**ARBITRATOR CONFLICTS AND DISCLOSURES**

**AHLA DR Service Webinar**

**May 9, 2019**

**John Allen Chalk, Sr.**

**Whitaker Chalk Swindle & Schwartz PLLC**

**Fort Worth, Texas**

1. **Conflicts of Interest vs. Required Disclosures** 
   1. **Disclosure Defined.** 
      1. 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. (*Note on Neutrality* in the Code of Ethics for Arbitrators in Commercial Disputes, pg. 2).
      2. The disclosure obligation in the Code is about “interests” and “relationships” described in Canon II.
         1. “Any known direct or indirect financial or personal interest in the outcome of the arbitration;” Canon II(A)(1).
         2. “Any known existing or past financial, business, professional or personal relationships … with “any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness;” Canon II(A)(2).
         3. Any such relationships “involving their families or household members or their current employers, partners, or professional or business associates …;” *Id.*
         4. “…any prior knowledge they may have of the dispute;” Canon II(A(3).*.*
         5. “Any other matters, relationships, or interests which they are obligated to disclosure …
            1. By agreement of the parties;
            2. By rules or practices of an institution; or
            3. Applicable law regulating arbitrator disclosure. Canon II(A)(4).

California Code of Civil Procedure §§1281.9 (“Neutral arbitrators; disclosure of information; disqualification; waiver”) and 1281.91 (“Disqualification of neutral arbitrators”).

California Code of Civil Procedure §1281.85 (“Ethical standards applicable to neutral arbitrators”).

* + - 1. “Arbitrators must comply with the Code of Ethics for Arbitrators in Commercial Disputes posted on AHLA’s website.” Rule 4.1(b), AHLA DR Service, Rules of Procedure for Arbitration.
      2. Arbitrators, parties and their representatives “shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator’s impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives.” R-17(a), AAA Commercial Arbitration Rules (2013).
    1. The arbitrator’s duty to disclose also includes disclosure of “any such relations involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts.” Cannon II(A)(2).
    2. “Within five (5) days after receiving an offer of appointment from the Administrator, a candidate who has been selected must complete the Arbitration Disclosure Checklist and decide whether or not to accept the appointment.” AHLA Rules of Procedure for Arbitration Rule 3.3 (hereinafter “AHLA Rule \_\_\_”).
    3. When a panel is required, “All three (3) arbitrators are presumed to be neutral.” AHLA Rule 3.5.
  1. **Conflicts of Interest defined.**
     1. Model Rules of Professional Conduct.
        1. Conflicts of Interest exists if:
           1. “The representation of one client will be directly adverse to another client.” Rule 1.7(a)(1).[[1]](#footnote-1)
           2. “There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.” Rule 1.7(a)(2).[[2]](#footnote-2)

* + - * 1. “Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.” Rule 7.1(b).

* + - * 1. With some exceptions “While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 . . .” Rule 1.10(a).[[3]](#footnote-3)

Exceptions in Model Rule 1.10(a)(1)-(2)are **very** narrow

The prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm, or

The prohibition is based upon Rule 1.9(a) or (b) [former client rules] and arises out of the disqualified lawyer’s association with a prior firm, and

The disqualified lawyer is timely screened . . . and is apportioned no part of the fee therefrom; written notice is promptly given to any affected former client; and certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm . . .

* 1. **Differences between Disclosures and Conflicts of Interest.**

|  |  |
| --- | --- |
| **Disclosures** | **Conflicts** |
| Focuses on the participants in the arbitration process: the parties, party representatives, co-arbitrators, and witnesses | Focuses on the representation of multiple clients |
| Continuing obligation to disclose throughout the entire arbitration | Initial determination at the beginning of the representation of clients |
| Relationships and interest-centered | Client centered |
| Analysis by the arbitration parties | Initial analysis by the lawyers |

* 1. **Model Rules of Professional Responsibility.**
     1. 1.7-1.12 Conflicts of Interest rules.
  2. **Law firm relationships and the attribution rule.**

* + 1. Opinion 90-357 (DM 179840) (JAC Letter 179801)
       1. “ABA Formal Opinion 90-357 (the “Opinion”) purports to apply to **all** “of counsel” relationships.[[4]](#footnote-4)

