

Arbitration in Consumer Disputes: A Focus on the Providers

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Despite continuing controversy about its use, there is no longer any question that mandatory arbitration has taken hold as a private system of deciding disputes between large corporate parties and their adversaries in consumer and employment cases. However, some commentators assert the private arbitration industry, ranging from individual arbitrators operating out of their houses, to large multi-national corporate arbitration provider organizations, is effectively unregulated by the State of California or any other level of government. While the absence of any meaningful regulation or public data precludes any definitive statements, they suggest nagging questions remain about the fairness of the arbitration system. Some of these issues were highlighted in a San Francisco Chronicle series, entitled "Private Justice," in October 2001.

Recently, California has undertaken the creation of ethical rules for arbitrators in private contractual arbitrations. These rules, however, will touch only on the conduct of arbitrators; they will not reach the conduct and practices of the arbitration provider organizations. Because the provider organizations play such a central role in the conduct and outcome of arbitration – from the selection of the arbitrator, to the imposition of every rule under which the arbitration is conducted – there have been continuing calls for ethical rules for provider organizations. This need for provider ethics, some commentators assert, is grounded as well in significant concerns about the close relationships and potential for – or at least the appearance of – bias that providers may have toward repeat corporate players. Under current law, they note there is little or no practical remedy for arbitrator or provider bias. Indeed, both arbitrators and provider organizations are absolutely immune from civil liability, no matter how egregious their misconduct may be.

This paper reviews these issues with an eye toward considering whether a legislative response is warranted.

RECENT HISTORY OF THE COMMITTEE'S INTEREST IN ARBITRATION

The issue of arbitration has been one that has received much consideration by the Legislature, and the Committee, over the years. In August 1997, the Committee held an informational hearing to evaluate the increasing use of arbitration by health care service plans and discuss the California Supreme Court's decision in *Engalla v. Kaiser Permanente*. And, in January 2001, the Committee held an informational hearing entitled "The Use of Voluntary ADR to Address Some of Our Most Vexing Public Policy Issues" during which the Committee heard from state and national experts about innovative approaches to the use of voluntary alternative dispute resolution mechanisms to help solve seemingly unsolvable partisan battles.

Bills that have been heard by the Committee have included: AB 858 (Kuehl) of 1999 which, as heard by the Committee, sought to prohibit merchants and employers from requiring consumers

to waive certain rights, including the right to a jury trial, as a condition of entering an insurance, health care, or employment contract and AB 1751 (Kuehl) of 2000 which contained similar provisions as applied to health care contracts. The Committee also heard AB 1934 (Polanco) of 2000 which prohibited health plan contracts that contain pre-dispute binding arbitration clauses from imposing damage limits on arbitration awards that differ from the damages that could be awarded in similar disputes decided by courts or jury trials. AB 1093 (Assembly Judiciary Committee) (1997 Stats. Ch. 445) revised disclosure laws for persons selected to serve as neutral arbitrators.

Other bills on the subject include AB 1067 (Jackson) of 2001 which required courts to vacate an arbitrator's award and hold a de novo hearing upon petition by a consumer if the award is the result of legal or factual error by the arbitrator that has resulted in an injustice to the party and the arbitration was mandated by a pre-dispute binding arbitration clause. SB 475 (Escutia) (2001 Stats. Ch. 362), as discussed in more detail below, required the Judicial Council to establish minimum ethical standards for private arbitrators and created a vacatur remedy for an arbitrator's failure to comply with these standards and existing disclosure requirements.

WHAT IS KNOWN ABOUT THE PRIVATE ARBITRATION INDUSTRY IN CALIFORNIA

Virtually all contractual arbitration is conducted in private. The arbitrators are private persons, not someone whose public function is to decide disputes. Like most states, California has not established qualifications, professional standards or licensing requirements for arbitrators. Nor does California regulate arbitration provider organizations. In addition, the process itself is private in that the public (including the media) is normally not permitted to observe any aspect of the process, and none of the information kept is a public record. In fact, rules under which arbitrations are conducted frequently prohibit the parties and the arbitrator from revealing information about the arbitration.

