



Process for Selecting an Arbitrator; Arbitrator Ethics and Disclosures

Mary K Austin. Esq.

Arbitrator, Mediator, Hearing Officer
New York, NY
mkaustin221@gmail.com

 AMERICAN
HEALTH LAW
ASSOCIATION

1

Arbitrator Selection

- First -- look to the arbitration agreement between the parties.
- Does it specify rules to govern the arbitration?
Examples: AHLA Rules of Procedure for Commercial Arbitration ("AHLA Rules")
AAA Commercial Arbitration Rules
- Does it include arbitrator selection terms, such as required background for the arbitrators, or selection process terms?
 - **Caution:** If too many specifications for arbitrator selection, could hold up or derail the process.
 - **Note:** Diversity considerations

2

What if the Arbitration Agreement is Silent?

- If the agreement involves commerce (most do) or is a maritime contract/transaction, **look to the FAA**
- FAA - Appointment of Arbitrators - Section 5

... if **no method be provided [in the agreement]**, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then **upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire**, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and **unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.**

Arbitrator Selection Under Administrator Rules

- Rules of each arbitration Administrator will specify their default selection process.
- Generally this process involves initial input from the parties, with the ultimate power of selection residing with the Administrator if arbitrators are not able to be chosen using the process.
- Parties can agree otherwise.

Where Parties Specify AHLA Rules

- Default (where agreement is silent) is that AHLA appoints a single, neutral arbitrator.
- The filing party can pay to receive a list of candidates with the right for each party to strike.
 - There is a sliding scale increasing with number of candidates/strikes per party
 - Scale starts with 5/1 candidates/strikes up to 15 candidates/5 strikes.
- Any party can invoke or increase the candidate/strike numbers by paying a fee.

Default Arbitrator Selection: AHLA

- AHLA will select the proposed candidates using the information provided in the Demand and any additional information responding party provides.
- AHLA will provide profiles and resumes of the candidates.
- Parties strike and rank candidates provided by AHLA.
- AHLA removes the candidates stricken, and selects candidates using a combined ranking score.

Ineligible Candidates - AHLA

- A candidate is ineligible to arbitrate a claim only if it would be unethical or impossible for him or her to do so.
- If a party believes a single candidate is ineligible, it should strike him or her.
- If a party believes two (2) or more candidates are ineligible, it may petition the Administrator to replace them with eligible candidates and provide a new Ranking Sheet.
- The Administrator will grant such a petition only if it is clearly established, in the sole discretion of the Administrator, why the candidate(s) to be replaced would be ineligible.

Default Arbitrator Selection Example: AAA

When there are two parties:

- AAA sends parties a list of 10 arbitrators from which the parties try to agree.
- If they cannot agree, parties can strike arbitrators they object to and rank the rest, then AAA chooses from the common lists.
- If this does not work, AAA appoints the arbitrators.

Where more than two parties, the AAA may appoint arbitrator(s) unless all the parties agree otherwise.

Contacting Arbitrators Prior to Appointment

- **AHLA:**
 - Parties may contact the potential arbitrators directly, but ...
 - *Only* in writing, with a copy to the other parties
 - *Only to* inquire about their suitability and availability for appointment
 - Parties may disclose the general nature of case but may not discuss merits.

Arbitrator Panels

- Arbitration agreements may specify a three-arbitrator panel.
- Read the applicable Administrator Rules to fill in gaps in the selection process.

AHLA: Chair and Wings

- Panel consists of a “Chair” and two other arbitrators typically referred to as the “Wings.”
- Chair manages the arbitration process and presides at the hearing.
- All matters to be decided by majority vote ...
- ... except where parties agree that Chair can be sole arbitrator of *procedural and/or evidentiary issues*, including presiding over *discovery*.

AHLA: Appointment of Arbitrator Panels

- If agreement is silent on the appointment process, the parties will each select a candidate from list provided by AHLA, using ranking.
 - If they pick the same arbitrator as their top candidate, this arbitrator becomes the Chair, and the second choices become the Wings.
 - If they pick different arbitrators as their top choice, these two arbitrators will pick the Chair.
 - If they can't agree, AHLA appoints the Chair.

AHLA: Neutrality

- Presumption of arbitrator *neutrality*
- *Unless* – prior to the appointment date – the Administrator receives a written agreement stating the party-appointed panelists will not be neutral.

AHLA: Arbitrability

- Appointed arbitrators have the power under the AHLA rules to determine their jurisdiction and any issues of arbitrability.
- Must first receive “appropriate evidence and argument.”

