Chapter 11

THE ARBITRATOR: QUALIFICATION, JURISDICTION, APPOINTMENT, DISCLOSURE, RESIGNATION, DISQUALIFICATION, IMMUNITY, AND ETHICS

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§ 11.1 • INTRODUCTION

The arbitrator is by far the most important component in the arbitral process: the skills, knowledge, education, experience, and temperament of the person or persons agreed upon to run the process and decide the dispute. Hence, in agreeing to arbitration and implementing arbitration, the arbitrator is the key component for a successful arbitration. That, in turn, depends upon the method of selection of the arbitrators, qualifications, and disclosures.

§ 11.2 • QUALIFICATIONS AND APPOINTMENT OF THE ARBITRATOR

§ 11.2.1—Qualifications

There are no provisions in the Colorado Revised Uniform Arbitration Act (CRUAA) or Federal Arbitration Act (FAA) defining any qualifications for a person to serve as an arbitrator. Similarly, there are no qualifications in the American Arbitration Association (AAA) rules, although arbitrators who are selected from the AAA Roster of Arbitrators, and most other arbitration service organizations, have undergone certain screening. *See* § 11.4, "Disclosures," and § 11.6, "Disqualification of Arbitrator."

However, the arbitration agreement can define the qualifications of the arbitrator. Such requirements may include a minimum age, type of education, licenses, experience, and so forth. Sometimes, particularly if the agreement to arbitrate was entered into after the dispute arose, the arbitration agreement will name a specific person to serve as the arbitrator. If the agreement to arbitrate relates to future disputes, it is much less common to see the arbitrator named, but it is done from time to time. Qualifications of and procedures for selection of the arbitrator are the most important provisions of an agreement to arbitrate.

None of the arbitration statutes mentions any requirement that the arbitrator be a lawyer or licensed to practice law. Historically, perhaps most arbitrators were not lawyers, although today most arbitrators are. The silence of the statute might be construed to mean no license is required or that the issue is left to another body, *e.g.*, the supreme court. The Philadelphia Bar Association Professional Guidance Committee held that a suspended lawyer awaiting reinstatement could act as a mediator or arbitrator, provided he or she does not give legal advice and clearly identifies himself or herself as not currently admitted to practice law.[1] *See also* Chapter 10, "Representation of Parties by Attorneys and Non-Attorneys."

Under the AAA Rules, the parties' agreed designation or method of appointing an arbitrator governs. However, in the absence of such agreement, the AAA submits to each party the identical list of proposed arbitrators from its Roster of Arbitrators. Each party can strike those arbitrators the party objects to and then number the remaining names in order of preference. The AAA then appoints the "most favored" person. Default provisions are also provided.[2]

§ 11.2.2—Agreement As To Manner Of Selection/Appointment

Arbitrators are appointed/selected in accordance with the agreement to arbitrate, including the rules the parties incorporate and any subsequent agreement of the parties.[3] A common method of appointment is for each party to appoint one arbitrator, and the two arbitrators together then appoint the

third arbitrator. On the other hand, many arbitrations cannot justify the cost of three arbitrators. Another procedure is provided by adopting the AAA Rules and following the procedures for selection set forth therein. Sometimes, the agreement may provide for appointment of the arbitrator by a judge or by a president of a bar association or other professional organization. The means of defining the appointment of the arbitrator are limited only by the imagination of the parties to the arbitration agreement.

Under the AAA Commercial Rules, where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Rule R-18 (Disqualification of Arbitrator) with respect to impartiality and independence unless the parties have specifically agreed that the party-appointed arbitrators are to be non-neutral and need not meet those standards.[4] Courts will intervene in the appointment process to compel the arbitration provider to follow the agreed-upon procedure for selection of the arbitrator.[5]

Unilateral Right of Appointment. If the arbitration agreement gives one party the unilateral right to appoint the arbitrator or arbitrators, that clause may be held to be unconscionable or to lack mutuality.

- Annot., *Validity and Effect of Arbitration Agreement Provision That, Upon One Party's Failure to Appoint Arbitrator, Controversy May Be Determined by Arbitrator Appointed by Other Party*, 47 A.L.R.2d 1346.

§ 11.2.3—Judicial Appointment

Under the CRUAA and FAA, judicial involvement in the arbitrator selection process will occur where there is an absence of a contractual method of appointment, the parties fail to agree, or there is a failure in the method prescribed by the agreement to arbitrate. Where an appointed arbitrator is unable to serve, the courts also have authority to appoint a replacement arbitrator.

§ 11.2.4—CRUAA

C.R.S. § 13-22-211 (2016), "Appointment of Arbitrator — Service as a Neutral Arbitrator," provides:

> (1) If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, the method shall be followed unless the method fails. If the parties have not agreed on a method, or the agreed method fails, or an appointed arbitrator fails to act or is unable to act and a successor has not been appointed, the court, on the motion of a party to the arbitration proceeding, shall appoint the arbitrator. An arbitrator appointed pursuant to this subsection (1) shall have all the powers of an arbitrator designated in an agreement to arbitrate or appointed pursuant to an agreed method.

§ 11.2.5—FAA

9 U.S.C. § 5, "Appointment of Arbitrators or Umpire," provides:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator

> or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

The differences under the statutes are relatively few. The federal statute does require appointment of a single arbitrator unless the agreement for arbitration provides otherwise. On the other hand, the two Colorado acts leave the decision regarding the number of arbitrators to the judge making the appointment.

Absent a provision in the arbitration agreement or incorporated rules, there are no required qualifications for a person to serve as an arbitrator.

§ 11.2.6—Effect Of Non-Compliance With Appointment Procedures

Some courts have held that an arbitration award made by an arbitrator not appointed in accordance with the procedures provided by the parties' contract must be vacated.[6]

An arbitration agreement that permitted the arbitrator appointed by one of the parties to act as sole arbitrator when the other party refused to appoint an arbitrator was upheld under the FAA.[7] The party that refused to appoint an arbitrator did so on the ground that the contract containing the arbitration clause was not valid. That party could have filed a motion to stay arbitration, or appointed its arbitrator and presented its objection.

Challenges have been made to arbitration based upon an alleged unconscionable process for selection of the arbitration panel, but generally have not succeeded.[8]

- Annot., *Validity and Effect Under State Law of Arbitration Agreement Provision for Alternative Method of Appointment of Arbitrator Where One Party Fails or Refuses to Follow Appointment Procedure Specified in Agreement*, 75 A.L.R.5th 595.
- As to under the FAA, *see* 159 A.L.R. Fed. 1.
- Annot., *Remedies of Insured Other than Direct Action on Policy Where Fire or Other Property Insurer Refuses to Comply with Policy Provisions for Appointment of Appraisers to Determine Amount of Loss*, 44 A.L.R.2d 850.
- Annot., *Validity and Effect of Arbitration Provision That, Upon One Party's Failure to Appoint Arbitrator Controversy May be Determined by Arbitrator Appointed by Other Party*, 47 A.L.R.3d 1346.

§ 11.2.7—Waiver Of Objections To Appointment

A party waives any objections to the appointment of the arbitrator, including the procedures followed for appointment, if not promptly asserted.[9]

§ 11.2.8—Procedure For Objecting To The Appointment Of The Arbitrator

There is no defined procedure for objecting to the appointment of an arbitrator, other than to assert the objection soon after learning the ground for it or risk being found to have waived the objection. Perhaps the objection should be made to the arbitrator about whom the objection is made. Perhaps

the objection should be made to the panel, if there is one, although it is uncertain that the two other arbitrators could rule. Perhaps it is best to seek a court order compelling arbitration before a properly selected arbitrator.[10]

If the arbitration is one to which AAA rules apply, the procedure is defined by those rules.

§ 11.2.9—Number Of Arbitrators

In *Dockser v. Schwartzberg*,[11] the plaintiffs contended that three arbitrators, rather than one, should be appointed to preside over the arbitration. The AAA rule then in effect provided that the arbitration should be heard and determined by one or three arbitrators, as may be agreed upon by the parties, but if unable to agree and the claim or counterclaim involved at least $1 million, then by three arbitrators. The then-applicable AAA Rule R-53 further provided that the rules should be interpreted and applied by an arbitrator or by the AAA itself. Of course, the parties may agree that the number of arbitrators will be determined by the court.

If the agreement defines the number of arbitrators, that should govern.

§ 11.2.10—Admission To The Colorado Bar

As to whether service as an arbitrator constitutes the practice of law, and whether *pro hac vice* admission is necessary, see §§ 10.6 and 10.7.

