

# AMERICAN BAR ASSOCIATION/COLLEGE OF COMMERCIAL ARBITRATORS ANNOTATIONS TO THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES

## Introduction

The Code of Ethics for Arbitrators in Commercial Disputes was originally proposed in 1977 by a joint committee consisting of a special committee of the American Arbitration Association and a special committee of the American Bar Association. It was revised in 2003 by an ABA Task Force and a special committee of the AAA. The Revised Code was approved and recommended by both organizations in 2004. It provides ethical guidance for many types of arbitration, but does not apply to labor arbitration, which is generally conducted under the Code of Professional Responsibility for Arbitrators in Labor-Management Disputes.

Various aspects of the conduct of arbitrators, including some matters covered by the Code, may also be governed by agreements of the parties to arbitration, arbitration rules to which they have agreed, applicable law, or other applicable ethics rules. By its terms the Code does not take the place of or supercede such laws, agreements or rules, and should be read in conjunction with other ethical rules. By its terms the Code also does not establish new or additional grounds for judicial review of arbitration awards.

Although the Code has been referred to for guidance and has been cited by many courts (and has been adopted in part by some) it does not have the force of law and cannot in itself provide a basis for judicial decision.

“ ... The arbitration rules and code do not have the force of law. If (defendant-appellee) is to get the arbitration award set aside it must bring itself within the statute [ 9 U.S.C. Sec. 10(b)] and the federal rule ...” *Merit Insurance Company vs. Leatherby Insurance Company*, 714 F.2d 673, 681 (7<sup>th</sup> Cir. 1983), Posner, J.

This Annotation provides citations to judicial decisions and other published writings which cite the 1977 or 2004 Codes from 1981 through July 1, 2013. It does not cite to the numerous court cases and writings that have considered issues encompassed by the Codes without referring to it.

Arbitrator ethical guidance may be found in sources in addition to the Code, such as portions of the Revised Uniform Arbitration Act, and the rules and standards of various domestic and international institutional arbitration administrative bodies. Some states, particularly California, have codified ethical principles or standards, see, for instance, Cal.Code.Civ.Proc Section 1281.9, Ethics Standards for Neutral Arbitrators in Contractual Arbitrations, Division VI, California Rules of Court Appendix A (rev. 2003). See generally, College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration (2d Ed. 2010).

The authors hope to augment the Annotation from time to time following its publication. The initial Annotation was prepared by a committee comprising members of the Arbitration Committee of the Section of Dispute Resolution of the ABA and of the Ethics Committee of the College of Commercial Arbitrators. Principally involved were:

Edna Sussman and Kurt L. Dettman, Co-Chairs, Arbitration Committee of the ABA  
Section of Dispute Resolution

Robert A. Holtzman, Chair, Ethics Committee of the College of Commercial Arbitrators

David Brainin, Judith Meyer, Bruce Meyerson and Carroll Neece, Committee  
Members and Editors

The Committee extends particular thanks to Jonnese S. Crandol and Rajeev Raghavan, law students at Stetson University College of Law and University of Michigan Law School respectively, for their legal research and identification of the cases and articles cited, and to David Moora, Director of the American Bar Association Section of Dispute Resolution, Matthew Conger, Section Staff Attorney, and Jeffrey D. Hoyle, Section Law Clerk for their coordination and supervision of the research project and invaluable technical support.

### **Text of the Code of Ethics for Arbitrators in Commercial Disputes Effective March 1, 2004 and Annotations**

#### *Preamble*

The use of arbitration to resolve a wide variety of disputes has grown extensively and forms a significant part of the system of justice on which our society relies for a fair determination of legal rights. Persons who act as arbitrators therefore undertake serious responsibilities to the public, as well as to the parties. Those responsibilities include important ethical obligations.

Few cases of unethical behavior by commercial arbitrators have arisen. Nevertheless, this Code sets forth generally accepted standards of ethical conduct for the guidance of arbitrators and parties in commercial disputes, in the hope of contributing to the maintenance of high standards and continued confidence in the process of arbitration.

This Code provides ethical guidelines for many types of arbitration but does not apply to labor arbitration, which is generally conducted under the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.

There are many different types of commercial arbitration. Some proceedings are conducted under arbitration rules established by various organizations and trade associations, while others are conducted without such rules. Although most proceedings are arbitrated pursuant to voluntary agreement of the parties, certain types of disputes are submitted to arbitration by reason of particular laws. This Code is intended to apply to all

such proceedings in which disputes or claims are submitted for decision to one or more arbitrators appointed in a manner provided by an agreement of the parties, by applicable arbitration rules, or by law. In all such cases, the persons who have the power to decide should observe fundamental standards of ethical conduct. In this Code, all such persons are called “arbitrators,” although in some types of proceeding they might be called “umpires,” “referees,” “neutrals,” or have some other title.

Arbitrators, like judges, have the power to decide cases. However, unlike full-time judges, arbitrators are usually engaged in other occupations before, during, and after the time that they serve as arbitrators. Often, arbitrators are purposely chosen from the same trade or industry as the parties in order to bring special knowledge to the task of deciding. This Code recognizes these fundamental differences between arbitrators and judges.

In those instances where this Code has been approved and recommended by organizations that provide, coordinate, or administer services of arbitrators, it provides ethical standards for the members of their respective panels of arbitrators. However, this Code does not form a part of the arbitration rules of any such organization unless its rules so provide.

#### *Note on Neutrality*

In some types of commercial arbitration, the parties or the administering institution provide for three or more arbitrators. In some such proceedings, it is the practice for each party, acting alone, to appoint one arbitrator (a “party-appointed arbitrator”) and for one additional arbitrator to be designated by the party-appointed arbitrators, or by the parties, or by an independent institution or individual. The sponsors of this Code believe that it is preferable for all arbitrators – including any party-appointed arbitrators – to be neutral, that is, independent and impartial, and to comply with the same ethical standards. This expectation generally is essential in arbitrations where the parties, the nature of the dispute, or the enforcement of any resulting award may have international aspects. However, parties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral and governed by special ethical considerations. These special ethical considerations appear in Canon X of this Code.

This Code establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise. This Code requires all party-appointed arbitrators, whether neutral or not, to make pre-appointment disclosures of any facts which might affect their neutrality, independence, or impartiality. This Code also requires all party-appointed arbitrators to ascertain and disclose as soon as practicable whether the parties intended for them to serve as neutral or not. If any doubt or uncertainty exists, the party-appointed arbitrators should serve as neutrals unless and until such doubt or uncertainty is resolved in accordance with Canon IX. This Code expects all arbitrators, including those serving under Canon X, to preserve the integrity and fairness of the process.

*Note on Construction*

Various aspects of the conduct of arbitrators, including some matters covered by this Code, may also be governed by agreements of the parties, arbitration rules to which the parties have agreed, applicable law, or other applicable ethics rules, all of which should be consulted by the arbitrators. This Code does not take the place of or supersede such laws, agreements, or arbitration rules to which the parties have agreed and should be read in conjunction with other rules of ethics. It does not establish new or additional grounds for judicial review of arbitration awards.

All provisions of this Code should therefore be read as subject to contrary provisions of applicable law and arbitration rules. They should also be read as subject to contrary agreements of the parties. Nevertheless, this Code imposes no obligation on any arbitrator to act in a manner inconsistent with the arbitrator's fundamental duty to preserve the integrity and fairness of the arbitral process.

Canons I through VIII of this Code apply to all arbitrators. Canon IX applies to all party-appointed arbitrators, except that certain party-appointed arbitrators are exempted by Canon X from compliance with certain provisions of Canons I-IX related to impartiality and independence, as specified in Canon X.

*Annotation to Preamble*

**2012 – 13 Supplement**

*H&R Block Tax Services LLC v. Wild*, 2011 U.S. Dist. LEXIS 124693

Although two of three arbitrators were party-appointed, all served as neutrals pursuant to the Code's establishment, as noted in the Preamble, of "a presumption of neutrality for all arbitrators, including party-appointed arbitrators."

CANON I. AN ARBITRATOR SHOULD UPHOLD THE INTEGRITY AND FAIRNESS OF THE ARBITRATION PROCESS.

