Double Blind Negotiation or “Go To”

The parties have negotiated to impasse. They are still thousands of dollars apart, but neither party will make the next move unless the other party bids first. Efforts to move the parties off their last positions are otherwise unavailing. In this situation, the mediator can propose using a double blind negotiation approach to break the impasse. The mediator suggests a number (the “go to” number) in private caucus with each party. The number falls between the last offer and the last demand. But the number is not “pulled out of thin air.” It is a number the mediator is reasonably certain at least one of the parties will agree to in order to settle the case. The mediator asks for only a yes or no response to the number from each party. Higher or lower numbers are not entertained. The parties’ responses are not revealed to each other. If both parties give their assent to the number, the case is settled. If one side says no, the negative response is not revealed to the other side. There is no downside to this method. The assenting party has not “tipped its hand” and can still negotiate from its last transmitted offer or demand. The mediator can ask for the assenting party’s permission to disclose its agreement to the “go to” number to the other side. If permission is given, the number is transmitted with the comment that the case can be settled for that amount. This puts some pressure on the other party to move off its last position or risk a breakdown of the negotiation. At the least, such a maneuver can restart the negotiation and keep the parties at the table.

Blind Bidding

If the parties have a good relationship with the mediator, and a high level of trust in her and the mediation process, the mediator can conduct what is known as “blind bidding.” This impasse-breaking technique (a variation of “Go To”), engages the parties in back-and-forth negotiation without either party being made aware of the other party’s current bid. The technique may be successful where the parties have narrowed the gap between them through more traditional negotiation methods, but the parties are at an impasse on publicly-disclosed positions that neither party will move from because of lack of trust that counter-moves will be made in good faith. If the mediator learns in caucus that each party still has room for movement, she asks the parties to commit to bidding without the bids being transmitted. The mediator discloses only that

(Continued on Page 2)
there is movement by the other side in order to induce further bidding. The blind bids are, thereby, not a reaction to the other party’s number; rather, they more closely reflect the parties’ belief in the value of their respective cases. When the bids are reasonably close, the mediator can then turn the parties back to more traditional open bidding and then move them to resolution. In order to successfully conduct blind bidding, the mediator must have some idea of the bottom-line numbers for each side and should monitor the bidding so that neither party reaches its bottom line well before the other.

Playing the Percentages

When parties engage in positional bargaining at mediation, they assert their arguments based on certainty, or near certainty, of success at trial. “I’m going to win! The jury will (or will not) award X.” The mediator can use such certainty to conduct a risk analysis with the party. For example, is the party 100 percent certain of a defense verdict, or conversely, 100 percent certain of a $1 million award? Generally, parties will concede that nothing is an absolute certainty. The mediator’s reality testing techniques cause the parties to rethink their positions and the percentages for particular outcomes will rise or fall after further consideration. The mediator can then use the revised percentages as a basis for new bidding numbers. For example, if the demand is $1 million, but the certainty of getting that award from a jury is only 75 percent, then the bidding number needs to be adjusted downward from $1 million. Likewise, if the certainty of a defense verdict is 75 percent, then the offer needs to move up from zero. The mediator persuades the parties to adjust their bids consistent with the new percentages; e.g., $750,000 and $250,000. Further reality testing may cause the parties to adjust their percentages at those levels still more, and accordingly, to move their bids in line with the new percentages. The parties are induced by the mediator to take a more realistic, interest-based approach to their negotiation and to abandon the litigation-style positional bargaining that caused them to reach the impasse.

The parties are then asked to explore what the percentages are for the case settling at other numbers. For example, does the case have a zero percentage of settling at $750,000 (or $250,000); 50 percent chance of settling at $650,000 (or $350,000); 75 percent chance of settling at $550,000 (or $450,000)? The mediator may present these percentages to the parties as a result of evaluative techniques, or may elicit the percentages from the parties themselves through a more facilitative approach. The result is the same however. The impasse is overcome and the parties move closer together in their negotiations.

Thresholds

Demand and offer numbers have strategic and psychological significance. Each successive bid is made to conform to certain tactical and psychological thresholds. Particular numbers will actually present barriers for parties that can stop negotiation in its tracks. For example, a $1.3 million demand is made to settle a case. The defense responds that the demand is grossly out-of-line and counters with a lowball number; e.g., $50,000. In caucus, the defense reveals that it will not come off its offer until the plaintiff’s demand is reduced to a number under $1 million. The tactical barrier for defendant is the million-dollar number. On the other hand, the million-dollar number may present a psychological as well as tactical barrier for the plaintiff that cannot be crossed unless the defendant makes a more serious offer. The parties are at impasse unless the mediator can convince one or both parties to make a move. One way to move the parties from these positions is for the mediator to inquire, in caucus, whether the plaintiff would be willing to move to a six-figure demand (even if it is $990,000), if the defense will move to a six-figure offer (even if it is $105,000). Likewise, in caucus, the mediator makes the same inquiry of the defense. No moves are made unless both parties agree to cross the respective thresholds. Another way for the mediator to frame the question is to ask each party whether the case has a reasonable likelihood of settling in the six-figure range, i.e., between $100,000 and $999,999. If the parties say yes, then the mediator asks each whether she would adjust her bid within that range so that negotiation can continue.