§ 11.3 • ARBITRATOR NEUTRALITY

The CRUAA, C.R.S. § 13-22-211(2) (2016) provides:

> (2) An individual who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party may not serve as an arbitrator if the agreement requires the arbitrator to be neutral.

The FAA does not have such a provision. On the other hand, in *City & County of Denver v. District Court for City & County of Denver*,[12] the Colorado Supreme Court quoted the New York Court of Appeals as to the right of the parties to agree upon the method for adjudication of their disputes, saying the case held:

> . . . that arbitration clause which named the attorney for one of the parties as the arbitrator was valid where full disclosure occurred; absent the "real possibility that injustice will result, the courts of the state will not rewrite the contract for the parties."[13]

In 2004, the American Bar Association and the American Arbitration Association promulgated a revised Code of Ethics for Arbitrators in Commercial Disputes. This Code is discussed in § 11.9.2 of this chapter. The most significant change in the Code of Ethics is the presumption stated in the Note on Neutrality and Canon IX.A that all arbitrators are neutral. Even party-appointed arbitrators are presumed to be neutral, with most of the same obligations as non-party-appointed arbitrators. This reverses the presumption contained in the 1977 Code that party-appointed arbitrators were presumed to be partial to the party appointing them.

The Code of Ethics provides in Canon IX.C that the party-appointed arbitrator should ascertain whether he or she is to serve as a neutral pursuant to the parties' agreement and inform the parties and the other arbitrators if he or she will not be acting as a neutral. Once non-neutral status is determined, the arbitrator is released from some of the provisions of Canon X of the Code of Ethics.

All arbitrators, regardless of appointment and neutral status, must disclose their interests and relationships. In addition to the time-honored disclosures of financial or personal interest in the outcome and prior knowledge of the dispute, Canons II.A and X.B require arbitrators to disclose "[a]ny known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties."

While a prospective neutral arbitrator may have *ex parte* communications with any party about the identities of parties, counsel, or witnesses and the general nature of the case and his or her suitability to serve (Canon III.B), non-neutral party-appointed arbitrators may have full communication with the appointing party except about the arbitration process.[14]

Arbitration is defined in the Colorado Dispute Resolution Act as "referral of a dispute to . . . neutral third parties."[15] However, there are numerous arbitrations wherein two of three arbitrators are not neutral. Perhaps neutrality of the third, or of a single arbitrator, is a requirement.

§ 11.3.1—Bias/Evident Partiality Of The Arbitrator

Under the FAA and CRUAA, the court may vacate an arbitration award where there was evident partiality or corruption in the arbitration. *See* § 17.4.6.

For purposes of defining "impartiality" of an appraiser, the District of Colorado[16] looked to the CRUAA, § 13-22-211, and referred to prior cases holding that "[a] individual who has a known, direct and material interest in the outcome of the appraisal proceeding or a known, existing and substantial relationship with a party is not impartial." The court also discussed prior decisions as to evident partiality under the arbitration statute.[17]

Hence, these are obvious grounds for disclosure and disqualification.

The Ninth Circuit Court of Appeals issued an order in *Fidelity Federal Bank, FSB v. Durga Ma Corp.*,[18] relating to disclosures by party-appointed arbitrators. Durga Ma claimed breach and initiated an arbitration. Under the contract provisions, each party selected an arbitrator, who, in turn, selected the third arbitrator. At the first telephone prehearing conference, both party-appointed arbitrators agreed, with the consent of the parties, to "act neutrally" when considering the evidence and rendering an award. Neither party requested a disclosure statement before or during the arbitration proceedings, and neither of the party-appointed arbitrators provided one. Neither party objected to the party-appointed arbitrators' failure to provide disclosure statements.

The arbitrators issued a unanimous award in favor of Durga Ma, and Fidelity moved to vacate the arbitration award on the ground of the arbitrator's evident partiality to Durga Ma, although Fidelity did not claim actual bias. The district court denied this motion and granted Durga Ma's motion to confirm the arbitration award. Fidelity appealed to the Ninth Circuit.

The Ninth Circuit held that Fidelity had waived its right to seek *vacatur* of the arbitration award. The FAA authorizes a district court to vacate an arbitration award "where there was evident partiality or corruption in the arbitrators, or either of them."[19] Evident partiality is present when facts that are not disclosed by an arbitrator create a "reasonable impression of partiality."[20] In non-disclosure cases, a showing of actual bias is not required.

The court found waiver in these circumstances:

> The parties selected a process for appointing arbitrators whereby each party selected its own arbitrator and the party-appointed arbitrators selected a third neutral arbitrator. The parties then chose to have the party-appointed arbitrators act neutrally or impartially. That process put Fidelity on notice that Arbitrator Leib, who was initially retained and appointed by Durga Ma as a non-neutral party-appointed arbitrator, was likely to have some personal or professional connection to Durga Ma or its attorneys.[21]

Does a party with constructive knowledge of potential partiality of an arbitrator waive its right to challenge an arbitration award based on evident partiality if it failed to object to the arbitrator's appointment or the arbitrator's failure to make disclosures until after an award was issued? Some circuits have found waiver only where the party had real, actual knowledge of the conflict. Others find a waiver if the complaining party either knew or should have known of the facts indicating partiality of an arbitrator but failed to raise an objection prior to the arbitration decision.

Interestingly, having found waiver, neither the district court nor the Ninth Circuit made any specific findings as to whether the party-appointed arbitrators were converted into neutral arbitrators for disclosure purposes.

- Annot., *Disqualification of Arbitrator by Court or Stay of Arbitration Proceedings Prior to Award, on Grounds of Interest, Bias, Prejudice, Collusion, or Fraud of Arbitrators*, 65 A.L.R.2d 755.

§ 11.3.2—Party-Appointed Arbitrators

Under AAA Commercial Rule 18(a), party-appointed arbitrators are presumed to be neutral, unless the parties otherwise agree. However, party-appointed arbitrators need not be neutral if the parties so agree.[22] When the arbitration agreement provides for party-appointed arbitrators, numerous questions arise as to the contact and communications the appointing party may have with the arbitrator it has appointed.

After the appointment, if the arbitrator is neutral, generally neither party should have *ex parte* contact with the arbitrator. However, prior to the appointment, what are the limits on *ex parte* communication? Custom defines that a party may contact its potential appointee arbitrator to determine qualifications, availability, and compensation. How much can be said about the case as background? Can the appointing party state the positions of the parties? Can hypothetical questions be asked? The ethics rules provide a start, but not much more.

§ 11.3.3—Who Determines Whether An Arbitrator Must Be Neutral?

In *Winfrey v. Simmons Food, Inc.*,[23] the contract provided that "each party shall appoint one arbitrator" and that these arbitrators "shall jointly appoint a third arbitrator." The respondent moved the court to remove the arbitrator selected by the claimant on the ground he was biased. The trial court denied the motion, ruling that the issue was for the panel to decide in the first instance. The Eighth Circuit affirmed. The panel determined that under the terms of the parties' agreement, a party-appointed arbitrator was not required to be neutral.

§ 11.4 • DISCLOSURES

Disclosure of information about an arbitrator's interest in the dispute and parties and counsel is the essence of obtaining neutral arbitrators.

See § 17.4.6, "Evident Partiality, Bias, or Corruption by the Arbitrator(s)." This ground for *vacatur* defines what disclosure is required to avoid *vacatur* based upon evident partiality of the arbitrator. *See also* § 17.4, "Grounds for Vacating the Award."

§ 11.4.1—Disclosures By An Arbitrator — Generally

Most of the "law" on what an arbitrator must disclose is found in the context of what circumstances cause an arbitrator to be disqualified and the award vacated.

At common law, an arbitrator has a duty to disclose facts and circumstances that might be construed as "evident partiality," which is a ground for vacation of an award.[24] Circumstances that may be evidence of partiality include pecuniary interest, familial relationship, a substantial business relationship with a party,[25] and an adversarial or sympathetic relationship.[26] However, in a medical malpractice arbitration, the fact that relatives of the arbitrator were health-care professionals did not establish evident partiality and did not need to be disclosed.[27]

The FAA does not have explicit disclosure requirements or grounds for arbitrator disqualification, but they can be implied from the grounds for vacating an award. The CRUAA, C.R.S. § 13-22-212(1), establishes an objective standard as to what must be disclosed: "facts that a reasonable person would consider likely to affect the impartiality of the arbitrator," including financial or personal interest in the outcome or a current or previous relationship with any of the parties, their counsel or representatives, a witness, or another arbitrator.

Failure to make required disclosures by a "neutral arbitrator" under the CRUAA creates the presumption that an arbitrator acted with "evident partiality," which, under C.R.S. § 13-22-223(1)(b)(I), is a ground for vacating an arbitration award.