- A. An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator should recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding. This responsibility may include pro bono service as an arbitrator where appropriate.
- B. One should accept appointment as an arbitrator only if fully satisfied:
  - (1) that he or she can serve impartially;
  - (2) that he or she can serve independently from the parties, potential witnesses, and the other arbitrators;
  - (3) that he or she is competent to serve; and
  - (4) that he or she can be available to commence the arbitration in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the parties are reasonably entitled to expect.
- C. After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality. For a reasonable period of time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest. Existence of any of the matters or circumstances described in this paragraph C does not render it unethical for one to serve as an arbitrator where the parties have consented to the arbitrator's appointment or continued services following full disclosure of the relevant facts in accordance with Canon II.
- D. Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, and fear of criticism or self-interest. They should avoid conduct and statements that give the appearance of partiality toward or against any party.
- E. When an arbitrator's authority is derived from the agreement of the parties, an arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules. An arbitrator has no ethical obligation to comply with any agreement,

- procedures or rules that are unlawful or that, in the arbitrator's judgment, would be inconsistent with this Code.
- F. An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision. An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.
  - G. The ethical obligations of an arbitrator begin upon acceptance of the appointment and continue throughout all stages of the proceeding. In addition, as set forth in this Code, certain ethical obligations begin as soon as a person is requested to serve as an arbitrator and certain ethical obligations continue after the decision in the proceeding has been given to the parties.
  - H. Once an arbitrator has accepted an appointment, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue. When an arbitrator is to be compensated for his or her services, the arbitrator may withdraw if the parties fail or refuse to provide for payment of the compensation as agreed.
  - I. An arbitrator who withdraws prior to the completion of the arbitration, whether upon the arbitrator's initiative or upon the request of one or more of the parties, should take reasonable steps to protect the interests of the parties in the arbitration, including return of evidentiary materials and protection of confidentiality.

*Comment to Canon I*

A prospective arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved. Arbitrators may also have special experience or expertise in the areas of business, commerce, or technology which are involved in the arbitration. Arbitrators do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the arbitration, but an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration.

During an arbitration, the arbitrator may engage in discourse with the parties or their counsel, draw out arguments or contentions, comment on the law or evidence, make interim rulings, and otherwise control or direct the arbitration. These activities are integral parts of an arbitration. Paragraph D of Canon I is not intended to preclude or limit either full discussion of the issues during the course of the arbitration or the arbitrator's management of the proceeding.

*Annotation to Canon I*

*Frisch's Restaurants, Inc. v. Fortney & Weygandt, Inc.*, Ohio App. 2008, 2008 WL 3586901

Arbitrator who had received two referrals from a party's law firm prior to the arbitration and three additional referrals while it was pending was not disqualified absent any showing of partiality or extensive impropriety.

Arbitrator who had received two referrals from a party's law firm prior to the arbitration and three additional referrals while it was pending should have disclosed them in accordance with Canon IIA, but failure to do so did not demonstrate extensive impropriety warranting vacatur of the award.

*Eckstein v. Kaiser Foundation Health Plan, Inc.*, Cal.Ct. Appeal, 2007 (unpublished) 2007 Cal.App.Unpub LEXIS 6994

Arbitrator in case in which Kaiser Foundation Health Plan was a party was not disqualified by personal membership in the Plan.

Arbitrator in case in which Kaiser Foundation Health Plan was a party was not required to disclose personal membership in Plan.

*Barcon Associates, Inc. v. Tri-County Asphalt Corp.*, 86 N.J. 179, 430 A.2d 214 (1981)

Existence of substantial and on-going business relationship between party-appointed non-neutral arbitrator and appointing party, which relationship included services

rendered and payments made during the arbitration, created an impermissible appearance of partiality.

Failure of party-appointed non-neutral arbitrator to disclose substantial on-going business relationship with appointing party was improper.

Every arbitrator, whether party-appointed or “neutral”, is required to disclose to the parties, prior to the commencement of the arbitration proceedings, any relationship or transaction that he has had with the parties or their representatives, and any other facts which would suggest to a reasonable person that the arbitrator is interested in the outcome of the arbitration or which might reasonably support an inference of partiality.

*Greenspan v. LADT, LLC*, 185 Cal.App.4<sup>th</sup> 1413, 111 Cal.Rptr.3d 468 (2010)

On appeal from order confirming arbitration award:

A reasonable person aware of the fact that a party had initiated a lawsuit against an arbitrator who was immune from liability under state law would view the arbitrator to be impartial and not subject to disqualification.

Where the applicable rule so provides, an arbitrator’s decision as to the scheduling of deadlines and the timeliness of the award is authorized and not subject to judicial review.

*Aetna Casualty & Surety Company v. Grabbert*, 590 A.2d 88 (R.I. 1991)

Service as a party-appointed non-neutral arbitrator pursuant to a contingent fee arrangement confers a direct financial interest in the award violative of Canon I, in that such interest would tend to destroy public confidence in the integrity of the arbitration process.

Party-appointed non-neutral arbitrator’s failure to disclose his contingent fee arrangement violated Canon II.

The award of the three arbitrator panel having been unanimous, no causal nexus existed between the party-appointed arbitrator’s improper conduct and the ultimate award.

*Merit Insurance Company vs. Leatherby Insurance Company*, 714 F.2d 673 (7<sup>th</sup> Cir. 1983)

District Court vacated arbitration award in reinsurance dispute on ground neutral arbitrator failed to disclose that fourteen years earlier he had worked for a different insurer under president of claimant, either in initial disclosures or when president appeared as witness. Seventh Circuit reversed, concluding that the relationship was



not so intimate as to cast serious doubt on arbitrator's impartiality. Statutory test is existence of evident partiality, not violation of ethical disclosure obligations. Court considered affidavits of co-arbitrators denying any indications of partiality.

*Brandeis Instel Limited vs. Calabrian Chemicals Corporation*, 656 F.Supp. 160 (S.D.N.Y. 1987)

District Court entered judgment on an arbitration award in a proceeding administered by the London Metal Exchange, rejecting the argument that a panel comprised of prominent and experienced members of the specific business community in which the dispute arose, who knew and transacted business with each other and with the party that was a member of the Exchange, was necessarily biased. No appearance of bias arose from the fact that in such a community the wakes of the parties often cross.

*Metropolitan Property and Casualty Insurance Company vs. J. C. Penney Casualty Insurance Company and Daniel J. McNamara*, 780 F.Supp. 885 (D.Conn. 1991)

Claimant sought an injunction against Respondent and its party-appointed arbitrator based on undisclosed extensive, substantive pre-appointment communications between Respondent and the arbitrator. In dicta the court observed that the arbitrator, although not expected to be neutral, was subject to the ethical obligation to participate in the arbitration process in a fair, honest and good-faith manner and that his alleged failure to disclose ex parte activities violated the rule that an arbitrator must disclose at the time of his appointment any circumstances likely to create a presumption of bias or which he believes might disqualify him as an impartial arbitrator. Lacking diversity jurisdiction, the District Court remanded the case to state court.

*Graceman vs. Goldstein*, 93 Md.App.658, 613 A.2d 1049 (Ct. of Special Appeals of Md., 1992)

Trial court order vacating an arbitration award for evident partiality was reversed. The finding of partiality was based on observed sympathetic conversations regarding a claimant's health between the arbitrator and the claimant, that the arbitrator was seen driving to and from the airport with the claimants, and that claimants' attorney prepared an affidavit for the arbitrator to sign. The affidavit, being post-award, could not be considered to be evident partiality during the hearing or in making the decision. The remaining matters were known to the respondents at the time and, having remained silent, they could not be heard to object on these bases after the award against them issued.

*Reeves Brothers, Inc. vs. Capital-Mercury Shirt Corp.*, 962 F.Supp. 408 (S.D.N.Y. 1997)

The District Court confirmed an arbitration award by a panel convened by the General Arbitration Council of the Textile and Apparel Industries and administered by American Arbitration Association. Before appointment one arbitrator disclosed

that he had been employed by a bank of which claimant was a customer. At the hearing another arbitrator disclosed that a witness seen entering the room was an old and close business associate. Respondent sought removal of both arbitrators, but the Association denied both requests. The Court defined “evident partiality” as “more than a mere appearance of bias” and held that it would be found where a reasonable person would have to conclude that an arbitrator was partial.