* + - 1. The “central, and defining, characteristic” of the “of counsel” relationship is a “close, regular, personal relationship” but neither that of a “partner (or its equivalent, a principal of a professional corporation),” nor, on the other hand, “the status ordinarily conveyed by the term ‘associate,’ which is to say a junior non-partner lawyer, regularly employed by the firm.”[[5]](#footnote-5)

* + - 1. The Opinion lists four relationships in which “it is **not ethically permissible** to use the term ‘of counsel’ to designate the relationship: (i) “a relationship involving only an individual case”; (ii) “a relationship of forwarder or receiver of legal business”; (iii) “a relationship involving only occasional collaborative efforts among otherwise unrelated lawyers or firms”; and (iv) “the relationship of an outside consultant.”[[6]](#footnote-6)

* + - 1. The “of counsel” relationship “clearly means that the lawyer is ‘associated’ with each firm with which the lawyer is of counsel.”[[7]](#footnote-7)
      2. This means that “there is attribution to the lawyer who is of counsel of all the disqualifications of each firm” (with which the lawyer is ‘of counsel’) and “attribution from the of counsel lawyer to each firm,” of each of the ‘of counsel’ lawyer’s disqualifications.[[8]](#footnote-8)

* + - 1. This means that if an ‘of counsel’ lawyer was so related to more than one firm at the same time, “the effect of two or more firms sharing an of counsel lawyer is to make them all effectively a single firm, for purposes of attribution of disqualifications.”[[9]](#footnote-9)

* + - 1. The attribution rules are stated in the Texas Disciplinary Rules of Professional Conduct at 1.06(f), 1.09(b), 1.10(b), and 1.11(c), which dictates “that an of counsel lawyer (or firm) is ‘associated in’ and has an ‘association with’ the firm (or firms) to which the lawyer is of counsel,” for purposes of [the attribution rules in TDRPC 1.06(f), 1.09(b), 1.10(b), and 1.11(c)].[[10]](#footnote-10)”

* + 1. *Amoco D.T. Co. v. Occidental Petroleum,* 343 S.W.3d 837 (Tex. App—Houston [14th Dist.] 2011), pet. denied.

1. **Arbitrator disclosures are statutorily mandated.**
   1. FAA.
      1. 9 U.S.C. §§ 2, 10(a)(2)
      2. Disclosures for Arbitrators in Domestic Commercial Disputes: A Checklist, ABA 2009, available at <https://www.americanbar.org/content/dam/aba/migrated/dispute/docs/DisclosureChecklist.authcheckdam.pdf>
   2. UAA of 1955 does not discuss disclosures, this was changed in the 2000 revisions.
   3. RUAA (2000).
      1. Section 12: “[A]n arbitrator, after making a reasonable inquiry, shall disclose … any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator …”
      2. Arbitrators have a continuing obligation to disclose.
      3. If the arbitrator fails to timely disclose, the court may vacate an award under Section 23(a)(2) [evident partiality, corruption, or arbitrator misconduct].
      4. States that have adopted the RUAA.

* + - 1. Twenty (20) states and the District of Columbia have adopted the RUAA,
         1. Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Hawaii, Kansas, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, Washington, and West Virginia.
      2. Three (3) other states are in various stages of adopting it (Pennsylvania, Massachusetts, and Vermont).
      3. Notably, California, New York, Texas, and Delaware have not adopted the RUAA.

* 1. California Code of Civil Procedure §§ 1280 et. seq (Cal. Arb. Act).
     1. Written disclosures within 10 days after being proposed as an arbitrator. § 1281.9(b).
     2. “ . . . the proposed neutral arbitrator shall disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial.” § 1281.9(a)
        1. Scope of disclosures in § 1281.9(a)(1)-(6).
     3. “A proposed neutral arbitrator shall be disqualified if he or she fails to comply with Section 1281.9 . . .” § 1281.91(a)