Canon II of the Code of Ethics for Arbitrators in Commercial Disputes defines the disclosure that is required of arbitrators under the Code:

> An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality, [including] any known direct or indirect financial or personal interest.

The "appearance of partiality" expands the pre-2004 Code standards for disclosure. See also Canon IX as to party-appointed arbitrators, and AAA Commercial Rules of Arbitration R-13.

CRUAA

C.R.S. § 13-22-212(1) (2016), Disclosure by Arbitrator, defines what must be disclosed by an arbitrator before accepting appointment:

> (1) Before accepting an appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceedings and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:
>
> (a) A financial or personal interest in the outcome of the arbitration proceeding; and
>
> (b) A current or previous relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrator.

Under C.R.S. § 13-22-212(2) (2016), an arbitrator, once having been appointed, has a continuing obligation to disclose to all parties to the agreement to arbitrate and to the arbitration proceeding and to all other arbitrators any facts that the arbitrator learns after accepting appointment that a reasonable party would consider likely to affect the impartiality of the arbitrator.

The statute requires that the arbitrator make "reasonable inquiry" to learn of disclosable matters. Similarly, disclosure of facts learned after accepting appointment that a reasonable person would consider likely to affect the impartiality of the arbitrator is a continuing obligation. Apparently, these disclosure requirements apply both to neutral and non-neutral arbitrators. It is uncertain what record-keeping this may impose upon an arbitration.

Under C.R.S. § 13-22-212(3) (2016), if the arbitrator discloses facts required to be disclosed, and if a party timely objects to the appointment of or continued service by the arbitrator based upon such facts, and the arbitrator continues to serve, the overruled objection "may be a ground . . . for vacating an award made by an arbitrator."

Similarly, C.R.S. § 13-22-212(4) (2016) provides that if the arbitrator does not disclose a fact as required by the statute, upon timely objection by a party, the court may vacate an award. Section 13-22-212(5) provides that a "neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing and substantial relationship with a party shall be presumed to act with evident partiality," which, in turn, under C.R.S. § 13-22-223(1)(b) (2016) is a ground for vacating an arbitration award. C.R.S. § 13-22-212(6) (2016) provides that if the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a motion to vacate an award on that ground under C.R.S. § 13-22-223(1)(b). *See* discussion of AAA procedures, below.

C.R.S. § 13-22-204(1)(c) (2016) provides that prior to an actual controversy arising for resolution pursuant to an agreement to arbitrate, the parties may not agree to unreasonably restrict the right under § 13-22-212 to receive disclosures by a neutral arbitrator.

The CRUAA generally reflects the common law approach taken by the Colorado Court of Appeals in *McNaughton & Rogers v. Besser*,[28] holding that under the "evident partiality" ground for vacating an arbitration award under the CUAA:

> [A]rbitrators have a duty to disclose any potential conflict which could constitute evident partiality — that is, a relationship which would persuade a reasonable person that the arbitrator is likely to be partial to one side in the dispute. Evident partiality has been found when a reasonable person would have to conclude that an arbitrator would be predisposed to favor one party to the arbitration. Some facts indicating bias include pecuniary interest, familial relationship and the existence of an adversarial or sympathetic relationship.

Neither of the statutes has any provision for disqualification of a proposed arbitrator after he or she makes disclosures such as those required by the CRUAA. Generally, the courts will not get involved. (*See* § 11.6.1, "Pre-Award Judicial Involvement in Arbitrator Disqualification.") However, as noted above, the CRUAA does provide that if the procedures of an arbitration organization such as the American Arbitration Association provide for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a motion thereafter to vacate an award on that ground under C.R.S. § 13-22-223(1)(b).

FAA

The FAA does not define what disclosures must be made by an arbitrator and under what circumstances an arbitrator can be disqualified, or by whom. However, the provisions in the Act for vacating an arbitration award provide some guidance as to what a proposed arbitrator should disclose. For example, 9 U.S.C. § 10 defines as a ground for vacating an award, "where there was evident partiality or corruption in the arbitrators. . . ." Thus, any facts that might suggest partiality (*e.g.*, conflict of interest) ought to be revealed. The failure of a party to object to the appointment/selection of the arbitrator after disclosure probably is a waiver of the objection. *See also* C.R.S. § 13-22-223(1)(b) (2016) to the same effect.

The U.S. Supreme Court has held (plurality decision) that arbitrators must disclose any facts that might give the impression of bias.[29] In that decision, *Commonwealth Coatings Corp. v. Continental Casualty Co.*, four justices concluded that any dealings that might create an impression of possible "bias" or create "even an appearance of bias" would constitute evident partiality.[30] Two justices took a more limited approach and required disclosure of "a substantial interest in a firm that has done more than trivial business with a party."[31] The three dissenting justices suggested that failure to disclose certain relationships established a rebuttable presumption of partiality. Various courts have followed all of these tests and others. However, for some courts, violation does not mean automatic vacation of the award.

Under the FAA, an arbitrator has a duty to investigate a potential conflict or at least inform the parties that he or she is not going to investigate in order to preserve his or her neutrality.[32] Suppose the

arbitrator did not tell the parties that he or she had erected a wall of confidentiality to prevent his or her knowing information that might cause a conflict? The Second Circuit noted that "[t]he mere failure to investigate is not, by itself, sufficient to vacate an arbitration award." Rather, "when an arbitrator knows of a potential conflict, a failure to either investigate or disclose an intention not to investigate is indicative of evident partiality."[33]

AAA Rules

If the parties have agreed to apply the AAA Commercial Arbitration Rules, Rule R-16(a) provides:

> Any person appointed or to be appointed as an arbitrator, as well as the 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. Such obligation shall remain in effect throughout the arbitration. Failure on the part of a party or a representative to comply with the requirements of this rule may result in the waiver of the right to object to an arbitrator in accordance with Rule R-41.

As a qualification to such disclosures, subpart (c) of the rule provides:

> Disclosure of information pursuant to this Section R-17 is not an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence.

ABA/AAA Code of Ethics

Effective March 1, 2004, the ABA and AAA jointly promulgated The Code of Ethics for Arbitrators in Commercial Disputes. Unless adopted by the parties, this Code probably is mandated only in AAA arbitrations (and even that is uncertain). However, this Code probably will hereafter define the common law ethical standards in all arbitrations, absent some contrary agreement of the parties.

The term "commercial" is used in a very broad sense. The Code specifies in the preamble that it is intended to apply "to all . . . proceedings in which disputes or claims are submitted for decision to one or more arbitrators."

Canon II of the Code provides: "An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality." The Canon then defines in detail the disclosures to be made to implement the Canon. These include known direct or indirect financial or personal interest, and known existing or past financial, business, or personal relationships. It requires that an arbitrator make reasonable efforts to learn of disclosable matters and imposes a continuing duty to disclose. Canon X covers special ethical rules for party-appointed arbitrators.

The Rhode Island Supreme Court followed the disclosure requirements of Canon X, but refused to adopt the code of ethics disclosure requirements as law.[34]

Federal Preemption

A California federal district court held that state arbitrator disclosure standards were preempted by the FAA and Exchange Act when the parties agreed that federal law applied.[35] Perhaps there is a difference in the scope of preemption when the parties agree that federal law is applicable versus when the FAA is applicable by its terms in that the subject matter involves interstate commerce.

Colorado Rules of Professional Conduct

It is somewhat unclear whether the Colorado Rules of Professional Conduct apply to a lawyer serving as an arbitrator, but the wiser course is to assume they do, at least in part. With respect to disclosures, the equivalent rules would be the conflict of interest rules, Colo. RPC 1.7 through 1.10. Generally, these rules, if interpreted as disclosure requirements, would impose no greater duty than the other disclosure requirements, with one exception — Colo. RPC 1.10, imputation. An arbitrator practicing in a large firm would find it practically impossible to disclose all direct or indirect financial or personal interests and all existing or past financial, business, professional, or personal relationships of all lawyers in the firm with either party.

§ 11.4.2—What Should Be Disclosed

The types of disclosure in general are any facts that might be perceived as potentially causing an arbitrator to favor one side. These are generally thought of in terms of any relationship between the arbitrator, including his or her family, friends, and firm, and the parties and their counsel, including their family, friends, and firm.

However, other kinds of facts and circumstances can be perceived as more important. For example, the frequency of an arbitrator's serving in cases involving each of the counsel, or having been retained by counsel, might be perceived as relevant.