*MCI Telecommunications Corporation vs. Matrix Communications Corporation*, 135 F.3d 27 (1<sup>st</sup> Cir. 1998)

A motion to set aside an order compelling an arbitration to be administered by JAMS, on the ground that claimant had concealed an agreement with JAMS that provided a close working arrangement between the two companies, was denied. None of the contacts between claimant and JAMS involved the arbitrators who are deciding cases. The suggestion that an arbitrator on the JAMS panel would have an inherent bias toward claimant as JAMS’ customer is contradicted by respondent’s express assurance that it did not doubt the impartiality of the arbitrator in the case.

*Morgan Phillips, Inc. vs. JAMS/Endispute*, 140 Cal.App.4<sup>th</sup> 795, 44 Cal.Rptr.3d 782 (2006)

The tendered defense of arbitral immunity in a suit against the arbitrator and the institutional administrator of the arbitration for breach of contract by withdrawing and refusing to issue an award was rejected. Withdrawal from the arbitration for no stated ethical reason following evidence and argument and refusal to render an award is a breach of the contractual duty to conduct a binding arbitration and is conduct not integral to the arbitration process; it is, rather, a breakdown of the process and not immunized.

*William C. Vick v. North Carolina Farm Bureau Federation*, 123 N.C.App.97, 472 S.E.2d 346 (N.C. 1996)

An arbitration award was vacated based on numerous disclosed and undisclosed non-trivial relationships between a neutral arbitrator and a party and the party’s counsel. These relationships were likely to affect impartiality or reasonably create an appearance of partiality or bias.

*Annotation to Canon I, Paragraph B*

*Borst v. Allstate Insurance Company*, 291 Wis.2d 361, 717 NW2d 42 (2006)

Appeal from order denying motion to vacate award. Reversed

Court adopts rule that all arbitrators, including party-appointed arbitrators, are presumed impartial unless the parties contract or applicable rules provide for non-neutral arbitrators.

Evident partiality arising from a relationship between an arbitrator and a party cannot be avoided simply by full disclosure at the outset.

Arbitrator who had substantial ongoing attorney-client relationship with party that selected arbitrator was evidentially partial as a matter of law, such that award had to be vacated.

Evidence of substantial ongoing attorney-client relationship between arbitrator who was expected to be neutral and party would cause a reasonable person to have serious doubts about the impartiality of the arbitrator.

### **2010 - 11 Supplement**

*Alim v. KBR (Kellogg, Brown & Root)-Halliburton*, 331 S.W.3d 178 (Tex.App, 2011)

Arbitrator's false answer to question contained in disclosure form regarding whether a party representative had appeared before him in any prior arbitration created a reasonable impression of partiality requiring vacatur of award.

*Dealer Computer Services, Inc. v. Michael Motor Company, Inc.*, 2010 WL 5464266 (S.D.Texas 2010)

On cross-motions to confirm and vacate arbitration award, award vacated. Party-appointed neutral arbitrator disclosed that she had previously served as a member of a three arbitrator panel in an arbitration involving the same appointing party, but failed to disclose that the earlier case involved the same form contract, the same issues of liability and damages, and testimony of the same expert witness, nor did she disclose that she had expressly accepted the expert witness testimony and ruled for the appointing party on all issues. Her failure to disclose the nature and extent of these connections with the appointing party and its case significantly compromised her ability to act impartially and constituted evident partiality.

## **CANON II. AN ARBITRATOR SHOULD DISCLOSE ANY INTEREST OR RELATIONSHIP LIKELY TO AFFECT IMPARTIALITY OR WHICH MIGHT CREATE AN APPEARANCE OF PARTIALITY.**

- A. Persons who are requested to serve as arbitrators should, before accepting, disclose:
- (1) Any known direct or indirect financial or personal interest in the outcome of the arbitration;
  - (2) Any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective

arbitrators should disclose any such relationships which they personally have with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts;

- (3) The nature and extent of any prior knowledge they may have of the dispute; and
- (4) Any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.

- B. Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in paragraph A.
- C. The obligation to disclose interests or relationships described in paragraph A is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, as soon as practicable, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.
- D. Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure.
- E. Disclosure should be made to all parties unless other procedures for disclosure are provided in the agreement of the parties, applicable rules or practices of an institution, or by law. Where more than one arbitrator has been appointed, each should inform the others of all matters disclosed.
- F. When parties, with knowledge of a person's interests and relationships, nevertheless desire that person to serve as an arbitrator, that person may properly serve.
- G. If an arbitrator is requested by all parties to withdraw, the arbitrator must do so. If an arbitrator is requested to withdraw by less than all of the parties because of alleged partiality, the arbitrator should withdraw unless either of the following circumstances exists:
  - (1) An agreement of the parties, or arbitration rules agreed to by the parties, or applicable law establishes procedures for determining challenges to arbitrators, in which case those procedures should be followed; or
  - (2) In the absence of applicable procedures, if the arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can nevertheless act and decide the case impartially and fairly.

- H. If compliance by a prospective arbitrator with any provision of this Code would require disclosure of confidential or privileged information, the prospective arbitrator should either:
- (1) Secure the consent to the disclosure from the person who furnished the information or the holder of the privilege; or
  - (2) Withdraw.

*Annotation to Canon II*

Lee Korland, *What an Arbitrator Should Investigate and Disclose: Proposing a New Test for Evident Partiality Under the Federal Arbitration Act*, 53 Case Western Law Review 815 (2002-2003)

Law review comment collecting and analyzing federal and state court decisions relating to prospective arbitrator disclosure.

*Lifecare International Corporation v. CD Medical, Inc.*, 68 F.3d 429 (11<sup>th</sup> Cir. 1995)

In accordance with Canon II the arbitrator should have disclosed his strongly held personal outrage over refusal of an attorney in the law firm representing a party, who was not himself involved in the arbitration, to agree to a postponement; but his failure to make this disclosure did not establish a reasonable impression of partiality.

In accordance with Canon II the arbitrator should have conducted a sufficient inquiry to determine, and should have disclosed, that before he joined a law firm a party interviewed the firm for the purpose of obtaining representation in the subject dispute and had retained the firm to review an amendment to the distributorship agreement between the parties; but his failure to do so did not create a reasonable impression of partiality.

*Frisch's Restaurants, Inc. v. Fortney & Weygandt, Inc.*, Ohio App. 2008, 2008 WL 3586901

Arbitrator who had received two referrals from a party's law firm prior to the arbitration and three additional referrals while it was pending was not disqualified absent any showing of partiality or extensive impropriety.

Arbitrator who had received two referrals from a party's law firm prior to the arbitration and three additional referrals while it was pending should have disclosed them in accordance with Canon IIA, but failure to do so did not demonstrate extensive impropriety warranting vacatur of the award.

*Betz v. Pankow*, 31 Cal.App.4<sup>th</sup> 1503, 38 Cal.Rptr.2d 107 (1995)

Attorney/arbitrators are required to make reasonable efforts to inform themselves of past financial, business or professional relationships which might reasonably create an impression of partiality or bias, but have not failed to make such efforts if they do not have access to files of prior law firms that might reveal past relationships and had no personal knowledge of them.

Attorney/Arbitrator who was previously a member of a law firm that had represented business entities in which an arbitration party was a principal in a single protracted litigation while he was with the firm, who had no knowledge of the representation and, having moved to a competing firm, had no access to its conflict records, cannot be faulted for failing to disclose facts of which he was unaware.

*Eckstein v. Kaiser Foundation Health Plan, Inc.*, Cal.Ct. Appeal, 2007 (unpublished) 2007 Cal.App.Unpub LEXIS 6994

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Every arbitrator, whether party-appointed or “neutral”, is required to disclose to the parties, prior to the commencement of the arbitration proceedings, any relationship or transaction that he has had with the parties or their representatives, and any other facts which would suggest to a reasonable person that the arbitrator is interested in the outcome of the arbitration or which might reasonably support an inference of partiality.

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Party-appointed non-neutral arbitrator's failure to disclose his contingent fee arrangement violated Canon II.

The award of the three arbitrator panel having been unanimous, no causal nexus existed between the party-appointed arbitrator's improper conduct and the ultimate award.

