



Ethical standards for neutral and party-appointed arbitrators

MOST PI ARBITRATIONS ARE CONDUCTED BEFORE A SINGLE NEUTRAL ARBITRATOR, WHEREAS PREDISPUTE ARBITRATION AGREEMENTS REQUIRE A PANEL OF THREE NEUTRAL ARBITRATORS; THE ETHICAL STANDARDS ARE DIFFERENT

Arbitrators can be categorized as neutral or party-appointed. The distinctions and their ethical duties are discussed in this article. Generally, categorization of arbitrators is as follows: 1) Single neutral arbitrator; 2) Panel of three neutral arbitrators; 3) Panel with a single neutral arbitrator and two party-appointed arbitrators.

Before the ethical duties of a party-appointed arbitrator can be discussed, it is necessary to explain the basic ethical requirements for a single *neutral* arbitrator or a *panel of neutral* arbitrators.

Single *neutral* arbitrator

Most personal injury arbitrations are conducted before a single neutral arbitrator. Some arbitrations requiring a single neutral arbitrator are set by statute, such as an uninsured or underinsured motorist arbitration. (Ins. Code, § 11580.2, subd. (f).) Others are required by a predispute arbitration agreement or by an agreement made during an ongoing dispute. Unless the arbitration agreement otherwise states, “The arbitration shall be by a single neutral arbitrator.” (Code Civ. Proc., § 1282, subd. (a).)

Regardless of how a single neutral arbitrator is appointed or selected by the parties, the neutral arbitrator, upon selection, has several “conflict” disclosure requirements. These disclosure requirements continue through the arbitration hearing and award. Failure of disclosure by a selected neutral arbitrator can be a basis for his/her *disqualification*, (*Honeycutt v. JP Morgan Chase* (2018) 25 Cal.App.5th 909) or *vacation* of an award. (*Gray v. Chiu* (2013) 212 Cal.App.4th 1355.) Ethical requirements for a single neutral arbitrator, including disclosure requirements, are:

- **Ethics Standards for Neutral Arbitrators in Contractual Arbitrations** (hereinafter “Standards”) have been promulgated by the California Judicial Council, as required by Code Civ. Proc., § 1281.85. The Standards are part of the California Rules of Court, but stand alone in the rule book. There are 17 Standards, with the most important being Standard 2, *Definitions*, Standard 7, *Disclosures*, and Standard 10, *Disqualification*. The Standards can be found at www.courts.ca.gov.

- **Code Civ. Proc., § 1281.85** requires *neutral* arbitrators to comply with the Standards.

- **Code Civ. Proc., § 1281.9** is another set of neutral arbitrator disclosure requirements, with some mirroring the Standards.



- **Code Civ. Proc., § 170.1** sets forth grounds for disqualification of a judicial officer, and violation of those grounds by a neutral arbitrator is a basis for disqualification.
- **Code Civ. Proc., § 1281.91** disqualification procedures.
- **Code Civ. Proc., § 1281.92** sets forth prohibited activities by a private arbitration company (PAC), such as JAMS, that may cause the disqualification of a neutral arbitrator on the PAC’s panel. (Also see Standard 8.)

Panel of *three neutral* arbitrators

Many predispute arbitration agreements require a panel of three neutral arbitrators. The ethical disclosure requirements set out above for a single neutral arbitrator have application to *each* of the three neutral panel members. The procedure for the appointment of the tribunal is typically set forth in the contract. If not, a court petition pursuant to Code of Civil Procedure

See Fields, Next Page

section 1281.6, may be the sole solution to obtaining the panel.

Unless the arbitration agreement provides otherwise, duties for a three-neutral arbitrator panel are set forth in Code of Civil Procedure section 1282, subdivision (c). That section provides: (1) a majority of the neutral arbitrators may exercise the powers and duties of a neutral arbitrator; or (2) by unanimous approval of the panel, the powers and duties for conduction of the arbitration can be delegated to one of them, with some exceptions.