Disclosures can take on the specter of absurdity. For example, in *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*,[36] the Fifth Circuit vacated an arbitration award where the sole arbitrator had not disclosed that seven years prior he was associated as co-counsel with the law firm of one of the parties to the arbitration in "significant and protracted litigation." The court concluded that the information, had it been disclosed, could have led a party to have had a "reasonable impression of the arbitrator's partiality."[37] Fortunately, the Fifth Circuit reversed on rehearing.[38]

In sum, the factual bases of claims of non-neutrality are limitless. The emphasis should be on the quality of the proposed arbitrator, and not every fact that is perceived as potentially influencing the arbitrator. If the arbitrator selected is, in fact, subject to being biased by reason of facts not relevant to deciding the issues, the parties are on the path to an unsuccessful arbitration. Nevertheless, full disclosure will usually result in the parties' waiving all but the most severe facts of potentially perceived non-neutrality, and will avoid substantial problems during the course of and after the arbitration.

§ 11.4.3—Disclosures By A Party-Appointed Neutral Arbitrator

The ABA/AAA Code of Ethics provides that a party-appointed arbitrator, if neutral, has the same duty of disclosure as any other neutral arbitrator.

§ 11.4.4—Disclosures By Non-Neutral Arbitrators

Canon X of the ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes provides that arbitrators appointed by one party who are not neutral are expected to observe all of the ethical prescriptions of the Code, except those specifically excused by Canon X. While the Code is not binding unless adopted by the parties, or unless the arbitration is AAA-administered, it may well reflect what the courts would hold as a matter of common law.

Much of the foregoing discussion concerning disclosure applies to non-neutral party-appointed arbitrators as well as to neutral arbitrators. In *McGinity v. Pawtucket Mutual Insurance Co.*,[39] the arbitration agreement called for each party to appoint an arbitrator and for those two to select a neutral third arbitrator. It appears that the party-appointed arbitrators in fact were not neutral, although the court did not state whether they were to be neutral.

Sometime after the hearing and after the arbitrators convened to deliberate the evidence, the plaintiff learned that the arbitrator appointed by the defendant was then engaged in continuing legal representation of the defendant in other unrelated matters. The plaintiff requested that the defendant-appointed arbitrator withdraw and that a new panel be reconvened. The arbitrator did not withdraw.

Thereafter, the neutral arbitrator and the defendant-appointed arbitrator awarded the plaintiff $45,000. The plaintiff-appointed arbitrator dissented and assessed the plaintiff's damages at $636,000. The court affirmed the vacation of the award by reason of the evident partiality of the defendant-appointed arbitrator.

The court said:

- Evident partiality will be found "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration."[40]
- The party seeking a vacation of an arbitration award due to evident partiality must show a causal nexus between the arbitrator's conduct and the arbitration award.
- Evident partiality is more than the appearance of bias but less than actual bias, the test being whether a reasonable person would have to conclude that the arbitrator was partial to one party to the arbitration.
- Without deciding its applicability as such, under the ABA/AAA Code of Ethics and the sensitive nature of the attorney-client relationship, the defendant-appointed arbitrator should have disclosed his position.
- The particular nature of the attorney-client relationship, in which the attorney is duty-bound to serve as a zealous advocate for his or her client, may fulfill the causal nexus requirement or at least give rise to a rebuttal presumption.

The court refused to hold that party-appointed arbitrators be required to disclose any conflicts and that failure to do so will result in automatic vacation of the award, perhaps as implied by the Code of Ethics.

Some courts have held that non-neutral arbitrators need not make any disclosures.[41]

However, disclosure of relationships that might evidence partiality does not "cure" "evident partiality" under the vacation of award statute.[42]

That the facts that may constitute a conflict of interest are in public records probably does not excuse the arbitrator from making the disclosures.[43]

§ 11.4.5—Disclosures By The Parties And Their Attorneys

The parties and their attorneys should also have a reasonable duty of disclosure of facts and circumstances that might define a conflict of interest the arbitrator may have. All facts and circumstances that should be disclosed cannot automatically be retrieved by the press of a computer key or even recalled by the arbitrator. The appointment of an arbitrator who is neutral and has the appearance of neutrality is the obligation of all persons and entities to the arbitral process.

There are no Colorado cases defining such a duty. However, in other jurisdictions, there are decisions dealing with waiver and estoppel when parties fail to disclose their knowledge of possible conflicts.

While perhaps the primary obligation is to disclose facts or circumstances that may constitute potential conflicts or other grounds for disclosure, each of the parties and their attorneys should also be considered as having a substantial obligation to reveal relevant facts. For example, counsel for one of the parties may have had relevant dealings with the arbitrator or the arbitrator's law firm that the arbitrator does not know or does not recall. A party may have had contact or a relationship with members of the arbitrator's family, close friends, or partners. Everyone should have the obligation of full and fair disclosure.

§ 11.4.6—Arbitrator's Duty To Investigate For Possible Disclosures/Conflicts

The U.S. Supreme Court, in *Commonwealth Coatings Corp. v. Continental Casualty Co.*,[44] discussed the meaning of "evident partiality" under FAA § 10(a)(2). *See* § 17.4.6. In *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*,[45] the Second Circuit discussed the potential "arbitrator's duty to investigate or disclose potential conflicts of interest" and concluded:

> [A]rbitrators must take steps to ensure that the parties are not misled into believing that no nontrivial conflict exists. It therefore follows that where an arbitrator has reason to believe that a nontrivial conflict of interest might exist, he must (1) investigate the conflict (which may reveal information that must be disclosed . . .) or (2) disclose his reasons for believing there might be a conflict and his intention not to investigate.

The court noted that the mere failure to investigate is not, by itself, sufficient to vacate an arbitration award. Rather, when an "arbitrator knows of a potential conflict, a failure either to investigate or to disclose an intention not to investigate is indicative of evident partiality." Moreover, a wall of confidentiality may not be a substitute for investigation. The court did not define any duty to investigate for conflicts when the arbitrator of his or her own knowledge knew of no potential conflicts.

§ 11.4.7—Social/Professional Networking

There has been an explosion of internet websites for social and professional networking. Persons by a click may become "friends" with another, endorsed professionals, etc. Most users of this book will be far more familiar with these websites than is the author. Today, arbitrators frequently are "members" of various social and professional internet networks. Thus, words such as "friending" and "tweeting" may denote close relationships or may be between two people who have never met or communicated one-to-one.

The issue arises as to when and what must an arbitrator disclose as to "membership" in such websites, and which websites' "memberships" may disqualify a person from serving as an arbitrator. At this point, the case law is too limited to reach conclusions, although the general rules described above provide substantial guidance.

In addition, multiple states have issued ethics opinions as to disclosure/disqualification by reason of internet social networking.[46]

§ 11.5 • ARBITRATOR'S OATH

There is no requirement in the statutes that an arbitrator take an oath.[47]

Even though there is no requirement in the arbitration statutes that the arbitrator take an oath, the parties may so provide expressly in the arbitration agreement, or indirectly by incorporating rules that do not require, but permit, an oath.

The AAA rules do not require an oath. *See* AAA Commercial Rule R-27.

§ 11.6 • DISQUALIFICATION OF ARBITRATOR

Generally, the court does not become involved in motions to disqualify an arbitrator. Rather, the issue comes before the court upon a motion to vacate an award on statutory grounds.

Compare Colorado Code of Judicial Conduct Canon 3(C) *and* 28 U.S.C. § 455.

See Chapter 17. Certain of the grounds for vacating an award are also grounds for disqualification.

§ 11.6.1—Pre-Award Judicial Involvement In Arbitrator Disqualification

The FAA does not authorize a federal district court to remove an arbitrator appointed under a valid arbitration agreement prior to the issuance of the arbitration award.[48] Thus, the court apparently will not become involved in an arbitrator's possible bias, etc., until after the arbitrator issues an award. At that point, a party may proceed under FAA § 10. To otherwise hold might add a long delaying procedure to the arbitration process — judicial consideration of requested arbitrator disqualification. Therefore, if one party makes a potentially sound objection to an arbitrator asserting bias, it may be desirable for the other party to agree to the disqualification of the arbitrator so as to avoid a process that might at the end be for naught if the court vacates the award. If the objection is made during the course of the proceeding to newly learned and disclosed information, the risk of proceeding with one party objecting is much less: It is anticipated that in such a circumstance the court would implicitly apply a much higher standard to disqualification.

