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ARTBA American Road & Transportation Builders Association



Modern Challenges & Ethical Dilemmas at Arbitration

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Agenda

I. Challenges Unique to Arbitration

- A. Who Has Oversight of the Arbitral Process?
- B. You Think You've Selected the "Wrong" Arbitrator. Now What?
- C. What Happens When Your Arbitration Panel Appears To Be Delaying the Process?
- D. Compelling Non-Signatories
- E. Disclosure Issues

II. Sources of Ethical Obligations in Arbitration

- A. Applicable Federal or State Laws, Court Rules, or Regulations of Professional Conduct
- B. The Code of Ethics for Arbitrators in Commercial Disputes
- C. The Arbitration Agreement
- D. Rules of the Arbitral Institution

III. Enforcement of Ethical Obligations in Arbitration

- A. Appropriate Disciplinary Authority
- B. Arbitral Institution
- C. Seek Relief from Arbitrators/Court

Challenges Unique to Arbitration

Who Has Oversight of the Arbitral Process?

- ☐ Arbitrator?
- ☐ Institutional Provider?
- ☐ Courts?

Challenges Unique to Arbitration

You Think You've Selected the "Wrong" Arbitrator, Now What?

- ❑ Seek Relief from Arbitral Provider
 - AAA Construction Rule 20--Disqualification of Arbitrator
- ❑ Consider Whether to Proceed to Hearing or Risk Waiver of Objection
- ❑ Seek Supplementation of Disclosures from Arbitrator based on New Potential Conflicts Information
 - Face Potential Waiver Argument under AAA Rule 42
- ❑ Consider Three Person Panel Versus Single "Wrong" Arbitrator
- ❑ Raise Canon 1—Seeking Voluntary Withdrawal of "Wrong" Arbitrator
 - "...who cannot uphold the integrity and fairness of the arbitration process." (Code of Ethics for Arbitrators in Commercial Disputes)

Challenges Unique to Arbitration

You Think You've Selected the “Wrong” Arbitrator, Now What?

- The Code of Ethics for Arbitrators in Commercial Disputes
 - Consider AAA Canons set forth in The Code of Ethics for Arbitrators in Commercial Disputes
 - Multi-State (and individual State) Rules of Professional Conduct
 - Is Arbitrator Serving as a Partisan Appointment on Panel?
 - Role Clarity is Critical Under Ethics Rules (e.g. Multi-State Professional Contract Rules 2.4 and 5.7)

Challenges Unique to Arbitration

What Happens When Your Arbitration Panel Appears To Be Delaying the Process!

- ❑ Case Manager Intervention
- ❑ Arbitrator Challenge
- ❑ Parties' Agreement
- ❑ Future Considerations
 - The Parties' Arbitration Agreement
 - Institution's obligations to ensure availability of the panelists
 - Arbitral Institution Penalties
 - Sole Arbitrator

Challenges Unique to Arbitration

Theoretical Bases for Compelling Non-Signatories

- ☐ Agency
- ☐ Assumption
- ☐ Incorporation by Reference
- ☐ Alter Ego/Piercing the Corporate Veil
- ☐ Estoppel/Waiver

Sources of Ethical Obligations in Arbitration

**Applicable Federal or State Laws,
Court Rules, or Regulations of
Professional Conduct**

Is representing a party in an arbitration the unauthorized practice of law?

☐ Yes, absent *pro hac vice* or notice

- California
- Connecticut
- Michigan
- Nevada
- Colorado
- Hawaii
- Mississippi

☐ No

- Alabama
- District of Columbia
- Florida
- Georgia
- Idaho
- Illinois
- Indiana
- Iowa
- Kansas
- Kentucky
- Louisiana
- Maine
- Maryland
- Massachusetts
- Minnesota
- Missouri
- Nebraska
- New Hampshire
- New Jersey
- New Mexico
- New York
- North Carolina
- Ohio
- Oklahoma
- Oregon
- Pennsylvania
- Rhode Island
- South Carolina
- South Dakota
- Tennessee
- Utah
- Vermont
- Virginia
- Wisconsin
- Wyoming

Is representing a party in an arbitration the unauthorized practice of law? (cont.)

❑ Only if forum requires *pro hac vice* admission

- | | | | | |
|---------------|-----------------|------------------|----------------|-------------|
| – Alaska | – Indiana | – Minnesota | – Ohio | – Utah |
| – Arizona | – Iowa | – Missouri | – Oklahoma | – Vermont |
| – Arkansas | – Kansas | – Nebraska | – Oregon | – Virginia |
| – Connecticut | – Louisiana | – New Hampshire | – Pennsylvania | – Wisconsin |
| – Delaware | – Maine | – New Jersey | – Rhode Island | – Wyoming |
| – Georgia | – Maryland | – New Mexico | – South Dakota | |
| – Illinois | – Massachusetts | – North Carolina | – Tennessee | |

❑ Maybe

- Arkansas

Is representing a party in an arbitration the unauthorized practice of law? (cont.)

□ Additional requirements or conditions

- California
- Florida
- Maryland
- North Dakota
- District of Columbia
- Kentucky
- Michigan
- South Carolina

□ Not settled

- Montana
- Texas

Sources of Ethical Obligations in Arbitration

The Code of Ethics for Arbitrators in Commercial Disputes

- ❑ Consider AAA Canons Set Forth in Code of Ethics for Arbitrators in Commercial Disputes.
- ❑ Multi-State (and Individual State) Rules of Professional Conduct
- ❑ Is Arbitrator Serving as a Partisan Appointment on Panel?
 - Role Clarity is Critical Under Ethics Rules (e.g. Multi-State Professional Contract Rules 2.4 and 5.7)

Sources of Ethical Obligations in Arbitration

The Arbitration Agreement

- The Agreement provides for the rules that govern all parties—including the arbitration panel
 - Institutional Rules which provide for codes of ethics
 - Procedural Rules
 - FAA
 - State
 - The Seat

Sources of Ethical Obligations in Arbitration

Rules of the Arbitral Institution

- ❑ AAA Rule 19 – Disclosure
- ❑ AAA Rule 20 – Disqualification of Arbitrator
- ❑ AAA Rule 21 – Communication with Arbitrator and the AAA
- ❑ AAA Rule 22 – Vacancies

Enforcement of Ethical Obligations in Arbitration

□ Arbitral Institution

- AAA Rule 20 (b) –Disqualification of Arbitrator

“...the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which shall be conclusive.
- AAA Administrative Review Council (ARC)
 - Executive Level administrative decision-making authority
 - Large, Complex Domestic Cases
 - Escalation to Entire Administrative Review Council
 - Escalation to Senior Management Committee/General Counsel

Enforcement of Ethical Obligations in Arbitration

☐ **Seek Relief from Arbitrators**

- Sanction the Offending Party
- Sanction Counsel
- Allocation of Fees, Compensation & Expenses
(e.g. AAA Construction Rule R-48 (c))

☐ **Seek Relief from a Court**

- Conflict of Interest
- Other Ethical Breaches

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THANK YOU

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