Typically, the arbitration hearing is conducted by a delegated single neutral, but motions for summary judgment and other dispositive issues are conducted by the entire panel. If no neutral arbitrator is delegated to conduct the arbitration process, those powers and duties are then exercised by majority vote of the tribunal.

Panel of a *single neutral* arbitrator and *two party-designated* arbitrators

This section of the article concerns the ethical requirements of a party-designated arbitrator, commonly referred to as a “party arbitrator.” Typically, an arbitration agreement that requires a three-party arbitration panel will state whether each party is to select a person to act as its party arbitrator.

Defining the “party arbitrator”

- “[A]rbitrators representing the parties should be designated ‘party arbitrators.’” (See 3 Cal.Law Revision Comm.Rep. (1960) p. G-42, as set forth in *Good v. Kaiser* (1984) 152 Cal.App.3d 819, 822-823.)
- Standard 2, section (q), defines “party arbitrator” as an “arbitrator selected unilaterally by a party.”
- Rules for Kaiser Permanente Member Arbitrations, Section A.4., states: “The term ‘Party Arbitrator’ means an Arbitrator selected by one of the sides to the arbitration.” On page 20 of the rules, Kaiser provides: “Party arbitrators are used when the claimant or Kaiser prefer to have three arbitrators decide the case rather than the neutral arbitrator alone.” Note that Kaiser defines “neutral

arbitrator,” as “any Arbitrator other than a ‘Party Arbitrator.’” (Kaiser rule 5.) (Kaiser rules are available at OIA-Kaiserarb.com)

- Canon IX, section B, of the Code of Ethics for Arbitrators in Commercial Disputes, Effective March 1, 2004, jointly promulgated by the American Bar Association (ABA) and the American Arbitration Association (AAA) uses the term “party-appointed arbitrator.” (Available at adr.org arbitration code of ethics.)

Kaiser predispute arbitration agreements requiring party arbitrators

Predispute arbitration agreements usually set forth the requirements for selection of arbitrators. Kaiser’s agreement, for example, requires party arbitrators to be appointed by *each side*. (Kaiser rule 14.b.) Kaiser’s “Code of Ethics” requires designated party arbitrators to follow the ethical requirements of the “AAA Code of Ethics (Canons) for Arbitrators in Commercial Disputes” (discussed below). (Kaiser rule 4.)

Note that Kaiser rules provide for Kaiser to pay the entire neutral arbitrator’s fee, *if* the parties waive in writing the utilization of party arbitrators. (Kaiser rules 13, 14, 15 and 22.) This writer recommends waiving party arbitrators for small cases, which means there is no neutral or party arbitrator fee to pay. For substantial cases against Kaiser, this writer prefers to use a party arbitrator with whom discussions can be had, although the neutral arbitrator’s fees will then be equally shared and each party will have to pay their party arbitrator’s fee.

International commercial arbitrations requiring party arbitrators

An international commercial arbitration is another example of a tripartite arbitration panel use, with a single neutral arbitrator and a party arbitrator chosen by each party. International commercial arbitrations are controlled by Code of Civil Procedure sections 1297.11 et seq., and several international convention rules. The Code of Civil Procedure provides

arbitrator selection rules for international commercial arbitrations: “The parties may agree on the number of arbitrators. Otherwise, there shall be one arbitrator.” (Code Civ. Proc., § 1297.101.) “[I]n an arbitration with three arbitrators and two parties, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator.” (Code Civ. Proc., § 1297.113.)

Whether a party-selected arbitrator for an international commercial arbitration acts as an advocate is a matter of debate. Most writers suggest that a selected party arbitrator for international commercial arbitrations is expected to be *sympathetic* to the designating party *but not act as an advocate* during the arbitration proceedings. An argument otherwise can be found in the decision of *Certain Underwriting Members of Lloyds of London v. Florida* (2nd Cir. 2018) 892 F.3d 501, 509-511, where the contract provided for the appointment of an umpire selected by two party arbitrators. In essence, the court found that party-designated arbitrators should disclose certain relationships with the appointing party, but willful failure of disclosures by a party arbitrator will not necessarily overturn an award.