Neither the FAA nor the CRUAA has any provisions on disqualification of a person to serve as an arbitrator. In rare instances, a court may intervene when an institutional provider fails to disqualify an arbitrator in an extreme case.[49]

The U.S. District Court for the District of Utah held that under the FAA it did not have authority to disqualify an arbitrator prior to issuance of the arbitration award.[50] However, there is contrary authority.[51]

Comment: Perhaps the better approach is that the courts will intervene to consider disqualification of an arbitrator if (1) there is not an organization such as the AAA to consider the issue, at least in the first instance, or (2) the disqualification ground is apparent from undisputed evidence, or (3) in special circumstances. For example, both parties may wish the issue decided prior to the hearing. On the other hand, if on its face the disqualification claim appears highly questionable, and the party not asserting the motion wishes to proceed with the hearing and defer the issue, perhaps the court should defer consideration.

The substantial issue is that when there is no organization administering the arbitration, the arbitrator(s) must determine any motion to disqualify if presented to the arbitrator(s). If there is a panel of arbitrators, the panel can determine the motion, with, it is suggested, the arbitrator at whom the motion is directed voting and participating. If there is a single arbitrator, there is no one to defer to except to direct the parties to take the motion to court. That does not appear to be the preferred course of action. Rather, like a judge, a sole arbitrator, when presented with a motion to disqualify himself or herself, should decide the motion. When judicial review may be affirmed is another issue. If the arbitrator is not disqualified, the motion can be made to vacate the award. *See* Chapter 17.

- Annot., *Disqualification of Arbitrator by Court or Stay of Arbitration Proceedings Prior to Award, on Ground of Interest, Bias, Prejudice, Collusion, or Fraud of Arbitrators*, 65 A.L.R.2d 755.

§ 11.6.2—Provisions In The AAA Rules Relating To Disqualification

Rule 18 of the AAA Commercial Rules of Arbitration provides:

(a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for:

i. partiality or lack of independence,

ii. inability or refusal to perform his or her duties with diligence and in good faith, and

iii. any grounds for disqualification provided by applicable law.

(b) The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-13 shall be non-neutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.

(c) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, 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 decision shall be conclusive.

There are few reported judicial decisions as to disqualification by the AAA. However, in the New York decision in *Shomron v. Fuks*,[52] 18 months after commencement of the arbitration, and after preliminary and evidentiary hearings had been held and 30 orders had issued, the respondent fired her third attorney and retained a lawyer at the firm of Moses & Singer. The arbitrator disclosed that Moses & Singer was a client of the accounting firm from which he had retired. He further indicated that he did not share in the accounting firm's profits and did not know the respondent's lawyer or any other lawyer at Moses & Singer. A subsequent disclosure advised that Moses & Singer performed legal services for the accounting firm, and the law firm had engaged the accounting firm for routine accounting services and had engaged the accounting firm on behalf of an unrelated client.

The claimants objected to the respondent's being represented by Moses & Singer because of the strong ties between Moses & Singer and the accounting firm from which the arbitrator had retired. The AAA did not reject the respondent's representation by Moses & Singer (there was no rule providing for such action) but disqualified the arbitrator.

The petitioner then moved the trial court to disqualify the law firm Moses & Singer and reinstate the arbitrator. The motion was denied. The appellate court reversed, holding that "the most appropriate response to this difficult situation" was to disqualify the law firm, as Moses & Singer was a newcomer to the proceeding. The court noted the stage of the arbitration and observed that the arbitrator's résumé disclosed that the accounting firm was his past and present employer. The court rejected that it need find that the respondent engaged in arbitrator shopping to find that Moses & Singer's appearance tainted the arbitration proceeding. The respondent's new counsel knew in advance the risk of the arbitrator's removal.

From the AAA standpoint, it may be desirable to remove an arbitrator if there is the slightest hint of a basis for post-award disqualification. Here, however, vacation of 18 months of proceedings would have imposed a substantial hardship on the party not seeking disqualification. Moreover, to disqualify an arbitrator when a party obtains new counsel having a conflict opens the door for potential abuse: should one party not like the arbitrator — particularly after months of proceedings — the arbitrator can be disqualified by hiring new counsel with a conflict with the arbitrator's firm, unless perhaps the party is found guilty of forum shopping.

> ***Comment:*** While it is most important that arbitrators be neutral, the pursuit of that objective may result in the opposite. For example, the disqualifying agency (*e.g.*, AAA) may disqualify an arbitrator upon objection when the law would not require disqualification, simply to avoid any issue after award about neutrality — avoid the battle and potential post-arbitration issue, as there are many other arbitrators available.
>
> On the other hand, taking a minimalistic grounds approach to disqualification, a party may use disqualification objections to remove an arbitrator who he or she feels might unconsciously or philosophically be more unfavorable to the party's cause.[53]

- *Annot.*, *Validity and Effect Under Federal Arbitration Act (9 U.S.C.A. §§ 1 et seq.) of Arbitration Agreement Provision for Alternative Method of Appointment of Arbitrator Where One Party Fails or Refuses to Follow Appointment Procedure Specified in Agreement*, 159 A.L.R. Fed. 1. See also 75 A.L.R.5th 595 for same topic under state law.

§ 11.6.3—Rules After Disqualification

The AAA rules provide the procedures for replacing the arbitrator. So too the statutes.

§ 11.6.4—Timing Of Request For Disqualification

If a party is going to request that an arbitrator be disqualified (including a request to the arbitrator himself or herself), it should be done immediately upon learning the facts supporting the request. No party should have the opportunity to "try out" the arbitrator or see the award before requesting disqualification: disqualification should not be permitted silently to become a means of terminating what a party comes to see as an unfavorable arbitrator. The doctrine of waiver applies to objections to the services of an arbitrator.[54]

None of the arbitration statutes has any provision for disqualification of an arbitrator. Obviously, an arbitrator may withdraw. However, if one party asserts that an arbitrator ought to be disqualified, there is no procedure or mechanism. Perhaps the courts have common law authority. Otherwise, the remedy is the motion to vacate the award.

On the other hand, the AAA has extensive rules providing for motions to disqualify at any time. The AAA determines the request.

§ 11.6.5—Disqualification Of A Party-Appointed Neutral Arbitrator

Assuming a party-appointed arbitrator is neutral, can the arbitrator be disqualified because of an interest, relationship, or circumstance? Is the right of the party appointing the arbitrator absolute?

There are no Colorado reported decisions on the issue. The statute defining the grounds for which a judge may be disqualified, and the procedure therefor, may be of assistance. *See* C.R.S. § 16-6-201.

§ 11.6.6—Who Determines Disqualification?

One court has held that an arbitration administrator should determine objections to an arbitrator when the rules so provide.[55] AAA rules provide that the AAA determines motions to disqualify.

If it is a non-administered arbitration, it becomes a bit more difficult. If there is a panel of three, a majority can determine the motion. If there is only one arbitrator, he or she can determine his or her own disqualification.

Is there any role for the court? Initial determination of motion? Appeal of arbitrators or arbitration administration? Possibly. *See* § 11.6.8.

§ 11.6.7—Grounds For Disqualification

See § 11.6.2.

Judicial recusal under 28 U.S.C. § 455 requires recusal if "impartiality might reasonably be questioned." In *In re Sherman-Williams Co.*, the Seventh Circuit further defined § 455:

> In addition to being well-informed about the surrounding facts and circumstances, . . . a reasonable person is a "thoughtful observer rather than a hypersensitive or unduly suspicious person." Finally, a reasonable person is able to appreciate the significance of the facts in light of relevant legal standards and judicial practice and can discern whether any appearance of impropriety is merely an illusion.[56]

§ 11.6.8—Procedures To Disqualify Arbitrator

Generally, motions to disqualify the arbitrator can be made only to the administrator of the arbitration, or if it is a non-administered arbitration, only to the arbitrator himself or herself. Generally, a court will not entertain an attack on the partiality of the arbitrator until after the rendition of the award.[57]

Administered Arbitration

If the arbitration is being administered, *e.g.*, by the AAA, motions to disqualify an arbitrator normally are submitted to the administrator, typically without notice to the arbitrator, particularly as to by whom the motion was filed. The administrator may request the arbitrator to suspend proceedings pending determination of the motion.

Once the administrator determines the motion, are there any grounds for "appeal"? If the motion is denied, perhaps a motion to enjoin the arbitration can be filed, and thereby some limited, deferential review of the denial may be obtained. If the motion is granted, query the procedure for any review. Generally, review would be pursued only if the hearing had already been conducted in whole or in part.

Non-Administered Arbitration

If the arbitration is non-administered, the motion to disqualify should be made to the arbitrator or panel of arbitrators. Thus, procedurally, the steps would be approximately the same as for a motion to disqualify a federal judge under 28 U.S.C. § 455.