*Safeco Insurance Company of America vs. Stariha*, 346 N.W. 2d 663 (Minn.App. 1984)

Court declined to vacate award in uninsured motorist arbitration where neutral arbitrator had served as an attorney for the law firm that represented respondent in the arbitration in earlier declaratory relief litigation. The attorney-client relationship was neither long-standing nor repeated. Court states general rule that a remote and unrelated attorney-client relationship between a neutral arbitrator and counsel for one of the parties is not a basis to vacate an arbitration award for undue means or evident partiality. Court admitted evidence of arbitrator deliberations demonstrating absence of partiality.

*Metropolitan Property and Casualty Insurance Company vs. J. C. Penney Casualty Insurance Company and Daniel J. McNamara*, 780 F.Supp. 885 (D.Conn. 1991)

Claimant sought an injunction against Respondent and its party-appointed arbitrator based on undisclosed extensive, substantive pre-appointment communications between Respondent and the arbitrator. In dicta the court observed that the arbitrator, although not expected to be neutral, was subject to the ethical obligation to participate in the arbitration process in a fair, honest and good-faith manner and that his alleged failure to disclose ex parte activities violated the rule that an arbitrator must disclose at the time of his appointment any circumstances likely to create a presumption of bias or which he believes might disqualify him as an impartial arbitrator. Lacking diversity jurisdiction, the District Court remanded the case to state court.

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*Sunkist Soft Drinks, Inc. vs. Sunkist Growers, Inc.*, 10 F3d 753 (11<sup>th</sup> Cir. 1993)

The District Court denied a motion to vacate an arbitration award based on pre- and post-appointment communications between claimant and its party-appointed arbitrator. The court recognized the commonplace predisposition of party-appointed non-neutral arbitrators toward the parties appointing them and found this consistent with the prevailing ethical rules.

*Positive Software Solutions, Inc. vs. New Century Mortgage Corporation*, 476 F.3d 278 (5<sup>th</sup> Cir. 2007)

The District Court ruling vacating an arbitration award based in undisclosed co-counsel status between counsel in the arbitration and the arbitrator in a case that had concluded seven years earlier was reversed. The standard is that in nondisclosure cases, an award may not be vacated because of trivial or insubstantial prior relationships between the arbitrator and the parties to the proceeding. The "reasonable impression of bias" standard is to be interpreted practically rather than with utmost rigor.

*William C. Vick v. North Carolina Farm Bureau Federation*, 123 N.C.App.97, 472 S.E.2d 346 (N.C. 1996)

An arbitration award was vacated based on numerous disclosed and undisclosed non-trivial relationships between a neutral arbitrator and a party and the party's counsel.



These relationships were likely to affect impartiality or reasonably create an appearance of partiality or bias.

*Annotation to Canon II Generally and to Canon II, Paragraph A*

*Merit Insurance Company vs. Leatherby Insurance Company*, 714 F.2d 673 (7<sup>th</sup> Cir. 1983)

District Court vacated arbitration award in reinsurance dispute on ground neutral arbitrator failed to disclose that fourteen years earlier he had worked for a different insurer under president of claimant, either in initial disclosures or when president appeared as witness. Seventh Circuit reversed, concluding that the relationship was not so intimate as to cast serious doubt on arbitrator's impartiality. Statutory test is existence of evident partiality, not violation of ethical disclosure obligations. Court considered affidavits of co-arbitrators denying any indications of partiality.

*Annotation to Canon II, Paragraphs A, F*

*Dadeland Square, Ltd. V. Gould*, 763 So.2d 524 (Fla.App. 2000)

Where arbitrator disclosed personal relationships with party and counsel and offered the opportunity to make further inquiry a party who failed to object or inquire waived its right to object to the arbitrator based on the relationships.

Where a party with knowledge of prospective arbitrator's personal interests and relationships nevertheless desires that individual to serve as arbitrator, that person may properly serve (citing former comment to Canon II, present Canon II, Subd. F).

*Annotation to Canon II, Paragraph F*

*Borst v. Allstate Insurance Company*, 291 Wis.2d 361, 717 NW2d 42 (2006)

Appeal from order denying motion to vacate award. Reversed

Court adopts rule that all arbitrators, including party-appointed arbitrators, are presumed impartial unless the parties contract or applicable rules provide for non-neutral arbitrators.

Evident partiality arising from a relationship between an arbitrator and a party cannot be avoided simply by full disclosure at the outset.

Arbitrator who had substantial ongoing attorney-client relationship with party that selected arbitrator was evidentially partial as a matter of law, such that award had to be vacated.

Evidence of substantial ongoing attorney-client relationship between arbitrator who was expected to be neutral and party would cause a reasonable person to have serious doubts about the impartiality of the arbitrator.

## **2010 - 11 Supplement**

*Capobianco v. Vulcan, Inc.*, 2011 WL 1364537 (Wash.App. 2011)

Note: unpublished opinion, See RCWA 2.06.0040

On cross-motions to confirm and vacate arbitration award, award confirmed, judgment affirmed on appeal. Undisclosed pre-appointment communications between party-appointed arbitrator and appointing parties' counsel regarding appointment and nature of case, including review of draft demand, and post-appointment submission of invoices, were consistent with Canon III B (1), (3) and demonstrated neither misconduct nor evident partiality. Such communications were not relationships requiring disclosure pursuant to Canon II A (2).

*Pacificawest General Contracting, Inc. v. Calvada Development, Inc.* 2011 WL 856810 (Cal.App. 2011) Note: See Unpublished Opinion, Rules 8.1105, 8.1110 and 8.1115, Cal.Rules of Court

Cross-motions to confirm and vacate arbitration award, award confirmed, on appeal, relevant portions of judgment affirmed. The arbitrator was not required to disclose past participation in local bar association activities with attorney for a party. Refusal to postpone hearing while application to court to disqualify arbitrator was pending did not exceed arbitrator's powers.

*Ashley v. Hart*, 2011 WL 6821009 (Haw.App.2011) Note: Unpublished disposition, See HI R RAP Rule 35

Arbitrator consultation with another attorney in her office (including review of draft of award), without prior notice to or consent of parties, and *ex parte* non-ministerial communications with counsel for one party, may constitute prejudicial misconduct. Case remanded for evidentiary hearing regarding contents of communications.

*Alim v. KBR (Kellogg, Brown & Root)-Halliburton*, 331 S.W.3d 178 (Tex.App, 2011)

Arbitrator's false answer to question contained in disclosure form regarding whether a party representative had appeared before him in any prior arbitration created a reasonable impression of partiality requiring vacatur of award.

*Dealer Computer Services, Inc. v. Michael Motor Company, Inc.*, 2010 WL 5464266 (S.D.Texas 2010)

On cross-motions to confirm and vacate arbitration award, award vacated. Party-appointed neutral arbitrator disclosed that she had previously served as a member of a

three arbitrator panel in an arbitration involving the same appointing party, but failed to disclose that the earlier case involved the same form contract, the same issues of liability and damages, and testimony of the same expert witness, nor did she disclose that she had expressly accepted the expert witness testimony and ruled for the appointing party on all issues. Her failure to disclose the nature and extent of these connections with the appointing party and its case significantly compromised her ability to act impartially and constituted evident partiality.

*Marik v. Keele*, 2010 WL 4724231 (Cal.App. 2010) Note: Not officially published, see Rules 8.1105, 8.1110 and 8.1115, Cal. Rules of Court

Appeal from judgment confirming arbitration award, judgment affirmed. Arbitrator, a retired judge, failed to disclose that two years before his selection to serve as arbitrator, he was publicly admonished by the Commission on Judicial Performance, based on a pervasive pattern of bias, prejudgment, *ex parte* communications and abuse of judicial authority in two matters, and had been privately admonished in three other matters some years before. Following *Haworth v. Superior Court* (2010) 50 Cal.4<sup>th</sup> 371, court holds that the conduct referred to did not suggest a predisposition for or against any of the parties, or that he could not be fair to a litigant such as the appellant in the subject action.

Disclosure was thus not required. Further, the information was readily available from public sources.

*Benjamin, Weill & Mazer v Kors*, Cal.App.4<sup>th</sup> (May 5, 2011). Opinion following grant of petition for rehearing, original opinion at 189 Cal.App.4<sup>th</sup> 126 (2010).