Advocacy and predisposition of party arbitrators

1) Contract requirement: Unless specified by contract, a party arbitrator is *not* a designated neutral arbitrator. If the contract requires a party arbitrator to be “neutral,” these party-neutral arbitrators are not advocates and have the same disclosure requirements as a mutually selected neutral arbitrator.

2) Law Review Commission: In California, party arbitrators have long been considered advocates for the appointing party, with a predisposition for that party’s position. The California Law Revision Commission made the hereinbelow findings concerning the expected advocacy of a party arbitrator, as set forth in *Good v. Kaiser Foundation Hospital* (1984) 152 Cal.App.3d 819, 822-823:

See Fields, Next Page

When a tripartite arbitration board is appointed, it is usually composed of a representative of each of the contending parties and a third arbitrator chosen by the other two or by some other pre-determined procedure. The third arbitrator, who is the neutral arbitrator, often acts as the chairman of the board. *In this type of arbitration only the neutral arbitrator is an impartial party and an arbitrator in the usual sense. The arbitrators representing the parties frequently behave more like advocates than arbitrators.* The practice of referring to ‘arbitrator’ as including both the party arbitrators and the neutral arbitrators leads to confusion as to their functions and responsibilities....

It is suggested that California should distinguish the arbitrators by their titles. The arbitrator appointed by both parties, or by the two arbitrators chosen by the parties, ... should be designated the ‘neutral arbitrator’ and ... [t]he arbitrators representing the parties should be designated ‘party arbitrators.’ Such designations will clearly identify the role of each of the appointees. (3 Cal.Law Revision Comm.Rep. (1960) p. G-42; emphasis added.)

3) Standards: The Standards, mentioned above, require *neutral* arbitrators to disclose conflicts and follow specified ethical rules. Those Standards have no application to non-neutral party arbitrators. The Standards that exclude party arbitrators from adhering to the neutral arbitrator Standards are:

- Standard 2, subd. (q), defining “party arbitrator” as “an arbitrator selected unilaterally by a party.”; and
- Standard 3, subd. (b)(1) stating: “These standards [for neutral arbitrators] do not apply to: (1) Party arbitrators, as defined in these standards ...” (Bracket added.)

4) Canons of ethics: On March 1, 2004, the ABA and AAA jointly prepared “The Code of Ethics for Arbitrators in Commercial Disputes.” The code has 10 “Canons” of ethics rules. They are enumerated in Canons I through X.

(Available at adr.org arbitration code of ethics.)

The Canons primarily establish ethical rules for neutral arbitrators, and they specifically exclude a *non-neutral* party-appointed arbitrator from following the neutral arbitrator ethical rules. It is recommended the reader reviews Canons IX and X, regarding a party arbitrator’s limited ethical requirements. Those requirements are summarized, as follows:

- Canon IX, B.: Explains that party-appointed arbitrators, not designated as neutrals, may be predisposed toward the party appointing them and they are not required to meet standards of neutrality.
- Canon X: Specifically excludes a non-neutral, party-appointed arbitrator from observing the ethics rules for neutral arbitrators. “Exemptions for arbitrators appointed by one party are not subject to rules of neutrality.”
- Canon X: Sets out several ethical rules for the party arbitrator. The most important rules:
 - o allow the party arbitrator to be predisposed toward the party who made the appointment, but in all other respects they are to act in good faith, with fairness and integrity;
 - o require disclosure to the opposing party and to the other arbitrators certain past relationships with the appointing party;
 - o allow consultations with the appointing party;
 - o require disclosure to the opposing party and the other arbitrators whether there will be communications between the appointing party and designated party arbitrator during the arbitration process and whether there had been prearbitration communications; and
 - o restrict disclosures of facts discussed during arbitrator panel deliberations, matters that are taken under consideration by the panel of arbitrators, and any interim or final decision of the arbitration panel prior to promulgation to all parties.

Knowledge of the Canons for party arbitrators is important, because several PACs require its compliance for non-

neutral, party-appointed arbitrators. For example, Kaiser’s rule A.4. states: “All party arbitrators shall comply with the AAA Code of Ethics for Arbitrators in Commercial Disputes.”