Ethics and Disclosures

Look to the applicable Administrator's code of ethics for arbitrators, typically a separate publication.

- AHLA – The Code of Ethics for Arbitrators in Commercial Arbitration
- AAA – The Code of Ethics for Arbitrators in Commercial Disputes

AHLA Code of Ethics

- Does not take the place of or supersede applicable laws, arbitration agreements, or arbitration rules to which the parties have agreed.
- Should be read in conjunction with other rules.
- Does not establish new or additional grounds for judicial review of arbitration awards.

CANON I.

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

- An arbitrator has a **responsibility not only to the parties but also to the process of arbitration** itself
- Arbitrator must observe high standards of conduct so that the **integrity and fairness** of the process will be preserved.

CANON I. *cont'd*

Arbitrator should accept appointment *only* if fully satisfied:

- that he or she can serve **impartially**;
- that he or she can serve **independently** from the parties, potential witnesses, and the other arbitrators;
- that he or she is **competent** to serve; and
- 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.

CANON I. *cont'd*

After accepting appointment and while serving as an arbitrator

- 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.

- 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.**

But *not* considered unethical if **the parties have consented** following **full disclosure** of the relevant facts.

CANON I. *cont'd*

- Arbitrators should conduct themselves in a way that is **fair to all parties.**
- Should ***not be swayed*** by outside pressure, public clamor, and fear of criticism or self-interest.
- Should avoid conduct and statements that give the **appearance of partiality** toward or against any party.

CANON I. *cont'd*

- When authority is derived from party agreement, arbitrator should neither **exceed that authority** nor do less than is required to **exercise that authority completely**.
- If the agreement requires **rules or procedures** to be followed, arbitrator is obligated to **comply**.
- **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 the Code.

CANON I. *cont'd*

- Arbitrator should conduct the process to advance the **fair and efficient resolution** of the matters submitted for decision.
- 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.
- **Duration:** Ethical obligations begin as soon as a person is requested to serve as an arbitrator and certain obligations continue after the decision.

CANON I. *cont'd*

- After accepting appointment, 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**.
- Arbitrator may **withdraw for nonpayment** of the compensation as agreed.
- Arbitrator who withdraws should take **reasonable steps to protect the interests of the parties**, including return of evidentiary materials and protection of confidentiality.

CANON II.

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

Before accepting appointment, arbitrator should disclose:

- any **known direct or indirect** financial or personal interest in the outcome of the arbitration;
- 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**;
- nature and extent of any **prior knowledge of the dispute**;
- 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.

CANON II. *cont'd*

Examples:

- Relationships arbitrator personally has with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness
- Relationships involving families or household members
- Relationships involving current employers, partners, or professional or business associates that can be ascertained by reasonable efforts

CANON II. *cont'd*

- Prior to disclosure, arbitrators should make a **reasonable effort** to inform themselves of any interests or relationships.
- Disclosure is a **continuing obligation**.
- During any stage of the arbitration should disclose, **as soon as practicable**, any interests or relationships which may arise, or which are recalled or discovered.

CANON II. *cont'd*

- Resolve any doubts **in favor of disclosure**.
- 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 **also inform the other arbitrators** of all matters disclosed.
- *“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.”*

CANON II. *cont'd*

Request from all parties for arbitrator to withdraw:

- Arbitrator must withdraw.

Request for withdrawal by less than all parties because of alleged partiality:

- Arbitrator should withdraw *unless*:
 - Different procedures are set by party agreement, agreed-upon arbitration rules, or applicable law; or
 - In the absence of applicable procedures, the **arbitrator 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**.

CANON II. *cont'd*

What if the arbitrator's disclosure obligations would require disclosure of confidential or privileged information?

Example: representation of a client related to one of the parties where the fact of the representation is confidential

Answer: Arbitrator should either:

- Secure the consent to the disclosure from the person who furnished the information or the holder of the privilege; or
- Withdraw.

Guidelines on Disclosures

- If in doubt, **disclose**.
- Disclosures should be specific:
 - Who
 - What
 - When
 - Where
 - How
- Failure to appropriately disclose or provide sufficient detail could delay confirmation.

[or worse ...]

CANON III.

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

Arbitrator should not discuss a proceeding with any party in the absence of any other party, except:

When the **appointment** of a prospective arbitrator is being considered, the arbitrator:

- may ask about the identities of the parties, counsel, or witnesses and the general nature of the case;
- may respond to inquiries from a party or its counsel designed to determine his or her suitability and availability for the appointment; and
- should not permit them to discuss the merits of the case.