§ 11.6.9—Appeals Of Grant Or Denial Of Disqualification

If the arbitrator refuses to disqualify himself or herself, perhaps an "appeal" is obtained by a motion in court to enjoin the arbitration. If the arbitrator does disqualify himself or herself, it is hard to imagine any sort of appeal.

§ 11.7 • REFUSAL, RESIGNATION, AND REPLACEMENT OF THE ARBITRATOR

§ 11.7.1—Prior To The Hearing

The FAA does not have a provision directly dealing with resignation of an arbitrator. Section 5, Appointment of Arbitrators, is applicable not only to initial appointment, but also when the agreement does not provide for filling a vacancy, or the method fails. "The court shall designate and appoint an arbitrator . . . who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein. . . ."[58] The CUAA, C.R.S. § 13-22-205 (2003), is similar to FAA § 5 and the CRUAA, C.R.S. § 13-22-211 (2016).

Dow Corning Corp. v. Safety National Casualty Corp.[59] involved Safety's party-appointed arbitrator's resignation prior to the hearing. Dow Corning asserted that the resignation terminated the

panel's authority to hear the dispute. Instead, the remaining two arbitrators ruled that Safety should appoint a substitute arbitrator, since it was Safety's appointed arbitrator who resigned. Instead of filing a motion under FAA § 5 challenging the ruling, Dow Corning agreed to proceed, but with a reservation of rights to thereafter challenge the panel's authority. The Eight Circuit viewed this procedure by Dow Corning "as a transparent attempt to preserve a threshold procedural issue in case Dow Corning eventually lost the arbitration on the merits."[60]

The court acknowledged the general rule that where one member of a three-person arbitration panel dies before the rendering of an award, and the arbitration agreement does not anticipate that circumstance, the arbitration must commence anew with a new panel. However, there are exceptions to the rule, *e.g.*, when the vacancy occurred prior to the substantive hearing and the substitute participated fully in the hearing, the panel's deliberations, and the preparation of the panel's decision. Here, the court found:

- The remaining arbitrators made a reasonable decision to allow the party to choose its substitute party-appointed arbitrator, the method of selecting party arbitrators prescribed in the agreement to arbitrate;
- Commencing anew would be to the advantage of one party and to the disadvantage of the other;[61] and
- A vacancy may be filled in the manner prescribed in the agreement to arbitrate.

Here, the court was authorized by FAA § 5 to construe the arbitration agreement to resolve the vacancy issue in the event the arbitration agreement did not provide a method for doing so. Dow failed to file an FAA § 5 motion challenging the ruling.

In *Reddam v. KPMG LLP*,[62] the arbitration clause involved provided that "[a]ny arbitration under this agreement shall be determined pursuant to the rules then in effect of the National Association of Security Dealers, Inc., as the undersigned you may elect."[63] The National Association of Security Dealers (NASD) refused to take jurisdiction over the arbitration because no named party was a member or associated with the NASD. While the context of the discussion was under 9 U.S.C. § 205, the court considered whether that refusal by the NASD meant that the claims were no longer subject to arbitration, because the NASD had declined to proceed.

The court noted that whether the NASD refusal to conduct the arbitration meant that the issues could not be arbitrated raised two preliminary questions: "First, did the agreement amount to a choice of forum clause? Second, if it did, did the refusal of that forum to conduct the arbitration mean that no arbitration at all could go forward — that is, was the choice of forum clause integral?"[64] The Ninth Circuit held the forum clause was not integral.

However, the court said it did not need to decide whether the provision was a choice of forum clause because the provision was not integral to the arbitration agreement. The court found that the arbitration agreement did not become unenforceable when the NASD refused to undertake the arbitration because there was no evidence that the naming of the NASD was so integral to the arbitration agreement that the unavailability of that arbitrator brought the agreement to an end. The court analogized to forum selection clauses: "There we have not treated the selection of a specific forum as exclusive of all other forums, unless the parties have expressly stated that it was."[65] While not specifically stated, ap-

parently the result was that the district court would exercise its authority under 9 U.S.C. § 5 to appoint a substitute arbitrator in place of the NASD.

Many arbitration clauses provide for administration/conduct of the arbitration by an organization. Sometimes that organization ceases administering certain types of arbitrations, or all arbitrations. That may or may not void the arbitration clause.[66]

§ 11.7.2—Incapacity Of Panel Member

During the course of an arbitration, one arbitrator may become ill and unable to attend hearings. A California court upheld an award when one of three arbitrators was incapacitated upon a showing the ill panel member received a transcript and video disk, plus exhibits as the daily hearings were transcribed, and rejoined the panel when he was able. The panel deliberated collectively.[67]

The problem of replacement of an arbitration panel member after an arbitration is underway is addressed by FAA § 5 and C.R.S. § 13-22-221.[68]

§ 11.7.3—Refusal, Resignation, And Replacement During The Hearing

The CRUAA, C.R.S. § 13-22-215(5) (2016), provides that if an arbitrator ceases or is unable to act during the arbitration proceeding, a replacement shall be appointed in accordance with § 13-22-211 to continue the proceeding and resolve the controversy. Thus, the replacement appointment process is the same for replacement during or after a hearing as it is if it occurs before the proceeding commences, or before the hearing is held. However, the statute does not define how proceedings should continue when a replacement arbitrator is appointed after the proceeding has commenced.

- Annot., *Effect of Vacancy Through Resignation, Withdrawal, or Death of One of Multiple Arbitrators on Authority of Remaining Arbitrators to Render Award*, 49 A.L.R.2d 900.

§ 11.7.4—Replacement Under AAA Rules

Clayco Construction Co. v. THF Carondelet Development, L.L.C.,[69] decided an issue of whether to replace an arbitrator or proceed with one arbitrator. A panel of three arbitrators was appointed by the AAA, all being neutral. Shortly before the hearing began, upon objection by one party, the AAA disqualified one arbitrator. The parties agreed to proceed with two arbitrators. After a week of hearing the objection, the AAA disqualified a second arbitrator, and "determined that the hearings will proceed before (1) arbitrator." The respondent objected to proceeding with one arbitrator, and the remaining arbitrator refused to decide the issue, stating the decision was not his. The AAA reaffirmed its determination that the arbitration proceed before the single remaining arbitrator, and the arbitration proceeded, culminating in a large award in favor of the claimant. The court held:

- Under then-current AAA Construction Rule 56, the arbitrator had the power to interpret and apply the AAA rules as they relate to the arbitrator's powers and duties — not the AAA.
    - Thus, the arbitrator and not the AAA had the power to determine whether under AAA rules the arbitration could proceed before a single arbitrator and also to interpret AAA rules on filling vacancies.
- The AAA Complex Case Procedures L-3 required that three arbitrators hear the case since the parties could not agree on the number of arbitrators. L-3 governed not only the number of arbitrators that hear the case, but also the number that determine the case.

- The right to a three-member arbitration panel was a substantial contract right.
- Complex Case Procedures L-3 superseded Construction Rule R-22. R-22(b) provided in the event of a vacancy in a panel of neutral arbitrators after the hearing commenced, the remaining arbitrator or arbitrators could continue the arbitration, unless the parties otherwise agreed.
- L-3, however, provided that if there was no agreement, three arbitrators shall hear and determine the case.

• L-1 provided that if there is any variance between rules and procedures, the procedures govern.

WellPoint, Inc. v. John Hancock Life Insurance Co.[70] defined some hopefully obvious rules under the FAA concerning replacement of an arbitrator who resigns. A party-appointed arbitrator, Nichol, resigned upon the request of WellPoint, which had appointed him, after authorization by the remaining panel members. WellPoint proposed two candidates to replace him, but Hancock rejected both. By agreement, thereafter the two remaining panel members suggested replacements, and WellPoint selected one, Krivosha, and Hancock approved.

The arbitration was thereafter held, resulting in an award in favor of WellPoint. Hancock moved to vacate on grounds that the panel was not selected in accordance with the arbitration agreement under 9 U.S.C. § 10(a)(4); the panel exceeded its authority when it accepted Nichol's resignation, permitted WellPoint to choose a replacement, and appoint Krivosha. The arbitration agreement did not expressly address replacing a panel member.

The court analyzed the replacement of a panel member under FAA § 5. The following rules followed:

• FAA § 5 applies to filling any vacancy in an arbitration panel: either party may ask the district court to appoint a new arbitrator.
• A party may not sit silently while a replacement arbitrator is appointed, and then object to the process only after it has lost before the panel.
• Vacancies can be filled after arbitration commences (*e.g.*, discovery), although there is no reference in § 5 to a vacancy arising during a hearing.

A party who fails to challenge an arbitration appointment at the § 5 stage may not forfeit challenges under § 10 (*e.g.*, a motion under § 5 cannot address the problem, or some other good cause).