Consequently, there is relatively little statistical data about the arbitration industry, including the numbers of cases, the growth in such numbers over time, the number of individual arbitrators or the number of provider organizations. Anecdotally, it is believed that the New-York based American Arbitration Association is the largest arbitration provider nationwide, followed by California-based JAMS and the National Arbitration Forum located in Minneapolis.

A survey of ADR¹ providers in California conducted by the Judicial Council Task Force on the Quality of Justice, Subcommittee on Alternative Dispute Resolution and the Judicial System in 1998 illustrates what little is known about the ADR field in general. According to the survey, 52 percent of the caseload of individual providers consisted of mediations, while the caseload of private firms was split largely between arbitrations and mediations, with slightly more arbitrations than mediations. The survey also found that of the 6,977 arbitrations reported by the survey respondents in 1997, arbitration provider organizations handled 5,461 cases – over three quarters of the total arbitrations.

This Judicial Council Task Force also requested that survey respondents indicate how many of the arbitrations they had handled in 1997 were the result of predispute contractual agreements to arbitrate. In response to the question, provider organizations indicated that 63 percent of all

arbitrations conducted were the result of such an agreement. In contrast, individual arbitrators who responded to the survey indicated that 35 percent of their arbitrations were the result of a predispute contractual agreements. In sum, this survey therefore suggests that provider organizations are handling the majority of pre-dispute mandatory arbitrations in California. The survey did not ask how many of these mandatory arbitrations involved consumer disputes.

With respect to the overall increase in the number of cases resolved using alternative dispute resolution, the *Washington Post* reported in March 2000 that, nationwide, 20,000 cases were filed before the National Arbitration Forum in 1999. That number was up from 16,000 the year before. According to the article, the American Arbitration Association handled 140,000 cases in 1999.² The AAA reports on its Internet web site that the number of cases it handled grew to 198,000 in 2000. In January 2001, the California Dispute Resolution Institute (CDRI) released a draft report detailing data concerning the numbers of ADR cases across the board, through a comprehensive survey of ADR programs statewide. According to preliminary figures reported by the American Arbitration Association for purposes of this draft report, AAA arbitrates and mediates a total of 4,500 to 5,000 cases a year in California. Similarly, figures provided by JAMS for the report indicate that JAMS settles 3,000 arbitration cases per year. CDRI has indicated that the report is not intended to be final or definitive and, at the time of the report's release, the organization intended to gather additional information. At the time of this writing, committee counsel was unable to determine whether reporting is complete.

THE DEVELOPING FIELD OF ARBITRATOR ETHICS

Arbitrators have long recognized voluntary codes of ethics. One of the earliest efforts in the field was in the area of labor arbitration, a product of the National Academy of Arbitrators in conjunction with the American Bar Association and the Federal Mediation Conciliation Service. Other organizations, including professional associations such as the California Dispute Resolution Council, and arbitration providers organizations, such as JAMS, have likewise adopted voluntary ethical codes. However, violations of these ethical standards are not subject to a legal remedy, and there is little evidence that the organizations who promulgate these standards actually enforce them in any way.³

Recently, California has begun to move from voluntary to mandatory ethics rules for individual arbitrators (as distinguished from the provider organizations). Arbitrator ethics rules were first mandated for judicial arbitrators. Last year's SB 475 (Escutia) established for the first time that private contractual arbitrators will also be subject to enforceable ethical obligations. SB 475 called on the Judicial Council to formulate and adopt ethics standards for private arbitrators, to be effective July 1, 2002. SB 475 was sponsored by the Governor, the Judicial Council, and Senator Martha Escutia in recognition of the growing use of private judges and the lack of regulation of the private judging industry.

Judicial Council staff, working with a nineteen-member Blue Ribbon Panel of Experts on Arbitrator Ethics appointed by Chief Justice Ronald M. George, has promulgated proposed standards to be included, in final form, in the Appendix of the California Rules of Court. These standards are currently being circulated for public comment. Comments will be accepted

through February 22, 2002. In addition, the Judicial Council recently held public forums in Los Angeles and San Francisco to take public comment on the proposed standards.