On cross-applications to confirm and vacate arbitration award, judgment confirming award reversed. In arbitration between attorney and client relating to legal fees, arbitrator failed to disclose that in his capacity as an attorney in private practice he engaged generally in the representation of lawyers and law firms in cases involving professional responsibility and fee disputes, and at the time of the arbitration represented a law firm in a fee dispute case before the California Supreme Court and another law firm in a high profile fee dispute. Finding that the arbitration should have been conducted under the California Arbitration Act and not the statutory scheme relating to non-binding attorney-client arbitration, the Court held that the arbitrator's disclosure obligations arose under the Arbitration Act and implementing Standards. The ongoing nature of the arbitrator's practice and his substantial relationships with lawyers and law firms in fee dispute matters were thus required subjects of disclosure.

## **2012 – 13 Supplement**

*Skidmore Energy, Inc. vs. Maxus (U.S.) Exploration Company*, 345 S.W.3d 672, 2011 Tex.App.LEXIS 5237 (Tex.App. 2011)

Where arbitrator provided an oath or undertaking of impartiality in accordance with Code, his failure to disclose that corporation for which he served as outside director and in which he owned stock, unknown to the arbitrator, engaged in intermittent and insubstantial business transactions with a party did not violate oath or warrant vacation of award.

*Cricket Communications, Inc. v. All You Can Talk Partners, Inc.*, 2011 U.S. Dist. LEXIS 116907

The losing party alleged that the arbitrator knew or may have known the prevailing party's chief financial officer professionally from some time preceding the arbitration and that he had not disclosed the possible acquaintanceship. This did not evidence partiality or corruption on the part of the arbitrator or result in the award being procured by fraud or undue means. The CFO was not a witness or otherwise involved in the arbitration, and arbitrators are not required to disclose the alleged "attenuated and speculative connection" with an individual who was not involved in the arbitration.

**CANON III. AN ARBITRATOR SHOULD AVOID IMPROPRIETY OR THE APPEARANCE OF IMPROPRIETY IN COMMUNICATING WITH PARTIES.**

- A. If an agreement of the parties or applicable arbitration rules establishes the manner or content of communications between the arbitrator and the parties, the arbitrator should follow those procedures notwithstanding any contrary provision of paragraphs B and C.
- B. An arbitrator or prospective arbitrator should not discuss a proceeding with any party in the absence of any other party, except in any of the following circumstances:
  - (1) When the appointment of a prospective arbitrator is being considered, the prospective arbitrator:
    - (a) may ask about the identities of the parties, counsel, or witnesses and the general nature of the case; and
    - (b) may respond to inquiries from a party or its counsel designed to determine his or her suitability and availability for the appointment. In any such dialogue, the prospective arbitrator may receive information from a party or its counsel disclosing the general nature of the dispute but should not permit them to discuss the merits of the case.
  - (2) In an arbitration in which the two party-appointed arbitrators are expected to appoint the third arbitrator, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the choice of the third arbitrator;

- (3) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning arrangements for any compensation to be paid to the party-appointed arbitrator. Submission of routine written requests for payment of compensation and expenses in accordance with such arrangements and written communications pertaining solely to such requests need not be sent to the other party;
  - (4) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the status of the arbitrator (*i.e.*, neutral or non-neutral), as contemplated by paragraph C of Canon IX;
  - (5) Discussions may be had with a party concerning such logistical matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the arbitrator should promptly inform each other party of the discussion and should not make any final determination concerning the matter discussed before giving each absent party an opportunity to express the party's views; or
  - (6) If a party fails to be present at a hearing after having been given due notice, or if all parties expressly consent, the arbitrator may discuss the case with any party who is present.
- C. Unless otherwise provided in this Canon, in applicable arbitration rules or in an agreement of the parties, whenever an arbitrator communicates in writing with one party, the arbitrator should at the same time send a copy of the communication to every other party, and whenever the arbitrator receives any written communication concerning the case from one party which has not already been sent to every other party, the arbitrator should send or cause it to be sent to the other parties.

*Annotation to Canon III*

*Metropolitan Property and Casualty Insurance Company vs. J. C. Penney Casualty Insurance Company and Daniel J. McNamara*, 780 F.Supp. 885 (D.Conn. 1991)

Claimant sought an injunction against Respondent and its party-appointed arbitrator based on undisclosed extensive, substantive pre-appointment communications between Respondent and the arbitrator. In dicta the court observed that the arbitrator, although not expected to be neutral, was subject to the ethical obligation to participate in the arbitration process in a fair, honest and good-faith manner and that his alleged failure to disclose *ex parte* activities violated the rule that an arbitrator must disclose at the time of his appointment any circumstances likely to create a presumption of bias or which he believes might disqualify him as an impartial arbitrator. Lacking diversity jurisdiction, the District Court remanded the case to state court.

*Graceman vs. Goldstein*, 93 Md.App.658, 613 A.2d 1049 (Ct. of Special Appeals of Md., 1992)

Trial court order vacating an arbitration award for evident partiality was reversed. The finding of partiality was based on observed sympathetic conversations regarding a claimant's health between the arbitrator and the claimant, that the arbitrator was seen driving to and from the airport with the claimants, and that claimants' attorney prepared an affidavit for the arbitrator to sign. The affidavit, being post-award, could not be considered to be evident partiality during the hearing or in making the decision. The remaining matters were known to the respondents at the time and, having remained silent, they could not be heard to object on these bases after the award against them issued.

*Sunkist Soft Drinks, Inc. vs. Sunkist Growers, Inc.*, 10 F3d 753 (11<sup>th</sup> Cir. 1993)

The District Court denied a motion to vacate an arbitration award based on pre- and post-appointment communications between claimant and its party-appointed arbitrator. The court recognized the commonplace predisposition of party-appointed non-neutral arbitrators toward the parties appointing them and found this consistent with the prevailing ethical rules.

### **2010 - 11 Supplement**

*Capobianco v. Vulcan, Inc.*, 2011 WL 1364537 (Wash.App. 2011)

Note: unpublished opinion, See RCWA 2.06.0040

On cross-motions to confirm and vacate arbitration award, award confirmed, judgment affirmed on appeal. Undisclosed pre-appointment communications between party-appointed arbitrator and appointing parties' counsel regarding appointment and nature of case, including review of draft demand, and post-appointment submission of invoices, were consistent with Canon III B (1), (3) and demonstrated neither misconduct nor evident partiality. Such communications were not relationships requiring disclosure pursuant to Canon II A (2).

#### **CANON IV. AN ARBITRATOR SHOULD CONDUCT THE PROCEEDINGS FAIRLY AND DILIGENTLY.**

- A. An arbitrator should conduct the proceedings in an even-handed manner. The arbitrator should be patient and courteous to the parties, their representatives, and the witnesses and should encourage similar conduct by all participants.
- B. The arbitrator should afford to all parties the right to be heard and due notice of the time and place of any hearing. The arbitrator should allow each party a fair opportunity to present its evidence and arguments.
- C. The arbitrator should not deny any party the opportunity to be represented by counsel or by any other person chosen by the party.

- D. If a party fails to appear after due notice, the arbitrator should proceed with the arbitration when authorized to do so, but only after receiving assurance that appropriate notice has been given to the absent party.
- E. When the arbitrator determines that more information than has been presented by the parties is required to decide the case, it is not improper for the arbitrator to ask questions, call witnesses, and request documents or other evidence, including expert testimony.
- F. Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes. An arbitrator should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all parties.
- G. Co-arbitrators should afford each other full opportunity to participate in all aspects of the proceedings.

*Comment to Canon IV paragraph G*

Paragraph G of Canon IV is not intended to preclude one arbitrator from acting in limited circumstances (e.g., ruling on discovery issues) where authorized by the agreement of the parties, applicable rules or law, nor does it preclude a majority of the arbitrators from proceeding with any aspect of the arbitration if an arbitrator is unable or unwilling to participate and such action is authorized by the agreement of the parties or applicable rules or law. It also does not preclude ex parte requests for interim relief.

*Annotation to Canon IV*

*Secretaries to International Arbitration Tribunals*, 17 Am.Rev.Int'l Arb. 575 (2006)

International arbitration panels frequently employ individuals to serve as administrators, assistants, researchers or secretaries. Although rare in domestic practice, such employment is consistent with Canons V and VI, provided that the duty to decide may not be delegated, the parties are informed, and the individual agrees to observe the requirement of arbitral confidentiality.