An interlocutory § 10 objection can be raised at the time the vacancy is filled — and it need not be deferred until after an award. Indeed, if the objection is not made immediately to the court or as otherwise agreed by the parties, it may be waived.

• Section 5 gives the court authority to resolve any issue about the way the parties handled a vacancy on the arbitration panel. There is no "reservation of rights." Annot., *Validity & Effect Under State Law of Arbitration Agreement Provision for Alternative Method of Appointment of Arbitrator Where One Party Fails or Refuses to Follow Appointment Procedure Specified in Agreement*, 75 A.L.R.5th 595 and 159 A.L.R. Fed. 1.

• Annot., *Validity & Effect Under Fed. Arbitration Act*, (9 U.S.C.A. §§ 1, *et seq.*) *of Arbitration Agreement Provision for Alternative Method of Appointment of Arbitrator Where One Party Fails or Refuses to Follow Appointment Procedure Specified in Agreement*, 159 A.L.R. Fed. 1.

§ 11.7.5—Non-lawyer Arbitrators

Generally, a non-lawyer arbitrator has the same duties, responsibilities, and powers as does a lawyer arbitrator. There probably are, however, limits on the duty of a non-lawyer arbitrator to apply the law. It has been held that an accountant appointed to resolve a dispute about payments made under an agreement can make legal determinations about that agreement.[71]

§ 11.8 • SCOPE AND DURATION OF ARBITRATOR'S AUTHORITY AND POWERS

A valid and unwaived arbitration agreement deprives the court of subject matter jurisdiction; the dispute is in the sole jurisdiction of the arbitrator.[72]

As discussed above, the arbitrator has the power to define the arbitration process to the extent not defined by the agreement of the parties or by the applicable statute and common law. Colorado courts have reaffirmed the principle that arbitrators are not bound by any particular substantive or procedural rules of law, unless the arbitration agreement so provides. An arbitrator may decide the dispute contrary to rules of law that would be applied by a court so long as there is no violation of an express term of the agreement to arbitrate.[73]

See § 19.4.

§ 11.8.1—Arbitrator's Powers Over Parties And Representatives: Sanctions

Until recent years, arbitration was typically handled by the parties themselves, and representation by an attorney was not typical. Indeed, the authors of both the Federal Arbitration Act and the Uniform Arbitration Act concluded it was both necessary and desirable to guarantee a party's right to counsel.

As more attorneys became involved in arbitration, initially they were not trial lawyers. The informal and loose procedures followed made the skills and knowledge of the trial lawyer unnecessary. The non-trial lawyer generally felt comfortable in the arbitration environment.

However, today most parties in arbitration are represented by counsel. With that have come some of the problems associated with a very small minority of trial lawyers — lack of professionalism and lack of compliance with the customary rules of court conduct and procedures.

Thus, arbitration has increasingly moved to be more like litigation, and with that has come the attendant problems of litigation. However, it is still rare to have to answer the questions of whether and how an arbitrator should control a lawyer who is stepping outside the appropriate boundaries.

By far the vast majority of lawyers are professional in their dealings and all aspects of arbitration. Only a very few step beyond the accepted rules of professional conduct and professional custom — just as they do occasionally in litigation. This may involve violating the norms in taking depositions, interrupting or harassing witnesses, inappropriate conduct, rudeness, failure to comply with orders, or failure to cooperate in the procedural aspects of the proceeding.

The scope of this section is to explore the authority and power of an arbitrator over persons representing a party, including comparison with the powers of a judge in our judicial system.

Generally, in the first instance, a court does not have the power to determine whether a lawyer appears before it. A judge sitting in a state court in essence has an "automatic" obligation to allow a person licensed to practice law in that state to appear before him or her. Normally, there are no other requirements. Federal courts are largely the same, but with the additional qualification of being admitted to practice in the federal court. Once admitted to the federal court, however, there is no further requirement.

Once a party is appearing before a court, normally a judge has plenary power over the acts, omissions, and conduct of the lawyer. Not only does it have the power, it has the power to enforce its rulings. This power usually takes the form of contempt of court proceedings, although the penalties can be directed toward the client the lawyer is representing.

The Powers of an Arbitrator

The Federal Arbitration Act and the Revised Uniform Arbitration Act provide that a party to an arbitration proceeding may be represented by "an attorney." It does not appear that the meaning of "attorney" has been litigated. Does it simply mean a person appearing in a representative capacity? Does it require a person educated in the law, graduated from an accredited law school, admitted to a state bar, admitted to the bar of the jurisdiction in which the arbitration is being held? There are no statutory definitions of an arbitrator's power.

Powers of the Arbitrator as Defined by the Common Law

Fortunately, the question has rarely arisen as to whether an arbitrator has power to invoke sanctions for non-compliance with his or her orders (other than the final award). However, in *Superadio Limited Partnership v. Walt "Baby" Love Productions, Inc.*,[74] the Massachusetts appellate court ruled that only where the parties implicitly agree to authorize the arbitrator to issue monetary sanctions for discovery order violations may the arbitrator do so; otherwise, the arbitrator is limited to issuing discovery orders and seeking court enforcement of subpoenas. However, the court did say that the arbitrator could enforce discovery orders by not allowing withheld documents in evidence. The Massachusetts Supreme Court reversed, holding that a prevailing party's representation by an attorney not licensed in Massachusetts did not provide a basis for vacation of the award, and the arbitration panel was authorized to resolve discovery disputes that arose during arbitration by imposing monetary sanctions.[75] But see *First Preservation Capital, Inc. v. Smith Barney, Harris Upham & Co.*,[76] wherein the court stated that the arbitrators could dismiss claims for violation of discovery orders.

§ 11.8.2—Arbitrator's Powers Over Conduct Of Proceedings

The courts give deference to the arbitrator's control over the order and presentation of evidence, giving them considerable liberty in conducting an arbitration hearing.[77]

§ 11.8.3—Arbitrator's Power To Conduct Independent Investigation Of Law And Facts

Arbitrators are often appointed because of their special knowledge of the general facts and law that provide the context for the dispute — that is one of the benefits of arbitration.

However, to what extent may an arbitrator undertake an investigation (*e.g.*, interview witnesses) as to what are the facts of the particular dispute, or undertake legal research? In today's environment, fact investigation probably would be reviewed as inappropriate, at least if without knowledge/consent of the parties and disclosure of results. Legal research probably is acceptable — like a judge. However, in some situations it may be desirable to provide the results to the parties with an opportunity for counter.

§ 11.9 • ETHICAL STANDARDS OF THE ARBITRATOR

§ 11.9.1—Colorado Rules Of Professional Conduct

As to arbitrators who are lawyers, few provisions of the Colorado Rules of Professional Conduct have a direct bearing. Rule 1.12 prohibits a lawyer from representing a party in a matter in which the lawyer served as an arbitrator,[78] unless both parties consent in writing. This disqualification is imputed to the lawyer's entire firm,[79] at least unless the lawyer is screened and notice given.

Rule 2.4, Lawyer Serving as Third-party Neutral, provides:

> (a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
>
> (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

ABA Model Rule of Professional Conduct 2.4, not adopted by Colorado, requires a lawyer serving as a third-party neutral to advise all unrepresented parties that he or she is not representing them.

§ 11.9.2—ABA/AAA Code Of Ethics

In 2004, the American Bar Association and the American Arbitration Association adopted the "Code of Ethics for Arbitrators in Commercial Disputes." (The term "Commercial Disputes" as used therein is much broader than as used by the AAA in its rules.) As such, the Code is not binding on anyone.[80]

The AAA has not incorporated the Code into its rules. However, the AAA has made it substantially binding on arbitrators who serve in AAA arbitrations. Specifically, the notice of appointment executed by an AAA arbitrator provides:

> I attest that I have diligently conducted a conflicts check, including a thorough review of the information provided to me about this case to date, and that I have performed my obligations and duties to disclose in accordance with the Rules of the American Arbitration Association, Code of Ethics for Commercial Arbitrators and/or all applicable statutes pertaining to arbitrator disclosures.
>
> I understand that my obligation to check for conflicts and make disclosures is ongoing for the length of my service as an arbitrator in this matter, and that failing to make appropriate and timely disclosures may result in my removal as arbitrator from the case and/or my removal from the AAA's Roster of Neutrals.
>
> The Arbitrator being duly sworn, hereby accepts this appointment, and will faithfully and fairly hear and decide the matters in controversy between the parties and, in accordance with their arbitration agreement, the Code of Ethics, and the Rules of the American Arbitration Association will make an Award according to the best of the arbitrator's understanding.