1. **Arbitrator disclosures are ethically mandated.**
   1. Code of Ethics for Arbitrators in Commercial Disputes (effective March 1, 2004), Canon II.
      1. “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.” Canon I (G).
      2. **Canon II. “An Arbitrator Should Disclose Any Interest Or Relationship Likely To Affect Impartiality Or Which Might Create An Appearance Of Partiality.”**
      3. At request to serve as arbitrator, that person “should make a reasonable effort to inform themselves of any interests or relationships described in paragraph A [II (A)(1)-(4)].” Canon II (B).
      4. The obligation to disclose “is a continuing duty.” Canon II (C).
      5. “Any doubt as to whether or not [to disclose] should be resolved in favor of disclosure.” Canon II (D).
      6. Disclosure required of party-appointed arbitrators who are presumed neutral. Canon IX(A).
      7. Disclosure required of party-appointed arbitrators who are deemed non-neutral. Canon X(B).
   2. ALHA Rules have adopted the Code of Ethics for Arbitrators in Commercial Disputes. AHLA Rule 4.1(b).
   3. CPR’s Model Rule for the Lawyer as Third-Party Neutral (“Proposed New Model Rule of Professional Conduct,” Rule 4.5 (“The Lawyer as Third-Party Neutral”).
      1. Rule 4.5.3 (“Impartiality”).
      2. Rule 4.5.3(b)(1) requires disclosure by the arbitrator “to the parties all circumstances, reasonably known to the lawyer, why the lawyer might not be perceived to be impartial,” with detailed listing of matters to be disclosed.
         1. “(i) any financial or personal interest in the outcome,”
         2. “(ii) any existing or past financial, business, professional, family or social relationship with any of the parties, including, but not limited to any prior representation of any of the parties, their counsel and witnesses, or service as an ADR neutral for any of the parties,”
         3. “(iii) any other source of bias or prejudice concerning a person or institution which is likely to affect impartiality or which might reasonably create an appearance of partiality or bias, and”
         4. “(iv) any other disclosures required of the lawyer by law or contract.”
      3. Rule 4.5.3(c): “All disclosures under (b) extend to those of the lawyer, members of his or her immediate family, his or her current employer, partners or business associates.”
   4. **California Ethics Standards for Neutral Arbitrators in Contractual Arbitration (**<https://www.courts.ca.gov/documents/ethics_standards_neutral_arbitrators.pdf)/>
      1. **Standard 7: Disclosures**
      2. **Standard 8: Additional Disclosures in Consumer Arbitrations Administered by a Provider Organization**
      3. **Standard 9: Arbitrators’ Duty to Inform Themselves About Matters to be Disclosed**
      4. **Standard 10: Disqualification**
2. **Arbitrator disclosures are required by numerous arbitration rules promulgated by arbitral institutions.**
   1. AHLA Dispute Resolution Services Rules of Procedure for Arbitration.
      1. R-3.2(e) describes “Ineligible Candidates” for the AHLA “Appointment Process” and states: “A candidate is ineligible to arbitrate a claim only if it would be unethical or impossible for him or her to do so.”
      2. R-3.5 also states: “All three (3) arbitrators [appointed to a panel] are presumed to be neutral.”
      3. R-4.1(b) (“Ethics”) states: “Arbitrators must comply with the Code of Ethics for Arbitrators in Commercial Disputes posted on AHLA’s website.”
      4. R-4.5 (“Removing an Arbitrator”) states: “A party who believes an arbitrator is unfit to serve because of a conflict of interest, a mental or physical impairment, or conduct that calls his or her fairness or impartiality into question, may pursue the following options: [with three subsections on “Unanimous Consent”; “Withdrawal”; and “Removal.”
      5. R-4.4 (Review Board)
         1. The Review Board (RB) and its designated Review Panel(s) will rule on petitions to remove an arbitrator under Rule 4.5
   2. AAA Commercial Arbitration Rules.
      1. R-17 Disclosure
      2. R-18 Disqualification of an Arbitrator

* 1. AAA Employment Arbitration Rules.
     1. R-15 Disclosures
     2. R-16 Disqualification of an Arbitrator
  2. JAMS Comprehensive Arbitration Rules.
     1. R-15(h)-(i) Disclosures and challenges of the Arbitrator

* 1. CPR Administered Arbitration Rules (effective date March 1, 2019)
     1. R-7.3 General disclosures for arbitrators
  2. CPR Non-Administered Arbitration Rules (effective date March 1, 2018)
     1. R-7.3 General disclosures for arbitrators

1. **Disclosures required by the parties’ arbitration agreement.**
   1. Example clause: “The neutral arbitrator shall be governed by the AAA/ABA/AHLA Code of Ethics for Arbitrators in Commercial Disputes (effective March 1, 2004).”
2. **Arbitrator disclosures and “evident partiality” as applied by the various federal circuits.**
   1. 9 U.S.C. § 10(a)(2) grounds for vacatur.
   2. Circuit Split on Evident Partiality.