CANON III. *cont'd*

Arbitrator should not discuss a proceeding with any party in the absence of the others, except:

- Party-appointed arbitrators may consult with the party that appointed them:
 - When two party-appointed arbitrators are expected to appoint the third arbitrator, but *only* concerning the choice of the third arbitrator
 - Regarding their compensation arrangements, and routine written requests for payment of compensation and expenses do not need to be sent to the other party
 - Concerning the status of the arbitrator as neutral or non-neutral

CANON III. *cont'd*

- Discussions may be had with a party concerning **logistical matters** such as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. But the arbitrator should promptly **inform the other parties** and give each absent party an opportunity to express their views before making a decision.
- If a **party does not attend hearing** after having been given due notice (or if all parties expressly consent), arbitrator may discuss the case with any party who is present.

CANON III. *cont'd*

Unless otherwise provided in Canon III, in the applicable arbitration rules or by agreement of the parties:

- when an arbitrator communicates in writing with one party, should at the same time send a copy to every other party; and
- when an arbitrator receives any written communication concerning the case from one party which was not sent to every other party, the arbitrator should send or cause it to be sent to the other parties.

CANON IV

AN ARBITRATOR SHOULD CONDUCT THE PROCEEDINGS FAIRLY AND DILIGENTLY.

- Conduct the proceedings in an **even-handed** manner
- Be **patient and courteous** to the parties, their representatives, and the witnesses and encourage similar conduct by all participants.
- Afford to all parties the **right to be heard** and **due notice** of the time and place of any hearing.
- Allow each party a **fair opportunity** to present its evidence and arguments.
- Do not deny any party the **opportunity to be represented** by counsel or by any other person chosen by the party.
- **Co-arbitrators** should afford each other full opportunity to participate in all aspects of the proceedings.

CANON IV. *cont'd*

What if a party fails to appear?

- Arbitrator must first receive assurance that **appropriate notice** has been given to the absent party
- If so, then the arbitrator should proceed with the arbitration when authorized to do so

CANON IV. *cont'd*

What if an arbitrator determines that **more information is required** to decide the case than has been presented by the parties?

- The arbitrator can ask questions.
- The arbitrator can call witnesses, and request documents or other evidence, including expert testimony.

CANON IV. *cont'd*

Discussions regarding **settlement**

- 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.
- But 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.

CANON V.

AN ARBITRATOR SHOULD MAKE DECISIONS IN A JUST, INDEPENDENT AND DELIBERATE MANNER.

- The arbitrator should, after careful deliberation, **decide all issues submitted** for determination. An arbitrator should decide **no other issues**.
- An arbitrator should decide all matters **justly, exercising independent judgment**, and should not permit outside pressure to affect the decision.
- An arbitrator should **not delegate** the duty to decide to any other person.
- If the parties request the arbitrator to embody a **settlement agreement in an award [Consent Award]**, the arbitrator may do so, *but* is not required to do so unless *satisfied with the propriety of the terms of settlement*. The award should state that it is based on an agreement of the parties.

CANON VI.

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

CANON VII.

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

CANON VIII.

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

Party-Appointed Arbitrators:

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.

Note on Neutrality

- AHLA preference for all arbitrators to be neutral, i.e., independent and impartial, and to comply with the same ethical standards.
- Non-neutral party appointed arbitrators will be governed by special ethical considerations in Canon X.

CANON X

- EXEMPTIONS FOR ARBITRATORS APPOINTED BY ONE PARTY WHO ARE NOT SUBJECT TO RULES OF NEUTRALITY.
- Non-neutral party-appointed arbitrators:
 - May be **predisposed** toward the appointing party, including with regard to the award
 - Must act in good faith, with integrity and fairness
 - Still have to **make disclosures**
 - Must let the parties and other arbitrators know whether they intend to communicate with their appointing parties about the case (or once appointed, whether they have already communicated)
- Other Canons continue to apply, with some modification to accommodate the ability to be predisposed and to communicate with party

CANON X. *cont'd*

- Non-neutral party-appointed arbitrators may *not*:
- communicate with the **neutral arbitrator** without the other arbitrator
- **disclose any deliberations** by the arbitrators on any matter or issue submitted to them for decision
- communicate with the appointing party on any matter or issue taken under consideration by the panel *after* the record is closed *or that has been submitted for decision*; or
- disclose any *final decision or interim decision* prior to disclosure to all parties.



Questions?