The standards will establish minimum standards of conduct for any person nominated or appointed as a neutral arbitrator under an arbitration agreement. The proposed standards cover the areas of arbitrators' overall ethical duties as well as specific duties to disclose particular relationships and interests, to refuse gifts from parties to an arbitration, and to refuse, under certain circumstances, future professional employment involving a party or lawyer in the current arbitration.

More specifically, the proposed standards:

1. Establish the minimum standards of conduct for neutral arbitrators, that are intended to guide the conduct of arbitrators, to inform and protect participants in arbitration, and to promote public confidence in the arbitration process. (Standard 1.)
2. Require that arbitrators must act in a manner that upholds the integrity and fairness of the arbitration process, and must maintain impartiality toward all participants in the arbitration at all times. (Standard 5.) They further provide that an arbitrator must decline appointment if he or she is not able to be impartial. (Standard 6.)
3. Mandate disclosure to the parties of any facts that might cause a person to doubt the arbitrator's ability to be impartial. Matters specifically required to be disclosed include family or other personal relationships between the arbitrator and parties or lawyers in the arbitration; financial or business relationships or affiliations between the arbitrator and parties or lawyers in the arbitration, including prior service as an arbitrator, mediator or other dispute resolution neutral; financial relationships between the arbitration provider organization administering the arbitration and the parties or lawyers in the arbitration; and the arbitrator's membership in any discriminatory organization. (Standard 7.)
4. Provide for disqualification of the arbitrator by notice by a party if the arbitrator fails to make the disclosures as required or by notice by a party based on such disclosure. (Standard 8.)
5. Require an arbitrator to refuse any gift, bequest or favor from a party or other person having an interest in the arbitration. (Standard 9.)
6. Restrict an arbitrator's acceptance of subsequent employment or professional relationships (including subsequent arbitrations) involving a party or lawyer in the current arbitration. (Standard 10.)
7. Require the arbitrator to conduct the arbitration fairly, promptly and diligently. (Standard 11.)
8. Limit an arbitrator's acceptance of ex parte communications. (Standard 12.)

9. Bar an arbitrator from using or disclosing information received in confidence to gain personal advantage. (Standard 13.)

SB 475 and the proposed standards represent one of the strongest steps nationwide towards mandatory disclosure by arbitrators of potential conflicts of interest, including disclosure of information relating to the provider organization as well as the individual arbitrator.

REMEDIES FOR ETHICAL VIOLATIONS

Once the Judicial Council adopts and implements its final rules, violations of arbitrator ethics will be enforceable by a civil action for vacatur of the arbitrator's decision. In other words, assuming that a violation can actually be proved, the only remedy available under the new individual arbitrator rules will be to set-aside the arbitrator's award, returning the parties to another round in the same system. If the arbitration agreement binding the parties designates a specific arbitration provider, vacatur does not disturb or re-write this provision. Likewise, vacatur does not contemplate that any party be reimbursed for the fees paid to the arbitrator, or their attorney's fees, or for other costs incurred in the arbitration proceedings or the vacatur action.

Moreover, the new round of arbitration is subject to the same risks, and may result in repeated vacatur.⁴ Indeed, there is no theoretical limit to the number of times the parties may be sent back to re-arbitrate a dispute following vacatur for violation of the arbitrator's ethical duties. Both arbitrators and arbitrator provider organizations have been held to be absolutely immune from all civil liability, irrespective of the frequency or nature of their misconduct.⁵

CONCERNS ABOUT THE ROLE OF AND THE LACK OF ETHICAL OBLIGATIONS FOR PROVIDER ORGANIZATIONS

Although the precise form the Judicial Council ethics standards will ultimately take has not yet been determined, the statute giving rise to the Judicial Council rules calls for the adoption of ethical rules for individual arbitrators. However, the Judicial Council's rules will not address the question of ethical obligations for provider organizations. The Judicial Council has understood its charge to be the ethical obligations of individual arbitrators. As noted above, while the proposed rules touch tangentially on providers by requiring certain minimal disclosures by the arbitrator regarding his or her relationship with the provider involved in the case, the proposed rules do not impose any ethical obligations on provider organizations themselves.