Practitioners may see the Code incorporated into arbitration agreements. At a minimum, it will no doubt become the standard.

The principal changes made by the Code are as follows:

- Presuming that all arbitrators and party-appointed arbitrators are neutral;
- Increasing disclosure requirements;
- Limiting communications between parties and arbitrators or prospective arbitrators; and
- Defining limitations on advertising, representation, and compensation of arbitrators.

It seems likely that this 2004 Code of Ethics will become the standard (custom of the industry) by which courts rule on ethical issues pertaining to arbitrators. However, when the arbitrator is a lawyer, it is probable that the Colorado Rules of Professional Conduct also apply.

Advertising by Arbitrators

Under the Code of Ethics, Canon VIII, an arbitrator may advertise and promote his or her services and availability as an arbitrator, so long as the information is truthful and accurate.

Arbitrator Compensation

Canon VII.B details aspects of arbitrator compensation. Specificity in the basis of payment is required. Communications about compensation, when handled directly by the arbitrator, should be in the presence of all parties. Absent extraordinary circumstances, arbitrators should not increase their compensation during the course of an arbitration.

§ 11.9.3—Unauthorized Practice Of Law

A continuing issue arises when an arbitrator sits in a jurisdiction in which he or she is not admitted to practice law. Is he or she engaged in the unauthorized practice of law? The ABA has taken the position that service as an arbitrator or mediator does not constitute the practice of law.[81]

The Massachusetts Supreme Court held that even if an out-of-state lawyer's representation of a party in a Massachusetts arbitration constituted unauthorized practice of law, it would not provide a basis for vacating the arbitrator's ruling.[82] In the arbitration, the panel of arbitrators refused to disallow the lawyer's appearance, citing ABA Model Rule 5.5(c)(3).

§ 11.10 • ACTION BY MAJORITY OF ARBITRATORS

The CRUAA provides that when there is a panel of arbitrators, all of the actions shall be taken by a majority of the arbitrators.[83] The FAA is silent, but no doubt the same result would be reached. Of course, the parties by agreement can require unanimous agreement of the arbitrators.

See § 16.3.1.

§ 11.11 • IMMUNITY OF ARBITRATOR (COMPETENCY TO TESTIFY, ATTORNEY FEES AND COSTS)

The FAA does not contain provisions concerning the immunity of an arbitrator with respect to competency to testify and related issues. However, an extensive body of common law has developed, and at least one Colorado trial court has held that the American Arbitration Association as administrator is immune.[84]

FAA

The common law both under the FAA and under state arbitration statutes has firmly established the immunity of arbitrators. The concept of immunity for those having "functional comparability" to judges was defined by the U.S. Supreme Court in *Butz v. Economou*.[85] It was thereafter applied in *Antoine v. Byers & Anderson*,[86] defining immunity as extending to those engaged in "performance of the function of resolving disputes between parties or of authoritatively adjudicating private rights."[87] See also *Corey v. New York Stock Exchange*, holding arbitrators and the boards that sponsor arbitration are immune.[88]

The Tenth Circuit acknowledged the doctrine of arbitral immunity where "the claim, regardless of its nominal title, effectively [sought] to challenge the decisional act of an arbitrator or arbitration panel."[89] In addition, the court also stated that the doctrine also applies to arbitration administrators.

The Third Circuit dismissed an antitrust claim against an arbitrator who rendered an award asserted by the plaintiff to constitute enforcement of an agreement in restraint of trade.[90] The arbitrator was immune under federal law.

This immunity is not only for civil liability, but may also extend to processes such as subpoenas with respect to cases in which they served as arbitrator.[91] This common law immunity has extended to arbitration organizations that administer arbitrations.[92]

In *Salt Lake Tribune Publishing Co., LLC v. Management Planning, Inc.*,[93] the Tenth Circuit impliedly acknowledged the existence of common law immunity and reversed, holding that because the appraisal procedure involved in that case was not an "arbitration" within the scope of the FAA, the appraiser did not have arbitral immunity.

CRUAA

The CRUAA, C.R.S. § 13-22-214 (2016), "Immunity of arbitrator – competency to testify – attorney fees and costs," provides immunity to arbitrators:

> (1) An arbitrator or an arbitration organization acting in the capacity of an arbitrator is immune from civil liability to the same extent as a judge of a court of this state acting in a judicial capacity.
> (2) The immunity afforded by this section is in addition to, and not in lieu of, or in derogation of, immunity conferred under any other provision of law.
> (3) The failure of an arbitrator to make a disclosure required by section 13-22-212 shall not cause any loss of immunity that is granted under this section.
> (4)(a) In a judicial proceeding, administrative proceeding, or other similar proceeding, an arbitrator or representative of an arbitration organization shall not be competent to testify and may not be required to produce records as to any statement, conduct, decision, or ruling that occurred during the arbitration proceeding, to the same extent as a judge of a court of this state acting in a judicial capacity.

See also annotations thereto. The U.S. District Court for the District of Colorado held that a defined appraisal procedure for determining the amount of insured losses constituted an arbitration, and the appraisers were arbitrators under § 201(2) of the CRUAA. Therefore, under § 214(4)(a), the appraisers could not be compelled to testify or be subjected to discovery order under § 4(a) as to their testimony and discovery of information occurring during the appraisal. However, "relevant information that date[d] prior to Plaintiff's demand for appraisal or after the appraisal concluded and [did] not relate to what occurred during the appraisal" was subject to discovery.[94]

C.R.S. § 13-22-214(4)(b)(I) goes on to state that § 13-22-214(4)(a) does not apply to the extent necessary to determine the claim of an arbitrator or arbitrator organization or representative against a party, or to certain motions to vacate if the movant makes a *prima facie* showing.

Lastly, C.R.S. § 13-22-214(5) provides that if a person commences a civil action against an arbitrator or arbitrator organization or representative, or seeks to compel him or her to testify or produce documents in violation of § 13-22-214(4), and a court determines he or she is immune, the court "shall" award reasonable attorney fees and expenses.

California common law arbitration immunity was extended to an arbitrator who failed to disclose relationships that potentially would have disqualified him.[95] The arbitrator failed to disclose his romantic relationship with the sister of the respondent's counsel, and rejected the vast majority of the

claimant's claims. The relationship was not disclosed until two years after the arbitration. The court set aside the arbitration award. *See also* C.R.S. § 13-22-214 comments.

The doctrine has limitations, for example, where for no ethical reason an arbitrator withdrew from an arbitration after evidence and argument had been presented, but refused to render an award. Arbitral immunity did not protect the arbitrator from suit.[96]

- Annot., *Admissibility of Affidavit or Testimony of Arbitrator to Impeach or Explain Award*, 80 A.L.R.3d 155.

§ 11.12 • IMMUNITY OF ARBITRATION ORGANIZATION

Generally, it is held that an arbitration association, such as the American Arbitration Association, has the same immunity as arbitrators.

- Annot., *Liability of Organization Sponsoring or Administering Arbitration to Parties Involved in the Proceedings*, 41 A.L.R.4th 1013; 69 A.L.R.6th 513.

§ 11.13 • DELIBERATIONS AND DECISION-MAKING PROCEDURES OF THE ARBITRATOR(S)

There are few judicial decisions as to the process that an arbitrator shall follow in reaching an award. Can a panel of arbitrators discuss the evidence before all evidence has been presented? Can the arbitrator rely upon personal knowledge and experience without advising the parties?

- Annot., *Arbitrator's Consultation with Outsider or Outsiders as Misconduct Justifying Vacation of Award*, 47 A.L.R.2d 1362.
- Annot., *Arbitrator's Viewing or Visiting Premises or Property Alone as Misconduct Justifying Vacation of Award*, 27 A.L.R.2d 1160.
- Annot., *Right of Arbitrators to Action on Their Own Knowledge of Facts, or Factors Relevant to Questions Submitted to Them, in the Absence of Evidence in that Regard*, 154 A.L.R. 1210.
- Annot., *Right of Arbitrator to Consider or Base His Decision Upon Matters Other than Those Involved in the Legal Principles Applicable to the Questions at Issue Between the Parties*, 112 A.L.R. 873.
- Annot., *Validity and Effect Under Federal Arbitration Act (9 U.S.C.A. §§ 1 et seq.) of Arbitration Agreement Provision for Alternative Method of Appointment of Arbitrator Where One Party Fails or Refuses to Follow Appointment Procedure Specified in Agreement*, 159 A.L.R. Fed. 1.

§ 11.14 • FAILURE TO PAY FEES

See § 12.6.

§ 11.15 • BIBLIOGRAPHY

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15. C.R.S. § 13-22-302.
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