step down from the umpire role. You do not get to choose which proceeding seems more attractive to you.

ARIAS

10/9/2017

Canon 4, Comment 5 highlights:

After the Panel has been accepted by the parties, an arbitrator should recognize the consequences to the parties and the process of a decision to withdraw and should not withdraw at his or her own instigation absent good reason, such as serious personal or family health issues.

10/9/2017



Canon I, Comment 4:

The judgment calls: "consider whether any of the following factors would likely affect their judgment" so as to require the candidate to decline the appointment:

- a) financial interest;
- b) serving in a non-neutral role on a panel involving a party and is now being proposed for an umpire role in an arbitration involving that party;

10/9/2017



Canon I, Comment 4:

- c) whether the candidate has previously served as a consultant for or against one of the parties;

Practice Point: Serving as an expert limits the number of appointments you can take.

10/9/2017




10

Canon I, Comment 4:

d) could you be called as a fact witness?;

**Practice Point: Don't make this one a close call.
Expensive proceedings only to find out your role.
Serve the industry.**




10/9/2017

11

Canon I, Comment 4:

e) have you been a lawyer for the party;

**Practice Point: So for those of you that have served
as in-house counsel - the very client with whom
you have had the closest relationship might
prevent you from working with them.**




10/9/2017

12

Canon I, Comment 4:

f) significant professional, or personal relationships with any of
those involved such that it would prompt a reasonable person
to doubt whether the candidate could render a just decision;

**Practice Point: Notice the phrasing: the objective eye. Not
your subjective knowledge about your relationships. We
asked counsel/friend to come to my daughter's wedding.
Too close. People would doubt I could vote against them.**



10/9/2017

13

Canon I, Comment 4:

g) whether a significant percentage -in the past five years have come from a party;

Practice Point: "significant percentage" - undefined. Does not mean that you can blow past this one. Take a moment to analyze whether you are financially tied a party. My question: Would I vote against them if the evidence was 51-49 against? Clinical thinking.

10/9/2017



14

Canon I, Comment 4:

h) whether a significant percentage of your appointments in the past five years have come from a law firm or third-party administrator;

- Same Test: if 51-49 against, would I do it?
- Notice that third party manager is part of this evaluation. They cut across multiple parties.

10/9/2017



15

Canon I, Comment 4:

i) whether a significant percentage of the candidate's total revenue earned as an arbitrator, consultant or expert witness in the past five years has come from a party involved in the proposed matter;

j) whether a significant percentage of the candidate's total revenue earned as an arbitrator, consultant or expert witness in the past five years has come from a law firm or third-party administrator or manager involved in the proposed matter;


10/9/2017



16

Disclosures Under the Code of Conduct

- Arbitrator disclosures are an integral element necessary to maintain trust and confidence in the arbitration process.
- Must be timely and should convey the essence of the nature of the relationship.
- Err on the side of disclosure, if in doubt whether to provide.
- If not sure whether there is a connection between your experience and the parties or party representatives, ask or make the disclosure in case there is a connection.
- The duty to disclose is on-going.




10/9/2017

17

Disclosures Relevant Canons

- Canon IV addresses disclosures – some key points
 - Comment 1 addresses relationships
 - Comment 2 deals with relationships and “issue conflicts.”
 - These are more limited in nature, and include
 - relevant positions taken in published works or in expert testimony
 - previous appointments by either party, either party’s counsel or either party’s TPA or manager
 - past or present involvement “with the contracts or claims at issue.”
 - Comment 3 deals with the timing of disclosures.
 - Comment 6 addresses the continuing duty to disclose.




10/9/2017

18

Disclosures Relevant Canons

- Canon 1. While Canon 1 deals with conflicts, it is nonetheless relevant to disclosure in that it contains a laundry list of items for arbitrators to consider that might affect their judgment.



10/9/2017

19

Some Final Thoughts on Disclosures

10/9/2017

ARIAS

20

Ex Parte Contact
Key Section of ARIAS · U.S. Code of
Conduct

- Canon V and its comments

10/9/2017

ARIAS

21

When Can A Party Appointed Arbitrator
Communicate With the Party Who
Appointed Him/Her?

- Yes, except those required to be “neutral” (See Canon V, comment 2)
- Check wording of the contract(s) at issue and what rules govern (See Canon V, Comment 1)


10/9/2017

ARIAS

22

When Can A Party Appointed Arbitrator Communicate With the Party Who Appointed Him/Her?

- Have clear cut-off date to end ex parte communications
 - Consider motions
 - Consider after panel's final award (See Canon V, comment 6)
 - Once cut-off agreed, communications can only be up to time agreed or ordered (See Canon V, comment 4)




10/9/2017

23

Are Ex Parte Communications in Writing Permitted?