The question whether provider organizations should be subject to ethical obligations has increasingly been the subject of concern among commentators and others in the field. Do providers have an obligation to be neutral? Should their relationships with arbitrators or parties be scrutinized? Should they make any disclosures to the parties? Historically, provider organizations proffered the view that they served merely an administrative function akin to the tasks that a court administrator performs for a judge. Under this view, provider organizations assert that they affect the outcome of arbitration no more than court employees affect the outcome of litigation. Thus, just as judges – but not court employees – have ethical duties, arbitrators – but not provider organizations – should have ethical obligations.⁶

In contrast to the "merely ministerial" view suggested by provider organizations, others have noted that providers may potentially have a significant impact on the process and the outcome of arbitrations far greater than the impact court employees have in litigation. Most notably, it is observed that, unlike court employees, provider organizations decide in the first instance which "judges" sit on the "court." Further, unlike court employees, the provider organizations affect, and in many cases, select, which arbitrators will decide which cases. In addition, provider organizations, unlike court employees, may determine which cases are amenable to arbitration.

Perhaps more importantly, provider organizations, unlike court employees, decide the very rules under which the arbitration will take place. Unlike civil litigation, there are no fixed rules governing the operation of private arbitration proceedings. As one court put it, "The American Arbitration Association is in competition not only with other private arbitration services but with the courts in providing -- in the case of the private services, selling -- an attractive form of dispute settlement. It may set its standards as high or as low as it thinks its customers want."⁷

The arbitration rules provider organizations adopt may affect every aspect of the proceeding, including, fundamentally:

- what types and how much discovery any party will be permitted
- whether there will be an in-person hearing
- whether the proceeding is subject to confidentiality
- whether summary disposition is allowed
- the scheduling and location of any hearing
- whether the arbitrator may sanction the parties
- whether the arbitrator will issue a written decision, and if so whether that decision will be admissible in evidence for the purpose of challenging the arbitrator's conduct/fairness
- whether and if so to whom and how the parties may appeal the arbitrator's award

In addition, provider organizations set the fees, determine how the fees will be allocated between the parties, determine when the fees must be paid, and control whether the arbitration will go forward and/or whether a decision will be issued if any party has not paid the allocated fees.

The *San Francisco Chronicle* recently ran a series entitled "Private Justice" that focuses on the private arbitration system and the growing arbitration industry in California. The series consisted of three articles. The first, entitled "Millions are losing their legal rights," focused on the inclusion of mandatory arbitration clauses in many consumer and employment contracts. The article raised concerns regarding the use of mandatory arbitration including, among other things, potentially high filing fees, limitations on class actions, and the lack of written opinions by arbitrators. The second article, titled "Can public count on fair arbitration?" discussed the nature of the relationship, particularly the financial relationship, between arbitration firms and their clients with a focus on the potential appearance of conflicts created by these relationships. Entitled "Judges' action cast shadow on court's integrity," the third article focused on concerns that the attraction of potentially lucrative jobs as private arbitrators once judges leave the bench may compromise the integrity of the courts.

ALLEGATIONS OF INAPPROPRIATE BUSINESS PRACTICES BY PROVIDER ORGANIZATIONS

As indicated above, private arbitration provider organizations are not regulated by any level of government. Just as any person may serve as a private arbitrator, so too may any person set up an arbitration provider organization. Consequently, there is a great deal that is unknown about their structure, operations and business practices. Critics nevertheless contend that, in their competitive search for business revenue, these organizations have formed relationships with corporate clients that impair their neutrality, or the appearance of neutrality, so important to the integrity of the arbitration function. Underlying these concerns is the fear that "repeat players" have unfair advantages when they are involved in mandatory arbitrations against "one-shot" users, such as individual consumers.