5) Cases: Cases holding non-neutral, party-selected arbitrators can advocate for the hiring party are:

- *Tipton v. Systron Donner Corp.* (1979) 99 Cal.App.3d 501, 506, finding that if the parties intended their party-selected arbitrators be impartial, that would have been stated in the arbitration contract;
- *Dinong v. Superior Court* (1981) 120 Cal.App.3d 300, 303, held the contract between the parties includes no requirement of neutrality or impartiality. Instead, the contract gives each party an unqualified right to nominate anyone as an arbitrator.
- *Painters Dist. Council No. 33 v. Moen* (1982) 128 Cal.App.3d 1032, 1040, finding there is no requirement that party-appointed arbitrators be neutral or impartial, as long as equal representation of partiality is given to each side of the dispute.
- *Good v. Kaiser Foundation Hospital* (1984) 152 Cal.App.3d 819, 822-823, finding application of the Law Revision Committee Report (set out above) to be applicable to the facts of the case.
- *Tate v. Saratoga Savings & Loan Assn.* (1989) 216 Cal.App.3d 43 (abrogated on other grounds by, *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362) held “... bias in a party arbitrator is expected and furnishes no ground for vacating an arbitration award, unless it amounts to ‘corruption.’ (Section 1286.2).”
- In a non-California case, a party arbitrator *ethically* acted as a true advocate for the retaining party with ongoing consulting, prehearing preparation, asking questions of witnesses and communication during deliberations. (See *Delta Mine Holding Co. v. AFC Coal Properties, Inc.* (8th Cir. 2001) 280 F.3d 815, 822; also see *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.* (11th Cir. 1993) 10 F.3d 753, 759.)

See Fields, Next Page

For an interesting holding on failure to disclose by a neutral arbitrator, see *Neaman v. Kaiser Foundation Hospital* (1992) 9 Cal.App.4th 1170l. In that Kaiser arbitration case, the neutral arbitrator failed to disclose prior retention by Kaiser as a party arbitrator. Such nondisclosure creates an impression of possible bias and constitutes legal cause for vacating the arbitration award.

For an interesting appellate decision finding party arbitrator corruption, see *Maaso v. Signer* (2012) 203 Cal.App.4th 362. Details of the *Maaso* case are discussed in the article written by John Blumberg, entitled "Post-arbitration award procedures," published in this issue.

Party arbitrator fees

Unless the contract provides otherwise, party arbitrator fees are to be paid by the retaining party. (*Turner v. Superior Court* (1998) 67 Cal.App.4th 1432.)

Party-named appraisers

Under Insurance Code section 2071, party-named appraisers are appointed when there is a dispute over property damage value. If the two party-named appraisers are unable to come to a value of the property damage, they select a disinterested umpire. The disinterested umpire acts as a neutral arbitrator and the party-named appraisers act as party arbitrators in an informal setting.

Conclusion and recommendation

Ethical requirements for neutral arbitrators are established by several statutes, standards and recognized canons. Violation of set-forth ethics rules can cause a disqualification of the neutral arbitrator or be the basis for vacation of an award.

For decades in California, party arbitrators have been considered advocates for the appointing party, with few ethical parameters. Whether this

practice will continue has been a matter of debate by scholars. For that reason, it is recommended arbitration parties confirm in writing the ethics requirements for party arbitrators before they are designated.

For nearly three decades, Mr. Fields authored, contributed and edited several books and articles on arbitration and mediation, in addition to being an arbitrator and mediator. He has lectured on those topics several times at CAALA's seminars and programs presented by other bar associations. He was CAALA's president in 2003 and the winner of CAALA's prestigious Ted Horn Memorial Award for his contributions to CAALA and the legal profession. He is the Special Editor for the November 2020 Advocate. After a 47-year trial practice, Mr. Fields retired from the active practice of law. He now serves as an independent mediator and arbitrator. He can be reached at msflb@aol.com. His website is www.michaelsfieldslaw.net.