Guidelines for Arbitrator Disclosures

Complete, timely, and accurate disclosures of arbitrators' qualifications and of any potential conflicts or other impediments to their ability to serve are essential to the integrity of the arbitral process. Two Canons of the *ARIAS•U.S. Guidelines for Arbitrator Conduct* (Code of Conduct) stress the importance of accuracy and truthfulness: (a) Canon III of the Code provides that candidates must accurately represent their qualifications to serve; and (b) Comment 2 to Canon IX provides that "Arbitrators shall make only accurate and truthful statements about their skills or qualifications." Further, Canon IV calls for candidates to "disclose any interest or relationship likely to affect their judgment." The commentary to this canon expands upon this duty:

1. Before accepting an arbitration appointment, candidates should make a reasonable effort to identity and disclose any direct or indirect financial or personal interest in the outcome of the proceeding or any existing or past financial, business, professional, family or social relationship that others could reasonably believe would be likely to affect their judgment, including any relationship with persons they are told will be potential witnesses.

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3. The duty to disclose all past and present interests or relationships is a continuing obligation throughout the proceeding. If any previously undisclosed interests or relationships described in Comment 1 are recalled or arise during the course of the arbitration, they should be disclosed immediately to all parties and the other arbitrators.

Although the first comment is framed in terms of information that a candidate must disclose before accepting an arbitration appointment, this form of comprehensive disclosure is appropriate to be made to all parties by all arbitrators, once a panel has been selected. The third comment makes clear that the duty to disclose is ongoing: any additional information should be disclosed immediately. Canon IV further provides that "[a]ny doubt should be resolved in favor of disclosure."

The format for disclosure may vary depending upon the protocols or procedures used by the parties in an arbitration. The ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure 2004 includes a suggested form of umpire and party-arbitrator questionnaire. That questionnaire has been updated and is available with this set of guidelines and in the Forms section of the ARIAS•U.S. website at www.arias-us.org. The disclosure items included in the questionnaire are not intended to be exhaustive; the parties are free to include other questions and requests they consider appropriate. Initial and/or supplemental disclosures may also be made orally during conference calls, at organizational meetings, or at hearings. In light of the importance of disclosures, the better practice is that they be made in a format that can be preserved – i.e., in writing or in a transcribed telephone call or transcribed in-person proceeding, as opposed to only in verbal form. Moreover, the parties should have the opportunity to ask follow up questions and to seek individual, appropriate information so that the disclosures are comprehensive, accurate, and intelligible.

Although the operating presumption favors disclosure, the duty to disclose is not limitless. Confidentiality obligations may restrict some of the information that may be disclosed. See Code of Conduct, Canon VI. When confronted with a conflict between the duty to disclose and the obligation to preserve confidentiality, an arbitrator should attempt to reconcile to two objectives, e.g., by providing the substance of the information without identifying details, if that can be done in a manner that is not misleading. An arbitrator who decides that it is necessary and appropriate to withhold certain information should notify the parties of the fact and the reason that information has been withheld. For example, it might be appropriate for an arbitrator to disclose that he or she served as an arbitrator in another matter involving one of the parties in the current matter and further disclose that he or she will not reveal the name of the other party to preserve the confidentiality of the other arbitration. The disclosure that the arbitrator has withheld certain information puts the parties on notice of that fact and allows for reasonable requests of additional information that may be pertinent, without compromising the confidentiality the arbitrator is bound to maintain.

It is conceivable that the conflict between the duty to disclose and some other obligation, such as a commitment to keep certain information confidential, may be irreconcilable. When an arbitrator is unable to meet the ethical obligations of disclosure because of other conflicting obligations, the arbitrator should withdraw from participating in the arbitration.