* + 1. “A reasonable impression of partiality”
       1. 5th, 8th, 9th, 10th, 11th federal circuit courts, and the state of Texas.
    2. “A reasonable person would have to conclude that an arbitrator was partial to one party to an arbitration.”
       1. 1st, 2nd, 3rd, 4th, 6th, 7th federal circuit courts.
    3. DC Circuit has discussed the issue but has so far refused to decide what constitutes “evident partiality.”

1. **Arbitrator disclosure methods and practices.**
   1. Lists and spreadsheets.
      1. Headings for arbitration list spreadsheet.
      2. The arbitrator has a duty to investigate for disclosures.

* 1. Duty and continuing duty to investigate for conflicts and disclosures.

* + 1. Code of Ethics for Arbitrators in Commercial Disputes
       1. Canon II (C) “The obligation to disclose interests or relationships . . . 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.”
    2. AAA Commercial Rules.
       1. R-17(a) “Such obligation shall remain in effect throughout the arbitration.”
  1. Scope of investigation.
     1. CPR Model Rule 4.5.3(b)(1) describes scope of disclosure to be made.
     2. Code of Ethics for Arbitrators in Commercial Disputes at Canon II (A) (1)-(4) describes cope of disclosures to be made.
  2. The default rule – “when in doubt disclose!”
     1. “We encourage full disclosure from arbitrators, while acknowledging that the very nature of the tripartite arbitrator system indicates to all that some relationship exists between each party and his or her appointed arbitrator. The parties to an **arbitration** have agreed to settle their dispute without a judge; judicial economy dictates that our interference be limited to instances that we deem appropriate. That said, we remind and encourage all party-appointed arbitrators: **When in doubt, disclose**.” *McGinity v. Pawtucket Mut. Ins. Co.*, 899 A.2d 504, 509 (R.I. 2006).

1. **Arbitrator disclosure procedures.**
   1. Administered arbitrations.
      1. AHLA Rules of Procedure for Arbitration, R-3.3 (Arbitration Disclosure Checklist).
      2. AAA Commercial Rules, R-17 and R-18.
      3. JAMS Comprehensive Arbitration Rules & Procedures, R-15(h)(i).
   2. Private, ad hoc arbitrations.
      1. CPR Non-administered Rules R-7 (Qualifications, Challenges and Replacement of Arbitrators)
         1. R-7.3 Disclosures
         2. R-7.4-7.8 Challenges to the Arbitrator
2. **Conclusions.**
   1. Contrary to popular belief, conflicts of interest and mandatory disclosures are not the same thing. It is your job to disclose both.
   2. Conflicts are about client relationships and disclosures are about any relationship or interest with the participants of the proceedings.
   3. Conflicts for one firm attorney are imputed to all other attorneys in the firm subject to very narrow exceptions.
   4. Disclosures are mandated by statutes, ethical rules, arbitration rules, and often the parties’ agreement itself.
   5. Disclosures are an ongoing obligation.
   6. When in doubt, disclose!

* 1. Arbitrators in the U.S. are required to make both conflicts of interest and disclosure of relationships and interest investigations when first appointed.
  2. This investigation for disclosures must be reasonable and should include the maintenance of good records on all arbitrations in which the arbitrator has participated in the past.
  3. Failure to reasonably investigate and report conflicts and disclosures means an award issued by the non-disclosing or faulty disclosing arbitrator is subject to vacatur for “evident partiality.”
  4. “Evident partiality” is **not** “evident” but something less than “evident.” It is “a reasonable impression” by “a reasonable person.”

* 1. The failure-to-disclose cases say that the mere fact of a failure to disclose constitutes some evidence of “evident partiality.”

1. Texas Disciplinary Rules of Professional Conduct Rule 1.06(a) [↑](#footnote-ref-1)
2. Texas Disciplinary Rules of Professional Conduct Rule 1.06(b)(2). [↑](#footnote-ref-2)
3. Texas Disciplinary Rules of Professional Conduct Rule 1.06(b)(1), (f). [↑](#footnote-ref-3)
4. Page 2, second full paragraph. [↑](#footnote-ref-4)
5. Page 2, second full paragraph. [↑](#footnote-ref-5)
6. Page 2, last full paragraph. [↑](#footnote-ref-6)
7. Page 3, second full paragraph. [↑](#footnote-ref-7)
8. Page 3, second full paragraph. [↑](#footnote-ref-8)
9. Page 3, second full paragraph. [↑](#footnote-ref-9)
10. Page 4, first full paragraph. [↑](#footnote-ref-10)