*Greenspan v. LADT, LLC*, 185 Cal.App.4<sup>th</sup> 1413, 111 Cal.Rptr.3d 468 (2010)

On appeal from order confirming arbitration award:

A reasonable person aware of the fact that a party had initiated a lawsuit against an arbitrator who was immune from liability under state law would view the arbitrator to be impartial and not subject to disqualification.

Where the applicable rule so provides, an arbitrator's decision as to the scheduling of deadlines and the timeliness of the award is authorized and not subject to judicial review.

*Merit Insurance Company vs. Leatherby Insurance Company*, 714 F.2d 673 (7<sup>th</sup> Cir. 1983)

District Court vacated arbitration award in reinsurance dispute on ground neutral arbitrator failed to disclose that fourteen years earlier he had worked for a different insurer under president of claimant, either in initial disclosures or when president appeared as witness. Seventh Circuit reversed, concluding that the relationship was not so intimate as to cast serious doubt on arbitrator's impartiality. Statutory test is existence of evident partiality, not violation of ethical disclosure obligations. Court considered affidavits of co-arbitrators denying any indications of partiality.

*Morgan Phillips, Inc. vs. JAMS/Endispute*, 140 Cal.App.4<sup>th</sup> 795, 44 Cal.Rptr.3d 782 (2006)

The tendered defense of arbitral immunity in a suit against the arbitrator and the institutional administrator of the arbitration for breach of contract by withdrawing and refusing to issue an award was rejected. Withdrawal from the arbitration for no stated ethical reason following evidence and argument and refusal to render an award is a breach of the contractual duty to conduct a binding arbitration and is conduct not integral to the arbitration process; it is, rather, a breakdown of the process and not immunized.

## **2010 - 11 Supplement**

*Shaffer v. Merrill, Lynch, Pierce, Fenner & Smith. Inc.*, 2011 WL 1225888 (N.D. CA 2011)

On cross-motions to vacate and to correct and confirm arbitration award, award corrected and confirmed. Vacatur was sought on the ground that the arbitrator engaged two private research attorneys to assist him and initially failed to disclose that he had done so. While better practice would have been to disclose his intent to engage such assistants in advance and to afford the parties the opportunity to object, neither the initial nondisclosure nor such use of assistants constituted misconduct or breach of contract.

*Pacificawest General Contracting, Inc. v. Calvada Development, Inc.* 2011 WL 856810 (Cal.App. 2011) Note: See Unpublished Opinion, Rules 8.1105, 8.1110 and 8.1115, Cal.Rules of Court

Cross-motions to confirm and vacate arbitration award, award confirmed, on appeal, relevant portions of judgment affirmed. The arbitrator was not required to disclose past participation in local bar association activities with attorney for a party. Refusal



to postpone hearing while application to court to disqualify arbitrator was pending did not exceed arbitrator's powers.

### **2013 Supplement**

*Barbara Minkowitz vs. Ron S. Israeli*, 2013 N.J. Super. LEXIS 144 (N.J. Super 2013).

Where arbitrator acted, in effect, as a mediator, and entered arbitration awards based on agreements reached during mediation, such awards were deemed in excess of his power as arbitrator and therefore must be vacated.

#### **CANON V. AN ARBITRATOR SHOULD MAKE DECISIONS IN A JUST, INDEPENDENT AND DELIBERATE MANNER.**

- A. The arbitrator should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues.
- B. An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.
- C. An arbitrator should not delegate the duty to decide to any other person.
- D. In the event that all parties agree upon a settlement of issues in dispute and request the arbitrator to embody that agreement in an award, the arbitrator may do so, but is not required to do so unless satisfied with the propriety of the terms of settlement. Whenever an arbitrator embodies a settlement by the parties in an award, the arbitrator should state in the award that it is based on an agreement of the parties.

#### *Annotation to Canon V*

*Secretaries to International Arbitration Tribunals*, 17 Am.Rev.Int'l Arb. 575 (2006)

International arbitration panels frequently employ individuals to serve as administrators, assistants, researchers or secretaries. Although rare in domestic practice, such employment is consistent with Canons V and VI, provided that the duty to decide may not be delegated, the parties are informed, and the individual agrees to observe the requirement of arbitral confidentiality.

*Merit Insurance Company vs. Leatherby Insurance Company*, 714 F.2d 673 (7<sup>th</sup> Cir. 1983)

District Court vacated arbitration award in reinsurance dispute on ground neutral arbitrator failed to disclose that fourteen years earlier he had worked for a different insurer under president of claimant, either in initial disclosures or when president appeared as witness. Seventh Circuit reversed, concluding that the relationship was

not so intimate as to cast serious doubt on arbitrator's impartiality. Statutory test is existence of evident partiality, not violation of ethical disclosure obligations. Court considered affidavits of co-arbitrators denying any indications of partiality.

*Morgan Phillips, Inc. vs. JAMS/Endispute*, 140 Cal.App.4<sup>th</sup> 795, 44 Cal.Rptr.3d 782 (2006)

The tendered defense of arbitral immunity in a suit against the arbitrator and the institutional administrator of the arbitration for breach of contract by withdrawing and refusing to issue an award was rejected. Withdrawal from the arbitration for no stated ethical reason following evidence and argument and refusal to render an award is a breach of the contractual duty to conduct a binding arbitration and is conduct not integral to the arbitration process; it is, rather, a breakdown of the process and not immunized.

CANON VI. AN ARBITRATOR SHOULD BE FAITHFUL TO THE  
RELATIONSHIP OF TRUST AND CONFIDENTIALITY  
INHERENT IN THAT OFFICE.

- A. An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.
- B. The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision. An arbitrator may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision if the arbitrator informs the parties of the use of such assistance and such persons agree to be bound by the provisions of this Canon.
- C. It is not proper at any time for an arbitrator to inform anyone of any decision in advance of the time it is given to all parties. In a proceeding in which there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone about the substance of the deliberations of the arbitrators. After an arbitration award has been made, it is not proper for an arbitrator to assist in proceedings to enforce or challenge the award.
- D. Unless the parties so request, an arbitrator should not appoint himself or herself to a separate office related to the subject matter of the dispute, such as receiver or trustee, nor should a panel of arbitrators appoint one of their number to such an office.

*Annotation to Canon VI*

**2010 - 11 Supplement**

*Ashley v. Hart*, 2011 WL 6821009 (Haw.App.2011) Note: Unpublished disposition, See HI R RAP Rule 35

Arbitrator consultation with another attorney in her office (including review of draft of award), without prior notice to or consent of parties, and *ex parte* non-ministerial communications with counsel for one party, may constitute prejudicial misconduct. Case remanded for evidentiary hearing regarding contents of communications.

### **2012 – 13 Supplement**

*Northwestern National Insurance Company vs. Insko, Ltd.*, 2011 U.S.Dist.LEXIS 113626 (S.D.N.Y. 2011)

Arbitrator who disclosed contents of written communications among panel made in the course of their deliberations to counsel for a party violated Canon VI (c); attorneys who received such communications disqualified.

*Northwestern National Insurance Company vs. Insko, Ltd.*, 2011 U.S.Dist.LEXIS 132107 (S.D.N.Y. 2011)

Reconsideration of 2011 U.S.Dist.Lexis 113626 denied. Arbitrator who disclosed contents of written communications among panel made in the course of their deliberations to counsel for a party violated Canon VI (c); attorneys who received such communications disqualified.

### **2013 Supplement**

*Delaware Coalition for Open Government, Inc. vs. The Honorable Leo E. Strine, Jr. et al*, \_\_\_ F.3d \_\_\_ (3<sup>rd</sup> Cir. 2013 [No. 12-3859, filed October 23, 2013] , dissent at slip opinion, page 6.

An arbitration process for business disputes as an alternative to civil litigation, utilizing the justices and facilities of the Delaware Chancery Court [10 Del. Code Ann., tit. 10, Sec. 349 (2009). Del. Ch. R. 96 – 98], and denying public access to the proceedings and their records, violated the U. S. Constitution First and Fourteenth Amendment rights of public access to trials. Confidentiality is an attribute of private arbitration but may not be imposed in proceedings utilizing court facilities and personnel and deriving their legitimacy and authority from the state.

CANON VII. AN ARBITRATOR SHOULD ADHERE TO STANDARDS OF INTEGRITY AND FAIRNESS WHEN MAKING ARRANGEMENTS FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES.