The next step is to further narrow the gap within that broad six-figure range. Can the case settle at or above (or below) other thresholds? The numbers selected by the mediator will have tactical and psychological significance for each party; i.e., they will be numbers ending in zero or, in contingency matters, amounts easily divided by three. In the scenario above, the numbers posed to plaintiff might be $900,000 (divisible by three), $750,000 (also divisible by three) and $500,000 (not easily divisible by three, but probed to find out the plaintiff’s bargaining limits). The numbers posed to defendant will explore the lower end of the six-figure range: $200,000 (ends in zero); $300,000 (divisible by three); and $500,000 (to probe the upper limits of defendant’s authority). By probing acceptance of these threshold numbers, the mediator attempts to move the parties off earlier threshold positions.
Breaking Impasse: How the Mediator Adds Value to Facilitated Negotiations -
Part 2 of 2
(Continued from Page 2)

Other numbers also have significance. At each bidding level there is a "split-the-difference" number. Each party may regard that number as a barrier and resistance may be encountered when a party is asked to cross it. For example, if the parties are at $100,000 and $900,000, the "split-the-difference" number is $500,000. The plaintiff may balk at going below that number or the defendant above it. Each party will calculate its successive bids with that number firmly in mind. Overlaying the "split-the-difference" number at each bidding level are other numbers of significance; e.g., the "split-the-difference" number between the first demand and offer and the walk-away numbers each party has set into her respective negotiation strategy. The mediator must be sensitive to those numbers in asking the parties, after each successive bid, whether they can or will move to the next bidding level. In skillfully guiding the parties through each of these thresholds, the mediator breaks impasse and moves the parties closer to resolution.

Conclusion

The mediator uses skill, creativity, communication and the cooperation of the parties to break the impasse. The techniques discussed above are but a few of the methods available to overcome the obstacles blocking parties from resolution.

Mark A. Welge is president of Welge Dispute Solutions LLC of Newtown Square. Questions or comments about this article should be directed to the author at (484) 840-1610 or m.welge-disputesolv@att.net.

Op-Ed from the Newsletter Editor

By Thomas B. Salzer

This is an opinion note and not the more objective article typical to this newsletter. It is merely my observation, made after I attended summer meetings of both an ADR professional society meeting in the Delaware Valley area and a meeting to launch a local county court-annexed mediation program. Both meetings were attended by comparatively experienced ADR professionals. Most had legal training,  but certainly there were also some non-attorney ADR professionals in attendance. The number of ADR professionals in each of the two meetings was about 35, so the statistical confidence is not great that these observances can be extrapolated beyond this snapshot occurrence.

The groups were asked what were the areas of dispute that they as mediators and mediators-arbitrators considered themselves capable of trying to resolve. With the caveat on the small statistical sample size, eight people in each meeting said they viewed themselves competent and/or actually practiced being mediators in "all" areas. Some of the eight went beyond the summary expression of "all" areas with a laundry list of their expertise in "family disputes and commercial and construction and medical malpractice and employment disputes." I wonder if the people who said "all" also meant maritime law and intellectual property disputes? The question is, can a mediator be really effective in "all" areas or topics of disputes?

There is a school of thought that if your mediation philosophy or style is facilitative or transformative, then it is the process that is paramount and the topic of the dispute is less important. However, when the nature of the dispute and the means of liability are so specialized, and the actual sources of potential recovery — such as medical malpractice disputes where statutes in some states bring various state and private insurance carriers in at different levels — so involved, how can a facilitative mediator be as effective as he should be? What does a transformative mediator do in moving from one caucus to another in relaying questions in a construction dispute when the parties are discussing the appropriate three alternatives of Eichleay calculations for damages and the mediator has no idea how important this discussion truly is? If a mediator doesn’t know the worker protections offered in a personal injury situation by the Federal Longshoreman Act when a stevedore is hurt, how can that mediator evaluate when a brainstorming session is reasonably complete?

When mediators market themselves as capable of working in "all" areas or present a laundry list of capabilities equating to "all" areas, is this the best way to further the use of mediation or ADR in general? ADR is rightfully presented as a potentially faster process than going to court, more economical than going to court and providing more certainty that mediators or arbitrators know the topic in dispute. If ADR continues to use three arbitrators with each arbitrator maximizing their schedule, the "quicker" component is in jeopardy, and the use of three arbitrators or co-mediators places in question the "more economical" feature, then the third strike to ADR’s advantages might be the certainty of topic knowledge when mediators present themselves as capable for "all" disputes.