These potential advantages spring from two essential sources. First, repeat players are potential sources of future business, giving arbitrators and provider organizations an incentive to ensure that the repeat player is satisfied with the outcome of the arbitrations in which it participates. Clearly, because these are competitive business arrangements in an unregulated free market, corporate repeat players are free to take their arbitration business elsewhere if they are dissatisfied with the results. Correspondingly, arbitrators and provider organizations operating in an unregulated free market have a financial incentive to appeal to large-volume repeat users. Unquestionably, there are many bases on which providers may seek to compete: price, speed, ease of use, the availability of nationwide offices, etc. Critics fear that one basis on which arbitrators and providers may seek to compete, inappropriately, is on the basis of outcome of the arbitration.

The other primary advantage attributed to repeat players is the superior information they acquire about which providers and which arbitrators may be more receptive to both the substance and style of their arguments, as well as all of the myriad nuances and minutiae that differentiate decision makers and lead civil litigants to engage in the well-known practice of "judge-shopping." Of course, these concerns are not implicated when both parties are repeat players.

Owing to the general lack of available data on the outcomes in mandatory arbitration, there has been little quantitative research regarding the experience of repeat players. The scholarly studies conducted to date, however, tend to validate that repeat users may indeed enjoy the advantages supposed.⁸

Although critics acknowledge differences among providers in their operation and sensitivity to ethical concerns, the allegations that have been made against providers generally include:

- Providers may have lucrative business dealings with corporate parties, such as consulting relationships, training programs, and administration services – apart from the provision of arbitration services – such that the provider has an even greater incentive to keep the corporate party satisfied with the results of its arbitrations or risk losing its other revenue streams.
- Providers may receive direct financial payments from corporate parties, such as "membership" or "sponsorship" fees.

- Providers may be owned or controlled by an adverse corporate party or persons closely associated with an adverse corporate party.
- Providers may have representatives of corporate parties on their board of directors.
- Providers may have exclusive arrangements with a corporate party for all arbitrations involving the corporation, or for all types of disputes between the corporate party and a class of parties (*e.g.*, all bank customer disputes).
- Even in the absence of exclusive-provider arrangements, the provider may conduct a large volume of mandatory arbitration business for a corporate party.
- Providers may determine which arbitrators they affiliate with and/or manipulate the list of potential arbitrators they offer in a case involving a preferred corporate party.
- Providers may have direct financial investments in corporate parties, *e.g.*, stock holdings, such that the provider stands to benefit financially when the corporate party prevails in its disputes.
- Likewise, corporate parties may have investment interests in the provider.
- Providers may be owned by their arbitrators, either as shareholders or as partners, such that each arbitrator has a financial stake not only in whether they personally are selected by repeat players, but whether the provider organization as a whole enjoys repeat business from the corporate party.
- Providers may offer price discounts or rebates to corporate repeat players.
- Providers may ignore their general rules or principles and/or adopt special rules in order to favor repeat corporate parties, such as by limiting the types of damages or discovery available to the corporate party's adversary.
- Providers may market themselves to corporate parties by actual or implied promises of customer satisfaction.
- Providers may solicit cases from corporate parties.
- Provider neutrality may be compromised by their advocacy in support of mandatory arbitration of consumer and employee cases, particularly where the provider has been designated to perform the arbitration at issue.

These practices are alleged to create at least the appearance of bias. Whether any of these potential conflicts actually results in skewing the results is an open question given the absence of publicly available data regarding the outcomes in arbitration, particularly in mandatory consumer arbitration involving a repeat player or other corporate entity with whom the provider has a business relationship or other financial interest.

Financial Relationship Explored. The second San Francisco Chronicle article, which detailed the financial ties between arbitration firms and their clients, reported that the American Arbitration Association "owns millions of dollars' worth of stocks and bonds in major corporations whose legal disputes its arbitrators have heard. Some of the corporations also buy 'memberships' in the association, and their executives sit on the association's board of directors." According to the *Chronicle*, the corporate clients in which the American Arbitration Association has held a financial interest include AT&T, Bank of America, Aetna, Cigna Corp., General Electric "and other corporations whose disputes its arbitrators have heard."

