Focusing on ARIAS-US Code of Conduct-Canon IV-How Much Disclosure is Enough?

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I. Introduction

As one of the Ethics Partners at the law firm of Adams and Reese LLP, it is my frequent pleasure to assist other firm lawyers as to how to resolve conflicts of interest and related disclosure issues in their practices, given applicable state bar rules. As one of the co-founders of ARIAS-US and as a proud member of the ARIAS-US Ethics Committee, I embrace this opportunity to provide insights as to disclosure issues addressed by our own Society's benchmark ARIAS-US Code of Conduct Canon IV. To refresh our collective memories, Canon IV. succinctly states:

DISCLOSURE: Candidates for appointment as arbitrators should disclose any interest or relationship likely to affect their judgment. Any doubt should be resolved in favor of disclosure.

This article will explore the pragmatic ramifications of this broad call for disclosure impacting an umpire's or arbitrator's ability to fairly arrive at an award. What are minimum disclosure standards for both party-appointed arbitrators and umpires? Are there current best practices for disclosure and, if so, what are these practices? In the context of each of party-appointed arbitrators and umpires, respectively, what is the best method and appropriate timing for disclosure? And, importantly, what happens if, upon Motion for Vacatur pursuant to the Federal Arbitration Act (9 U.S.C. Section 10 et seq.), a reviewing court determines that the disclosure provided is simply not enough?

A related subject addressed by Comments 4 and 5 to Canon IV. is the umpire's or arbitrator's withdrawal from service on the arbitration panel. Comment 4 addresses withdrawal mandated by an umpire's or arbitrator's inability to reconcile his or her "duty to disclose and some other obligation, such as a commitment to keep certain information confidential." Comment 5 addresses an umpire's or arbitrator's withdrawal for other "good reason," including "serious personal or family health issues." This article will explore when and whether an umpire should withdraw or, alternatively, should consider that a different less drastic cure—such as final hearing postponement—is in order. Finally, this article will discuss what happens to the Panel when one of the three members does indeed withdraw. Should a new Panel be entirely reconstituted? Or will the interests of justice and due process be served by replacing only the arbitrator or umpire who has tendered his or her resignation?

II. Minimum Standards and Best Practices for Arbitrator and Umpire Disclosure

Comment 1 to Canon IV. makes clear that it is not enough for an umpire or arbitrator to advise the parties to an arbitration, through counsel, of any obvious conflicts which the umpire or arbitrator readily remember. The Comment evidences the expectation that umpires and arbitrators will undertake an affirmative responsibility to (1) determine the issues underlying the arbitration and understand the identities of counsel, parties and witnesses and (2) seek out and disclose any present or potential conflicts that relate to same. Witness the following language:

1. Before accepting an arbitration appointment, candidates for appointment as arbitrators should make a diligent effort to identify and disclose any direct or indirect financial or personal interest in the outcome of the proceeding or any existing or past financial, business, professional, family or social relationship that others could reasonably believe would be likely to affect their judgment, including any relationship with persons they are told will be arbitrators or potential witnesses. Such disclosures should include, where appropriate and known by a candidate, information related to the candidate's current employer's direct or indirect financial interest in the outcome of the proceedings or the current employer' s existing or past financial relationship with the parties that others could reasonably believe would be likely to affect the candidate's judgment.

Comment 1 is a further refinement to Canon IV.'s admonition that umpires and arbitrators must disclose "any interest or relationship likely to affect their judgment." That initial admonition alone frames necessary disclosure in terms of what the umpire or arbitrator himself or herself subjectively deems likely to affect their ability to resolve the matters in controversy in the arbitration proceeding. But Comment 1 adds the perspective of what, objectively, "others could reasonably believe would be likely to affect the candidate's judgment."

Here are the minimum standards that should satisfy the reasonable beliefs of those analyzing sufficiency of disclosure:

- **Identifying the issues central to the dispute**: By means of the umpire questionnaire to be distributed to the party-appointed arbitrators as well as the umpire, counsel should disclose enough facts about the dispute that the arbitrators and umpire will know if they have addressed the involved principles previously by arbitration award, expert testimony or publications and presentations. For example, if a given controversy involves the Extra-Contractual Obligations Clause, the dispute description agreed upon by counsel should indicate that differing interpretations of this clause is central to the arbitration proceeding. That will allow the conscientious umpire or arbitrator to indicate whether he or she has spoken or written about this subject.

  Reasonable minds differ, however, on whether it is necessary for an arbitrator or umpire to disclose their service on other arbitrations wherein the facts appear similar to the

II . Actual and Putative Conflicts of Interest

A. . The Duty to Identify Conflicts

2. Timing and Method of Disclosures

3. Tug of War with Confidentiality Mandates?

4. The Continuing Duty to Disclose

5. The Specific Instance of Publications or Expert Testimony Touching on the Subject Matter of the Arbitration

III. What Happens If, Upon a Party's Motion to Vacate, a Reviewing Court Finds Arbitrator Disclosures to be Insufficient?

IV. Arbitrator Withdrawal: When is this Step Necessary?

V. Arbitrator Withdrawal: What Happens to the Existing Panel When a Panel Member Goes Away?