

# The ARIAS Code in Practice

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# Conflicts

Pertinent Code sections?

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

# 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.**

## 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;

## 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.**

## 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.

## 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.

## 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;



## 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.**

## 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.**

## 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.**

## 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.**

## 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.**

## 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.**

## 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;

# 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.





# 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.



# 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.

# Some Final Thoughts on Disclosures

## Ex Parte Contact

# Key Section of ARIAS · U.S. Code of Conduct

- Canon V and its comments

# 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)

# 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)

# 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)

# 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”.



# 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.



# 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.

# How Much Advocacy Is Permitted?

# The Problem

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

## 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



# Stages of the Arbitration

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

# 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

# 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 . . .”



# 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.”

## 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.”

## 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.”

## 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”

# 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 . . .”

# 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 ...”

# 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.”

# 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”



# The Decision

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