In response to the concerns raised by the *Chronicle* regarding the American Arbitration

Association's financial investments in clients it serves, a spokeswoman for the firm stated that "an outside investment firm manages all the nonprofit association's investments and the association's actual knowledge of the investments 'is extremely limited.' And whatever the affiliations of its directors or members, she explained, arbitrators are largely independent from the organization and usually selected from panels by the parties themselves. 'Our neutrals decide the outcome of cases. AAA doesn't.'"

The article notes in response critics' arguments that arbitration firms have substantial control over the cases they resolve. For example, the article states "American Arbitration Association sets the arbitration rules, selects and trains the panels and chooses arbitrators when parties cannot."

Concern Regarding Undisclosed Contracts. The *Chronicle* also raised the issue of side agreements between arbitration firms and their clients under which the firms provide administrative and consulting services to corporate clients. According to the article, in a case involving a mandatory arbitration clause filed with the Federal Communications Commission by MCI WorldCom Inc., several long-distance phone customers alleged that JAMS was "financially beholden to MCI under side agreements that had never been made public." The issue was of importance because the arbitration clause apparently required customers to file all complaints with JAMS. In his court filings, one of the customers alleged that JAMS had earned more than \$325,000 providing administrative and consulting services to MCI. In response, the president of JAMS, Steve Price, said, according to the *Chronicle*, that "any claim that the program was biased is just not true."

Issue Regarding Solicitation of Clients. In the second article, the *Chronicle* also raised the concern that an expansion of the role of mandatory arbitration has led to an increase in the demand for arbitrators and therefore an increase in the competition among arbitration firms. According to the article, the American Arbitration Association has used its arbitrators in sales calls to potential clients, which, the *Chronicle* suggests, is indicative of the increased competition within the arbitration industry that has flowed from the growing use of the system to solve legal disputes.

Concern Pertaining To Repeat Players. According to the *Chronicle*, this issue is of concern because "parties that frequently use arbitration tend to have an advantage over individuals who go to arbitration once or twice." The article further stated: "A repeat player who chooses an arbitrator and wins is more likely to select the same arbitrator in future cases. The prospect of more business gives the arbitrator a financial incentive to rule in the repeat player's favor." The article cited a recent revised study by the director of the Indiana Conflict Resolution Institute which reportedly found that in cases against repeat players (defined as "employers in arbitration at least twice a year"), employees won 29 percent of the time. In cases against non-repeat players, employees won 51 percent of the time.

The article reported that, in response to the concern, the co-chair of JAMS' Committee on Professional Standards and Public Policy, Michael Young, said "the risks of the repeat player advantage are real and can be disturbing," while, according to the reporter, many arbitrators "take seriously their ethical obligations to be impartial."

Concerns Regarding Impact on Public Courts. The third article in the *Chronicle* series raised the concern that the "lure of high-paying jobs as arbitrators may compromise [the] impartiality" of judges. According to the article, arbitration providers compete to hire "the biggest names on the bench." As a result, the *Chronicle* asserted, judges who desire to become arbitrators once they leave the bench may request to change their assignments, often requesting assignments in civil court. Raising concern about the practice, Justice Anthony Kline of the state Court of Appeal in San Francisco said "lawyers are increasingly worried about the objectivity of judges who seek assignments they think will enhance their chances of landing a job as a private arbitrator." (Justice Kline will illuminate these concerns as a witness at the Committee hearing.)

PROPOSED ETHICAL PRINCIPLES FOR PROVIDER ORGANIZATIONS

As stated above, provider organizations in the United States are not currently subject to any enforceable ethical principles in California or elsewhere. Consequently, they are not required to avoid or disclose any of the foregoing relationships. Indeed it is not universally accepted that provider organizations have an obligation to be neutral, to provide "justice," or to avoid actual or potential conflicts of interest. Nonetheless, there is a growing recognition of the need for provider ethics. A joint initiative of Georgetown University Law Center and the CPR Institute for Dispute Resolution established the CPR-Georgetown Commission on Ethics and Standards in the Practice of ADR. This commission, made up of representatives drawn from major law firms, arbitrators, provider organizations, law professors and the courts, has developed proposed Principles for ADR Provider Organizations.