Guidelines for Party-Appointed Arbitrators in the Context of the Pre-Appointment Interview

1. Ascertain the identities of the parties; identities of counsel; identities of witnesses (to the extent known); general factual background; and the anticipated issues and positions of the parties.
2. Be sure to pin down any relationships that could lead to a challenge, including affiliate relationships that may not be obvious. Ask the parties to provide a list of current and former affiliates.
3. It must be emphasized throughout the discussion that any decision will be based on the evidence presented.
4. Do not offer any assurances, or even predictions, as to how you will decide the dispute, except as called for by the evidence.
5. Do not state a position on any particular issue except as similarly qualified, i.e., expressly subject to the evidence as it develops.
6. Do not accept or review any documentary material that counsel would not be willing to produce to the other side.
7. Do not offer a commitment to dissent, or to work for a compromise, in the event you disagree with the majority's proposed award.
8. It is appropriate to advise whether or not you would be willing to render a reasoned award if requested.
9. It is appropriate to discuss your availability and your billing practices.
10. Be sure to disclose any information that might be considered as reflecting on your impartiality, including:

a. relevant positions taken in published works or expert testimony;

b. any past or present involvement in a business or professional context with this transaction or these issues;

c. the extent of previous appointments by the same party and/or the same law firm; and

d. the extent of relationships with other arbitrators, to the extent known.

All such disclosures should not be limited to yourself as an individual, but also where appropriate, to your law firm if you are a lawyer and (to the extent disclosed by reasonable inquiry) to your company if you are a company employee.

Guidelines on Ex Parte Communications

- An arbitrator should not reveal the deliberations of the Panel. To the extent an arbitrator predicts or speculates as to how an issue might be viewed by the Panel, the arbitrator should at no time repeat statements made by any member of the Panel in deliberations, even his or her own.
- An arbitrator can make suggestions with respect to issues he or she feels are not being clearly presented. An arbitrator can also make suggestions about what arguments or aspects of argument in the case to emphasize or, alternatively, to abandon.
- An arbitrator can make suggestions as to the usefulness of expert evidence relating to certain issues in a case, and can encourage or discourage a party to put forward such expert evidence.
- An arbitrator may be consulted by a party as to whether certain arguments or facts should be included in a filing or pre-hearing brief. However, an arbitrator should not edit briefs, interview or prepare witnesses, or preview demonstrative evidence to be used at the hearing.

Guidelines on Whether to Accept Appointment as Arbitrator or Umpire

- Canons I and II require, among other things, that arbitrators/umpires serve only in those matters in which they can render a just decision.
- It is not only important that arbitrators/umpires can render a just decision, but that the parties have complete confidence that the arbitrators/umpires can do so.
- The parties' confidence in the arbitrator'/umpires' ability to render a just decision is influenced by many factors, which arbitrators/umpires should consider prior to and during their service.
- Therefore, a candidate for appointment as an umpire, non-neutral or party-appointed arbitrator must refuse to serve:
    - where the candidate has a material financial interest in a party that could be substantially affected by the outcome of the proceedings; and/or
    - where the candidate does not believe that he/she can render a decision based on the evidence and legal arguments presented to all members of the panel.
- Candidates for appointment as an umpire, non-neutral or party-appointed arbitrator should weigh these factors as they decide whether to accept an assignment:
    - whether they currently serve as an umpire on a panel involving the company that has proposed to appoint them in a non-neutral role;
    - whether they currently serve in a non-neutral role on a panel involving the company and are now being proposed for an umpire role in an arbitration involving that party;
    - whether they currently serve or have served as a consultant or expert witness for a party and are being proposed to serve as an umpire or in a non-neutral role in an arbitration involving that party;
    - whether they currently serve as an umpire or in a non-neutral role and they are being proposed as a consultant or expert witness for a party;
    - whether they have involvement in the contracts or claims at issue such that they could reasonably be called as a fact witness;
    - whether they have previously served as a lawyer for either party on issues that are closely associated with the central issue(s) expected to be involved in the merits of this matter;
    - whether they have, or previously had, any significant professional, familial or personal relationships with any of the lawyers, factual witnesses or expert witnesses involved such that it would prompt a reasonable person to doubt whether they could render a just decision;
    - whether a significant percentage of their prior appointments as an arbitrator come from the company involved;
    - whether a significant percentage of their prior appointments come as an arbitrator from the law firm involved;
    - whether a significant percentage of their revenue earned as an arbitrator or consultant or expert witness comes from the company involved; and
    - whether a significant percentage of their revenue earned as an arbitrator or consultant or expert witness comes from the law firm involved.
- While a candidate sits as an umpire in one matter, he or she should carefully consider whether to take any party-appointed role from any party that is involved in that matter.
- Sitting arbitrators, umpires or non-neutrals should continually evaluate whether the same factors and prohibitions that are identified above would allow them to continue to serve if they arose following acceptance of the appointment.