



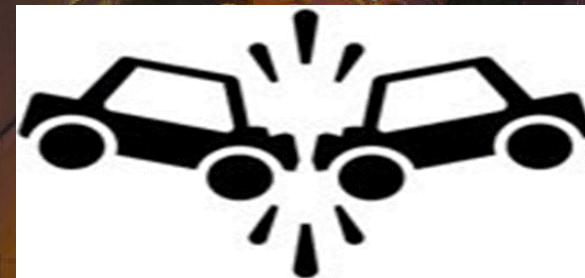
ARIAS•U.S. 2018 Fall Conference
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Emergency First Aid: How to Quickly Resolve Hearing “Burns”

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Exploring “Burns” That Require Emergency First Aid

- All Panel Members: *Unforeseen Disability*
- All Panel Members: *Apparent racial, ethnic or gender bias*
- Umpire Issues:
 - *Inability to Control the Proceeding*
 - *Unilateral Actions; such as ruling on evidentiary motions without party arbitrators’ input*

Exploring “Burns” That Require Emergency First Aid (cont.)

- Counsel Issues:
 - Failing to “Abstain from All Offensive Personality”
 - Refusals to Provide Panel Member(s) with Hold Harmless Agreements
- Process Issues:
 - Emergency Motions, even before Organizational Meeting

Which Topic Occurs Most Frequently?

- Panel Member Issue: *Unforeseen Disability?*
- Panel Member Issue: *Apparent Racial, Ethnic or Gender Bias?*
- Umpire Issues: *Unilateral Action or Inability to Control Proceedings?*
- Counsel Issues: *Failure to Collaborate and Failure to Indemnify?*
- Process Issues: *Emergency Motions?*
- Other?

Which Topic Causes Most Harm?

- Panel Member Issue: *Unforeseen Disability?*
- Panel Member Issue: *Apparent Racial, Ethnic or Gender Bias?*
- Umpire Issues: *Unilateral Action or Inability to Control Proceedings?*
- Counsel Issues: *Failure to Collaborate and Failure to Indemnify?*
- Process Issues: *Emergency Motions?*
- Other?

The Panel: Unforeseen Disability of Panel Member

- Physical Disability (Hearing Loss)
- Inability to Understand and Engage in the Proceedings
 - American Arbitration Association's Standards and Responsibilities for Members of the Roster of Arbitrators and Mediators (Standard #2)
 - Obligations Imposed on Other Panel Members
 - Ability to Intervene
 - When to Apply First Aid in the ARIAS-US Arbitration Context?

The Panel: Unforeseen Disability of Panel Member (cont.)

Arbitrator and Mediator Fitness Requirements:

The AAA/ICDR requires arbitrators and mediators to be fit to engage in cases for which they are listed or to which they are appointed. Arbitrators and mediators must advise the AAA/ICDR of any personal, physical or mental condition that may impair their ability to fully execute their responsibilities during all phases of a case. In addition, this responsibility extends to any such condition an arbitrator or mediator observes in another AAA/ICDR arbitrator or mediator or co-panelist.

The Panel: Unforeseen Disability of Panel Member (cont.)

Panelist fitness-related matters may be addressed through, but not be limited to, the following means:

- a. Arbitrators and mediators may request to be placed on inactive status from the roster of arbitrators or mediators as a result of any physical or mental condition that may have an adverse impact upon the appearance of the integrity of the arbitration or mediation process, or which could result in a failure of the arbitrator or mediator to meet the expectations of the parties for a panelist of the highest caliber and an expeditious and efficient process.
- b. The AAA/ICDR may, at its own discretion, remove or place an arbitrator or mediator on inactive status from the AAA's roster....

The Panel: Apparent Racial, Gender or Ethnicity Bias

Scenario: *When the white male arbitrator seeks to discuss a pending objection, the umpire convenes a private session.*

When the female arbitrator seeks to discuss a pending objection, the umpire proceeds to rule.

Points Umpires Should Consider Before Taking Unilateral Action

1. Is the matter in question truly ministerial in nature or will it create monetary or other consequences for the parties?
2. Is there any practical reason not to obtain “buy in” from the entire Panel on the matter in question?
3. Would the other arbitrators expect to be consulted about the matter in question?

Refusal to Provide Hold Harmless Agreements to Arbitration Panelist(s)

- *Austern v. Chicago Bd. Options Exchange, Inc.*, 898 F.2d 882 (2d Cir. 1990) – Court held arbitrators in contractually agreed upon arbitration proceedings are absolutely immune from liability and damages for all acts within the scope of the arbitral process.
- *Indemnity Insurance Co. of North America v. Mandell*, 30 A.D.3d 1129 (N.Y.App. Div. 2006) – Court ordered execution of a hold harmless agreement. Request was consistent with same protection arbitrators entitled to under prevailing rule that arbitrators are immune from liability for acts performed in their arbitral capacity.
- *Pacific Employers Insurance Co. v. Moglia*, 365 B.R. 863 (N.D. Ill. 2007) – In compelling execution of a harmless agreement by the objecting party, court held arbitration panel's hold harmless requirement reasonable and properly served to facilitate the arbitration proceedings.

Points Counsel Should Consider Before Filing an Emergency Motion

1. What (if anything) would be lost by following the agreed protocol for contested motions?
2. If the issue is one of timing (such as an imminent briefing or discovery cut-off), who or what is responsible for the issue not being surfaced sooner?
3. Has my side done everything it could or should have done to resolve the issue?

Points Panels Should Consider Before Agreeing to Vary Contested Motion Protocol

- Does the responding party agree that the issue should be resolved on an emergency basis?
- Great if they do, but ... does the Panel have the availability to deal with the dispute on an emergency basis?
 - If not, what are the options?
 - Need to communicate Panel limitations to parties so that parties can be heard regarding possible work-arounds (such as adjusting to briefing schedule, adjourning whatever deadline is causing the problem or seeking agreement for dispute to be resolved by less than the full Panel)

Points Panels Should Consider Before Agreeing to Vary Contested Motion Protocol (cont.)

- Where there is not an agreement by the parties that the issue must be resolved on an emergency basis, the Panel will need to decide:
 1. Is this an actual emergency or is this something else?
 - An attempt by one party to truncate the other side's time for responding?
 - Posturing or hyperbole?
 - A timing problem created in whole or at least in large part by the movant?
 2. Even if there is an emergency, will it be fair to truncate the other side's response time?
 3. Are there alternatives to expediting the briefing schedule?

Points Panels Should Consider Before Responding to the Pre-Organizational Meeting Motions

- Is this a unilateral Motion or are both parties seeking relief or clarification prior to the Panel being constituted?
- Does the Motion relate to a procedural issues (such as the timing or venue of the Organizational Meeting) or is the question more substantive (confidentiality or pre-answer security)?
- Are the as yet unseated Panel members' disclosures complete and up-to-date or would additional disclosures need to be made before considering the issue?
- Should the as yet unseated Panel members request that the Parties accept the Panel and provide an appropriate Hold Harmless Agreement as a condition of taking up the issue prior to the form Organizational Meeting?



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