As explained by the preamble, the Principles recognize:

As the use of ADR expands into almost every sphere of activity, the public and private organizations that provide ADR services are coming under greater scrutiny in the marketplace, in the courts, and among regulators, commentators and policy makers. The growth and increasing importance of ADR provider organizations, coupled with the absence of broadly-recognized standards to guide responsible practice, propel this effort by the CPR-Georgetown Commission to develop the following Principles for ADR Provider Organizations. The Principles build upon the significant policy directives of the past decade which recognize the central role of the ADR provider organization in the delivery of fair, impartial and quality ADR services.

These Principles are designed to establish a benchmark for responsible practice by entities that provide arbitration and other ADR services. In sum, these principles are:

- 1) ADR Provider Organizations should take all reasonable steps to maximize the quality and competence of its services, absent a clear and prominent disclaimer to the contrary.
- 2) ADR Provider Organizations should take all reasonable steps to provide clear, accurate and understandable information about the following aspects of their services and operations:
 - a) The nature of the ADR Provider Organization's services, operations, and fees;

- b) The relevant economic, legal, professional or other relationships between the ADR Provider Organization and its affiliated neutrals;
 - c) The ADR Provider Organization's policies relating to confidentiality, organizational and individual conflicts of interests, and ethical standards for neutrals and the Organization;
 - d) Training and qualifications requirements for neutrals affiliated with the Organization, as well as other selection criteria for affiliation; and
 - e) The method by which neutrals are selected for service.
- 3) The ADR Provider Organization has an obligation to ensure that ADR processes provided under its auspices are fundamentally fair and conducted in an impartial manner.
 - 4) ADR Provider Organizations should take all reasonable steps, appropriate to their size, nature and resources, to provide access to their services at reasonable cost to low-income parties.
 - 5) The ADR Provider Organization should disclose the existence of any interests or relationships which are reasonably likely to affect the impartiality or independence of the Organization or which might reasonably create the appearance that the Organization is biased against a party or favorable to another, including (i) any financial or other interest by the Organization in the outcome; (ii) any significant financial, business, organizational, professional or other relationship that the Organization has with any of the parties or their counsel, including a contractual stream of referrals, a de facto stream of referrals, or a funding relationship between a party and the organization; or (iii) any other significant source of bias or prejudice concerning the Organization which is reasonably likely to affect impartiality or might reasonably create an appearance of partiality or bias.
 - 6) The ADR Provider Organization shall decline to provide its services unless all parties choose to retain the Organization, following the required disclosures, except in circumstances where contract or applicable law requires otherwise.
 - 7) ADR Provider Organizations should provide parties with mechanisms for addressing grievances about the Organization, and its administration or the neutral services offered, and should disclose the nature and availability of the mechanisms to the parties in a clear, accurate and understandable manner. Complaint and grievance mechanisms should also provide a fair and impartial process for the affected neutral or other individual against whom a grievance has been made.
 - 8) ADR Provider Organizations should require affiliated neutrals to subscribe to a reputable internal or external ADR code of ethics, in the absence of or in addition to a controlling statutory or professional code of ethics.
 - 9) ADR Provider Organizations should conduct themselves with integrity and evenhandedness in the management of their own disputes, finances, and other administrative matters.
 - 10) An ADR Provider Organization should not knowingly make false or misleading communications about its services. If settlement rates or other measures of reporting are

communicated, information should be disclosed in a clear, accurate and understandable manner about how the rate is measured or calculated.

- 11) An ADR Provider Organization should take all reasonable steps to protect the level of confidentiality agreed to by the parties, established by the organization or neutral, or set by applicable law or contract. ADR Provider Organizations should establish and disclose their policies relating to the confidentiality of their services and the processes offered consistent with the laws of the jurisdiction. ADR Provider Organizations should ensure that their policies regarding confidentiality are communicated to the neutrals associated with the Organization. ADR Provider Organizations should ensure that their policies regarding confidentiality are communicated to the ADR participants.

POSSIBLE LEGISLATIVE RESPONSES

Without regard to order of priority, the foregoing discussion raises a number of possible legislative responses.

