

Party-Appointed Arbitrators: Ethical Concerns

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Arbitration, like litigation, is governed by a code of ethics—one not necessarily well understood by litigators. A primer on key provisions in the Code of Ethics for Arbitrators in Commercial Disputes (Code of Ethics) concerning party-appointed arbitrators follows.

The “Party-Appointed Clause” is a popular option in arbitration. It provides for a three-member panel, with each party choosing one arbitrator, and the two chosen arbitrators selecting the third. When you select an arbitrator to serve as a party-appointed arbitrator—or serve as one yourself—it is important to carefully review Canons III, IX, and X of the Code of Ethics.

For starters, the sponsors of the Code of Ethics state in the preamble that “it is preferable for all arbitrators to be neutral, that is, independent and impartial.” Indeed, the Code of Ethics presumes that all arbitrators are neutral absent agreement to the contrary. That said, the sponsors realize that parties may prefer to appoint non-neutral arbitrators. Accordingly, they provide a separate Canon X to govern non-neutral arbitrators, referred to in the Code of Ethics as “Canon X arbitrators.”

The Code of Ethics obligates party-appointed arbitrators to determine their status by reviewing the arbitration clause governing their appointment. They

may also consider the parties’ course of conduct and the trade’s custom and usage. If the party-appointed arbitrators conclude they are not intended to be neutral, Canon IX of the Code of Ethics requires them to inform the parties and the third arbitrator of that.

The information parties may communicate to third-party arbitrators before and after they are selected is governed by Canon III of the Code of Ethics. Parties may communicate with *prospective* third-party arbitrators about the parties, counsel, witnesses, and the general nature of the dispute, but they may not communicate about the merits. Parties may communicate with their *selected* third-party arbitrator about whether the third-party arbitrator is neutral, the selection of the third arbitrator, compensation for the party-appointed arbitrator, and logistics.

Canon X arbitrators are allowed to be predisposed toward the party who appointed them. If Canon X arbitrators plan to communicate with their appointing parties, they should so inform the parties and the third arbitrator. They may communicate about anything other than arbitrator deliberations on a submitted issue, any matter after the record is closed, or any final or interim decision before their decision is released. ■



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