- Yes – Canon V, comment 5 (A party arbitrator is not required to send copies of such communications to other party or arbitrators)
- But see Canon V comment 3 (A party arbitrator should disclose to other panel members documents he/she examined)




10/9/2017

24

What is the Scope of Permissible Ex Parte Communications – What Can the Arbitrator Discuss with the Party Appointing Him or Her?

- See Canon V, comment 6
 - 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.
 - But “an arbitrator should not edit briefs, interview or prepare witnesses, or preview demonstrative evidence to be used at the hearing”.



10/9/2017

25

Can the Umpire Ever have Ex Parte Communications?

No but note...

- Canon V, comment 7 provides that if the umpire is communicating with one party or counsel, it should be sent at the same time to the other party or counsel, and if the umpire receives a communication from one party or counsel, it should immediately forward to the other party or counsel.

10/9/2017

ARIAS

26

Can the Umpire Ever have Ex Parte Communications?

- Comment 8 to Canon V also sets forth 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 arbitrator, party or counsel. These are:
 - a) Discussions about ministerial matters ..., 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;
 - b) If all parties so request or consent to the contact; or
 - c) If a party fails to be present at the 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.

10/9/2017

ARIAS

27

How Much Advocacy Is Permitted?

10/9/2017

ARIAS

28

The Problem

- Party-appointed arbitrators are permitted to be “initially predisposed”
- Where is the proper balance between “initial predisposition” and being a hired gun?

10/9/2017



29

Who is affected?

- Party-appointed arbitrators who are members of ARIAS
 - Application for Certification:
 - “I agree to abide by and be subject to the ARIAS●US Code of Conduct”
- Not umpires
- Not arbitrators in arbitrations using the ARIAS neutral panel rules

10/9/2017



30

Stages of the Arbitration

- I. The appointment.
- II. Before the hearing.
- III. At the hearing.
- IV. The decision.

10/9/2017



31

The Appointment

- A party-appointed arbitrator may be initially predisposed toward the party's position.
 - Canon II, Comment 2.
- A party-appointed arbitrator can discuss the merits with the appointing party.
 - Canon V, Comment 2

10/9/2017



32

The Appointment

- Implications:
 - Can the arbitrator share preliminary views?
 - Yes.
 - Can the arbitrator make promises?
 - NO!
 - Canon II, Comment 2: "Arbitrators should refrain from offering any assurance, or predictions . . ."
 - Cannon II, Comment 3: "Party-appointed arbitrators should not offer a commitment to dissent, or to work for a compromise . . ."

10/9/2017



33

The Appointment

- What *should* the arbitrator tell the appointing party?
 - Canon II, Comment 2:
 - "Arbitrators should advise the appointing party, when accepting an appointment, that they will ultimately decide issues presented in the arbitration fairly."


10/9/2017



34

Before the Hearing

- Party-appointed arbitrators can make *suggestions*.
 - Canon V, Comment 6:
 - The arbitrator may “make suggestions with respect to . . . issues he or she feels are not being clearly presented.”
 - The arbitrator may also “make suggestions about what arguments or aspects or argument . . . to emphasize or abandon.”




10/9/2017

35

Before the Hearing

- Is the arbitrator just another lawyer?
 - NO!
 - Canon V, Comment 6:
 - “An arbitrator should not edit briefs, interview or prepare witnesses, or preview demonstrative evidence to be used at the hearing.”




10/9/2017

36

At the Hearing

- Party-appointed arbitrators can question witnesses.
 - Canon VII, Comment 5: “for explanation and clarification to help them understand and assess the testimony”
- The arbitrator can’t go too far:
 - Canon VII, Comment 5:
 - “refrain from assuming an advocacy role”
 - “avoid interruption counsel’s examination”




10/9/2017

37

At the Hearing

- Don't be a jerk!
 - Canon VII, Comment 3:
 - “Arbitrators should make all reasonable efforts to prevent delaying tactics, harassment . . . , or other abuse or disruption . . .”
 - Canon VII, Comment 4:
 - “Arbitrators should be patient and courteous . . .”




10/9/2017

38

The Decision

- In deliberations, party arbitrators can argue for their positions.
 - Canon VIII, Comment 2:
 - Decisions are to be made “after careful review, analysis and deliberation with other members of the panel ...”




10/9/2017

39

The Decision

- Does the arbitrator need to stick to his or her initial position?
 - NO!
 - Canon II, Comment 2:
 - Arbitrators should “avoid reaching a judgment on any issues ... until after both parties have had a full and fair opportunity to present their respective position and the panel has fully deliberated on the issues.”



10/9/2017

40

The Decision

- Must the arbitrator vote for the appointing party?
 - NO!
 - Canon VII: “Arbitrators should make decisions justly, exercise independent judgment and not permit outside pressure to affect decisions”

10/9/2017

41

The Decision

- What is the arbitrator providing?
 - Expertise and judgment
 - NOT a guaranteed vote

10/9/2017