- A. Arbitrators who are to be compensated for their services or reimbursed for their expenses shall adhere to standards of integrity and fairness in making arrangements for such payments.
- B. Certain practices relating to payments are generally recognized as tending to preserve the integrity and fairness of the arbitration process. These practices include:
  - (1) Before the arbitrator finally accepts appointment, the basis of payment, including any cancellation fee, compensation in the event of withdrawal and compensation for study and preparation time, and all other charges, should be established. Except for arrangements for the compensation of party-appointed arbitrators, all parties should be informed in writing of the terms established.
  - (2) In proceedings conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, communication related to compensation should be made through the institution. In proceedings where no institution has been engaged by the parties to administer the arbitration, any communication with arbitrators (other than party appointed arbitrators) concerning payments should be in the presence of all parties; and
  - (3) Arbitrators should not, absent extraordinary circumstances, request increases in the basis of their compensation during the course of a proceeding.

*Annotation to Canon VII*

**2012 – 13 Supplement**

*Plastic Recovery Technologies, Co. vs. Samson*, 2011 U.S.Dist.LEXIS 82937 (N.D.Ill, 2011)

Since Code does not preclude such communications, using “should” rather than “must”, arbitrator’s discussion about fees with parties in administered arbitration was not a violation; if it were to be deemed a technical violation it would not justify setting aside award for evident partiality.

**CANON VIII. AN ARBITRATOR MAY ENGAGE IN ADVERTISING OR PROMOTION OF ARBITRAL SERVICES WHICH IS TRUTHFUL AND ACCURATE.**

- A. Advertising or promotion of an individual's willingness or availability to serve as an arbitrator must be accurate and unlikely to mislead. Any statements about the quality of the arbitrator's work or the success of the arbitrator's practice must be truthful.
- B. Advertising and promotion must not imply any willingness to accept an appointment otherwise than in accordance with this Code.

*Comment to Canon VIII*

This Canon does not preclude an arbitrator from printing, publishing, or disseminating advertisements conforming to these standards in any electronic or print medium, from making personal presentations to prospective users of arbitral services conforming to such standards or from responding to inquiries concerning the arbitrator's availability, qualifications, experience, or fee arrangements.

**CANON IX. ARBITRATORS APPOINTED BY ONE PARTY HAVE A DUTY TO DETERMINE AND DISCLOSE THEIR STATUS AND TO COMPLY WITH THIS CODE, EXCEPT AS EXEMPTED BY CANON X.**

- A. In some types of arbitration in which there are three arbitrators, it is customary for each party, acting alone, to appoint one arbitrator. The third arbitrator is then appointed by agreement either of the parties or of the two arbitrators, or failing such agreement, by an independent institution or individual. In tripartite arbitrations to which this Code applies, all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator.
- B. Notwithstanding this presumption, there are certain types of tripartite arbitration in which it is expected by all parties that the two arbitrators appointed by the parties may be predisposed toward the party appointing them. Those arbitrators, referred to in this Code as “Canon X arbitrators,” are not to be held to the standards of neutrality and independence applicable to other arbitrators. Canon X describes the special ethical obligations of party-appointed arbitrators who are not expected to meet the standard of neutrality.
- C. A party-appointed arbitrator has an obligation to ascertain, as early as possible but not later than the first meeting of the arbitrators and parties, whether the parties have agreed that the party-appointed arbitrators will serve as neutrals or whether they shall be subject to Canon X, and to provide a timely report of their conclusions to the parties and other arbitrators:
  - (1) Party-appointed arbitrators should review the agreement of the parties, the applicable rules and any applicable law bearing upon arbitrator neutrality. In reviewing the agreement of the parties, party-appointed arbitrators should consult any relevant express terms of the written or oral arbitration agreement. It may also be appropriate for them to inquire into agreements that have not been expressly set forth, but which may be implied from an established course of dealings of the parties or well-recognized custom and usage in their trade or profession;
  - (2) Where party-appointed arbitrators conclude that the parties intended for the party-appointed arbitrators not to serve as neutrals, they should so inform the parties and the other arbitrators. The arbitrators may then act as provided

- in Canon X unless or until a different determination of their status is made by the parties, any administering institution or the arbitral panel; and
- (3) Until party-appointed arbitrators conclude that the party-appointed arbitrators were not intended by the parties to serve as neutrals, or if the party-appointed arbitrators are unable to form a reasonable belief of their status from the foregoing sources and no decision in this regard has yet been made by the parties, any administering institution, or the arbitral panel, they should observe all of the obligations of neutral arbitrators set forth in this Code.

D. Party-appointed arbitrators not governed by Canon X shall observe all of the obligations of Canons I through VIII unless otherwise required by agreement of the parties, any applicable rules, or applicable law.

*Annotation to Canon IX*

*Barcon Associates, Inc. v. Tri-County Asphalt Corp.*, 86 N.J. 179, 430 A.2d 214 (1981)

Existence of substantial and on-going business relationship between party-appointed non-neutral arbitrator and appointing party, which relationship included services rendered and payments made during the arbitration, created an impermissible appearance of partiality.

Failure of party-appointed non-neutral arbitrator to disclose substantial on-going business relationship with appointing party was improper.

Every arbitrator, whether party-appointed or “neutral”, is required to disclose to the parties, prior to the commencement of the arbitration proceedings, any relationship or transaction that he has had with the parties or their representatives, and any other facts which would suggest to a reasonable person that the arbitrator is interested in the outcome of the arbitration or which might reasonably support an inference of partiality.

*Borst v. Allstate Insurance Company*, 291 Wis.2d 361, 717 NW2d 42 (2006)

Appeal from order denying motion to vacate award. Reversed

Court adopts rule that all arbitrators, including party-appointed arbitrators, are presumed impartial unless the parties contract or applicable rules provide for non-neutral arbitrators.

Evident partiality arising from a relationship between an arbitrator and a party cannot be avoided simply by full disclosure at the outset.

Arbitrator who had substantial ongoing attorney-client relationship with party that selected arbitrator was evidentially partial as a matter of law, such that award had to be vacated.

Evidence of substantial ongoing attorney-client relationship between arbitrator who was expected to be neutral and party would cause a reasonable person to have serious doubts about the impartiality of the arbitrator.

*Aetna Casualty & Surety Company v. Grabbert*, 590 A.2d 88 (R.I. 1991)

Service as a party-appointed non-neutral arbitrator pursuant to a contingent fee arrangement confers a direct financial interest in the award violative of Canon I, in that such interest would tend to destroy public confidence in the integrity of the arbitration process.

Party-appointed non-neutral arbitrator's failure to disclose his contingent fee arrangement violated Canon II.

The award of the three arbitrator panel having been unanimous, no causal nexus existed between the party-appointed arbitrator's improper conduct and the ultimate award.

*Metropolitan Property and Casualty Insurance Company vs. J. C. Penney Casualty Insurance Company and Daniel J. McNamara*, 780 F.Supp. 885 (D.Conn. 1991)

Claimant sought an injunction against Respondent and its party-appointed arbitrator based on undisclosed extensive, substantive pre-appointment communications between Respondent and the arbitrator. In dicta the court observed that the arbitrator, although not expected to be neutral, was subject to the ethical obligation to participate in the arbitration process in a fair, honest and good-faith manner and that his alleged failure to disclose ex parte activities violated the rule that an arbitrator must disclose at the time of his appointment any circumstances likely to create a presumption of bias or which he believes might disqualify him as an impartial arbitrator. Lacking diversity jurisdiction, the District Court remanded the case to state court.

*Sunkist Soft Drinks, Inc. vs. Sunkist Growers, Inc.*, 10 F3d 753 (11<sup>th</sup> Cir. 1993)

The District Court denied a motion to vacate an arbitration award based on pre- and post-appointment communications between claimant and its party-appointed arbitrator. The court recognized the commonplace predisposition of party-appointed non-neutral arbitrators toward the parties appointing them and found this consistent with the prevailing ethical rules.