- Should providers be required to be neutral?
- Should provider organizations be subject to any ethical rules?
- Should providers be owned or controlled by an adverse corporate party or persons closely associated with an adverse corporate party?
- Should provider organizations be permitted to maintain exclusive relationships with corporate parties for the administration of consumer arbitrations?
- Should provider organizations receive direct financial payments, such as "membership" or "sponsorship" fees from corporate parties for whom they provide arbitrations?
- Should provider organizations be permitted to provide non-arbitration services, such as training, consulting and the like, to corporations who make use of the provider for mandatory consumer arbitrations?
- Should provider organizations be required to make disclosures regarding their business relationships with corporate parties in mandatory consumer arbitrations?
- Should consumers be permitted to disqualify a provider exclusively-designated by their corporate adversary?
- Should providers have representatives of corporate parties on their boards of directors?
- Should providers be permitted to manipulate the list of potential arbitrators they offer in a case involving a corporate party? If so, are subjective criteria appropriate?
- Should providers have direct financial investments in corporate parties, e.g., stock holdings? Likewise, Should corporate parties have investment interests in the provider?
- Should providers be owned by their arbitrators, either as shareholders or as partners, such that each arbitrator has a financial stake not only in whether they personally are selected by repeat players, but whether the provider organization as a whole enjoys repeat business from the corporate party?
- Should providers be required to adhere to specified arbitration rules?
- Should providers be permitted to market themselves or their arbitrators directly to corporate parties or to solicit particular cases?
- Should provider organizations be permitted to arbitrate mandatory consumer disputes involving corporate repeat players?

- Is vacatur an adequate remedy for all arbitrator or provider misconduct?
- Should arbitrators and/or providers be absolutely immune from all civil liability?

¹ Arbitration is one of form of dispute resolution, other than civil litigation, collected under the title ADR. Mediation is the other dominant form of ADR. Traditionally, ADR has been shorthand for Alternative Dispute Resolution. Concern about misuse of ADR, however, has caused some to suggest that the term that best captures the purpose of ADR is "Appropriate" Dispute Resolution.

² "Win Some, Lose Rarely?; Arbitration Forum's Rulings Called One-Sided," *The Washington Post*, March 1, 2000.

³ See, e.g., *Delta Mine Holding Company v. AFC Coal Properties, Inc.*, 2001 U.S. App. LEXIS 27260 (8th Cir. Dec. 28, 2001)(conduct by the arbitrator may violate AAA ethical standards, but these standards form no part of the rules under which the arbitration was conducted); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 680 (7th Cir.), *cert. denied*, 464 U.S. 1009, 78 L. Ed. 2d 711, 104 S. Ct. 529 (1983)(AAA arbitrator ethics code does not have the force of law).

⁴ E.g., *Honn v. National Assoc. of Securities Dealers, Inc.*, 182 F.3d 1014 (7th Cir. 1999)(case returned to arbitration under the auspices of the same arbitration provider organization after ethical improprieties in each of the two prior arbitrations between the parties).

⁵ See *Austern v. Chicago Board of Options Exchange*, 898 F.2d 882, 886 (2d Cir. 1990), *cert den.*, 498 U.S. 850 (1990).

⁶ See National Arbitration Forum, Millennial Issues Regarding Arbitration Fairness: An Administrator's View (2000), available at <http://www.arb-forum.com/arbitration/NAF/arblaw.asp>

⁷ *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir.), *cert. denied*, 464 U.S. 1009, 78 L. Ed. 2d 711, 104 S. Ct. 529 (1983).

⁸ E.g., C. Menkel-Meadow, *Do the Haves Come Out Ahead in Alternative Judicial System?: Repeat Players in ADR*, 15 Ohio State J. on Dispute Resolution 19 (1999)(collecting and commenting on research). See also, "Win Some, Lose Rarely?; Arbitration Forum's Rulings Called One-Sided," *The Washington Post*, March 1, 2000 (National Arbitration Forum has ruled in favor of its corporate client, First USA, in more than 99 percent of the cases that went to an arbitrator).