*Positive Software Solutions, Inc. vs. New Century Mortgage Corporation*, 476 F.3d 278 (5<sup>th</sup> Cir. 2007)

The District Court ruling vacating an arbitration award based in undisclosed co-counsel status between counsel in the arbitration and the arbitrator in a case that had concluded seven years earlier was reversed. The standard is that in nondisclosure cases, an award may not be vacated because of trivial or insubstantial prior relationships between the arbitrator and the parties to the proceeding. The “reasonable impression of bias” standard is to be interpreted practically rather than with utmost rigor.

## **2010 - 2011 Supplement**

*Capobianco v. Vulcan, Inc.*, 2011 WL 1364537 (Wash.App. 2011)  
Note: unpublished opinion, See RCWA 2.06.0040

On cross-motions to confirm and vacate arbitration award, award confirmed, judgment affirmed on appeal. Undisclosed pre-appointment communications between party-appointed arbitrator and appointing parties’ counsel regarding appointment and nature of case, including review of draft demand, and post-appointment submission of invoices, were consistent with Canon III B (1), (3) and demonstrated neither misconduct nor evident partiality. Such communications were not relationships requiring disclosure pursuant to Canon II A (2).

*Dealer Computer Services, Inc. v. Michael Motor Company, Inc.*, 2010 WL 5464266 (S.D.Texas 2010)

On cross-motions to confirm and vacate arbitration award, award vacated. Party-appointed neutral arbitrator disclosed that she had previously served as a member of a three arbitrator panel in an arbitration involving the same appointing party, but failed to disclose that the earlier case involved the same form contract, the same issues of liability and damages, and testimony of the same expert witness, nor did she disclose that she had expressly accepted the expert witness testimony and ruled for the appointing party on all issues. Her failure to disclose the nature and extent of these connections with the appointing party and its case significantly compromised her ability to act impartially and constituted evident partiality.

### **CANON X. EXEMPTIONS FOR ARBITRATORS APPOINTED BY ONE PARTY WHO ARE NOT SUBJECT TO RULES OF NEUTRALITY.**

Canon X arbitrators are expected to observe all of the ethical obligations prescribed by this Code except those from which they are specifically excused by Canon X.

#### **A. *Obligations under Canon I***

Canon X arbitrators should observe all of the obligations of Canon I subject only to the following provisions:



- (1) Canon X arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness. For example, Canon X arbitrators should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statements to the other arbitrators; and
- (2) The provisions of subparagraphs B(1), B(2), and paragraphs C and D of Canon I, insofar as they relate to partiality, relationships, and interests are not applicable to Canon X arbitrators.

B. *Obligations under Canon II*

- (1) Canon X arbitrators should disclose to all parties, and to the other arbitrators, all interests and relationships which Canon II requires be disclosed. Disclosure as required by Canon II is for the benefit not only of the party who appointed the arbitrator, but also for the benefit of the other parties and arbitrators so that they may know of any partiality which may exist or appear to exist; and
- (2) Canon X arbitrators are not obliged to withdraw under paragraph G of Canon II if requested to do so only by the party who did not appoint them.

C. *Obligations under Canon III*

Canon X arbitrators should observe all of the obligations of Canon III subject only to the following provisions:

- (1) Like neutral party-appointed arbitrators, Canon X arbitrators may consult with the party who appointed them to the extent permitted in paragraph B of Canon III;
- (2) Canon X arbitrators shall, at the earliest practicable time, disclose to the other arbitrators and to the parties whether or not they intend to communicate with their appointing parties. If they have disclosed the intention to engage in such communications, they may thereafter communicate with their appointing parties concerning any other aspect of the case, except as provided in paragraph (3).
- (3) If such communication occurred prior to the time they were appointed as arbitrators, or prior to the first hearing or other meeting of the parties with the arbitrators, the Canon X arbitrator should, at or before the first hearing or meeting of the arbitrators with the parties, disclose the fact that such communication has taken place. In complying with the provisions of this subparagraph, it is sufficient that there be disclosure of the fact that such communication has occurred without disclosing the content of the communication. A single timely disclosure of the Canon X arbitrator's intention to participate in such communications in the future is sufficient;
- (4) Canon X arbitrators may not at any time during the arbitration:
  - (a) disclose any deliberations by the arbitrators on any matter or issue submitted to them for decision;
  - (b) communicate with the parties that appointed them concerning any matter or issue taken under consideration by the panel after the record is closed or such matter or issue has been submitted for decision; or

- (c) disclose any final decision or interim decision in advance of the time that it is disclosed to all parties.
- (5) Unless otherwise agreed by the arbitrators and the parties, a Canon X arbitrator may not communicate orally with the neutral arbitrator concerning any matter or issue arising or expected to arise in the arbitration in the absence of the other Canon X arbitrator. If a Canon X arbitrator communicates in writing with the neutral arbitrator, he or she shall simultaneously provide a copy of the written communication to the other Canon X arbitrator;
- (6) When Canon X arbitrators communicate orally with the parties that appointed them concerning any matter on which communication is permitted under this Code, they are not obligated to disclose the contents of such oral communications to any other party or arbitrator; and
- (7) When Canon X arbitrators communicate in writing with the party who appointed them concerning any matter on which communication is permitted under this Code, they are not required to send copies of any such written communication to any other party or arbitrator.

D. *Obligations under Canon IV*

Canon X arbitrators should observe all of the obligations of Canon IV.

E. *Obligations under Canon V*

Canon X arbitrators should observe all of the obligations of Canon V, except that they may be predisposed toward deciding in favor of the party who appointed them.

F. *Obligations under Canon VI*

Canon X arbitrators should observe all of the obligations of Canon VI.

G. *Obligations Under Canon VII*

Canon X arbitrators should observe all of the obligations of Canon VII.

H. *Obligations Under Canon VIII*

Canon X arbitrators should observe all of the obligations of Canon VIII.

I. *Obligations Under Canon IX*

The provisions of paragraph D of Canon IX are inapplicable to Canon X arbitrators, except insofar as the obligations are also set forth in this Canon.

*Annotation to Canon X*

*Barcon Associates, Inc. v. Tri-County Asphalt Corp.*, 86 N.J. 179, 430 A.2d 214 (1981)

Existence of substantial and on-going business relationship between party-appointed non-neutral arbitrator and appointing party, which relationship included services

rendered and payments made during the arbitration, created an impermissible appearance of partiality.

Failure of party-appointed non-neutral arbitrator to disclose substantial on-going business relationship with appointing party was improper.

Every arbitrator, whether party-appointed or “neutral”, is required to disclose to the parties, prior to the commencement of the arbitration proceedings, any relationship or transaction that he has had with the parties or their representatives, and any other facts which would suggest to a reasonable person that the arbitrator is interested in the outcome of the arbitration or which might reasonably support an inference of partiality.

*Aetna Casualty & Surety Company v. Grabbert*, 590 A.2d 88 (R.I. 1991)

Service as a party-appointed non-neutral arbitrator pursuant to a contingent fee arrangement confers a direct financial interest in the award violative of Canon I, in that such interest would tend to destroy public confidence in the integrity of the arbitration process.

Party-appointed non-neutral arbitrator’s failure to disclose his contingent fee arrangement violated Canon II.

The award of the three arbitrator panel having been unanimous, no causal nexus existed between the party-appointed arbitrator’s improper conduct and the ultimate award.

*Metropolitan Property and Casualty Insurance Company vs. J. C. Penney Casualty Insurance Company and Daniel J. McNamara*, 780 F.Supp. 885 (D.Conn. 1991)

Claimant sought an injunction against Respondent and its party-appointed arbitrator based on undisclosed extensive, substantive pre-appointment communications between Respondent and the arbitrator. In dicta the court observed that the arbitrator, although not expected to be neutral, was subject to the ethical obligation to participate in the arbitration process in a fair, honest and good-faith manner and that his alleged failure to disclose ex parte activities violated the rule that an arbitrator must disclose at the time of his appointment any circumstances likely to create a presumption of bias or which he believes might disqualify him as an impartial arbitrator. Lacking diversity jurisdiction, the District Court remanded the case to state court.

*Sunkist Soft Drinks, Inc. vs. Sunkist Growers, Inc.*, 10 F3d 753 (11<sup>th</sup> Cir. 1993)

The District Court denied a motion to vacate an arbitration award based on pre- and post-appointment communications between claimant and its party-appointed arbitrator. The court recognized the commonplace predisposition of party-appointed

non-neutral arbitrators toward the parties appointing them and found this consistent with the prevailing ethical rules.