Thomas B. Salzer is an attorney with construction litigation experience and is the general counsel for APG-America, Inc., a curtain wall manufacturer and installer.
Changes to the Rules of Civil Procedure Governing Medical Malpractice Litigation

This press release was issued by the Administrative Office of Pennsylvania Courts on Aug. 20, 2004.

Chief Justice of Pennsylvania Ralph J. Cappy today announced three changes to the state’s Rules of Civil Procedure governing aspects of medical malpractice litigation. These changes join three earlier civil rules changes or additions with respect to med-mal issues, dating back as far as March 2003.

“The rules being promulgated today are additional steps, with real value, in further demystifying the complex issues of trying medical malpractice cases in Pennsylvania’s courts and supporting alternative adjudicatory procedures for those cases,” said Chief Justice Cappy. “Our efforts are but part of the med-mal puzzle that engage all three branches of state government and interested parties, but they further demonstrate our commitment to help understand and resolve legitimate concerns.”

Newly-adopted Rule of Civil Procedural 223.3 mandates a specific charge (instruction) by a presiding judge to a jury deciding a case involving bodily injury or death where a claim for non-economic loss is sought by the plaintiff. While the specific jury charge may be modified by agreement of both parties, the charge set forth in the new rule aims to define the components of non-economic damage claims and awards in clearly understandable terms for jurors. The rule also lists specific factors that jurors shall consider when deliberating non-economic damage awards. This rule will apply in all negligence litigation involving a claim for non-economic damages.

A second new rule, Rule of Civil Procedure 1042.71, implements section 509 of the MCARE Act and requires a breakdown of every verdict into certain categories, thus facilitating prior orders of the Supreme Court which require statistics to be kept.

A third new civil procedural rule, Rule 4011, adds to provisions of an existing rule limiting the scope of discovery and deposition and in conformity with current state law which provides that most mediation communications and documents are privileged. These amendments will enhance the role of the mediation process as an important tool in helping to effectively decide medical malpractice cases.

Among other steps taken by the Supreme Court of Pennsylvania regarding medical malpractice issues:

- a rule to ensure that med-mal cases are heard in the proper venue;
- rules to speed med-mal litigation by requiring pre-certification of med-mal claims and early disclosure of expert reports;
- the requirement that by Jan. 1, 2005, all Pennsylvania jurisdictions that deal with med-mal claims will have a mediation program in place to provide “early intervention” in cases; and
- the requirement that local courts begin collecting additional data on med-mal cases that will — in the long term — help all parties to better understand these complex issues.

Additionally, Pennsylvania’s court system announced in late July its creation of an electronic “one-stop shop” — a med-mal-related Web page on the Judiciary’s Web site (www.courts.state.pa.us) — to centrally locate all efforts, statistics, rules and related topics within the Judiciary’s purview regarding medical malpractice issues.

PBA Alternative Dispute Resolution Committee

Co-Chairs:
Kathleen L. Daerr-Bannon
Mark A. Welge
Ann Begler

Co-Vice Chairs:
Robert Mitchell Ackerman
Thomas B. Salzer

Newsletter Editor:
Thomas B. Salzer

PBA Staff Liaison:
Louann Bell

PBA Newsletter Liaison:
Patricia M. Graybill

Copyright © 2004 by the PBA Alternative Dispute Resolution Committee.
Some Reality Checks on the Course of Arbitration

By Thomas B. Salzer

In theory, arbitration has many benefits over litigation. It is cheaper, faster, and as a secondary or derivative benefit, potentially less disruptive through other means in employer/employee disputes. [See article on Kodak Co. in the previous newsletter at www.pabar.org/pdf/ADRspring04.pdf.] The reality is that the “cheaper” claim is made because time is money and time-consuming depositions are usually not allowed in arbitration. The “faster” claim is made because of abbreviated discovery and having arbitrators address motions hopefully “faster” than courthouses and “faster” because in the hearings, there are — obviously — no juries and the rules of evidence are usually followed in principal but without the procedural hurdles.

Stopping the analysis here would be uneven though: the “cheaper” notion is diminished by the costs charged by the arbitrators that are only exacerbated when there are three arbitrators, and further eroded when the arbitrator(s) let the hearings go on for an unwarranted number of days.

These reality checks are not merely the idea of the writer but were also expressed in other words by speakers at the recent Minority Corporate Counsel Association’s Third Annual CLE Expo in Chicago. “The benefits of arbitration are sometimes more theoretical than real,” said Joseph J. Torres, a partner in the Chicago office of Winston & Strawn, during the April seminar “Employee Arbitration Agreements.” Among the downsides to arbitration, Torres said, are the lack of summary judgment, the narrow scope of review and the fact that arbitration doesn’t necessarily stop the EEOC from taking action against a company.

Respondents to a recent Corporate Legal Times survey on ADR noted the limitations of arbitration when almost 41 percent said arbitration is as expensive as the traditional adjudication process; 17 percent thought it was less fair than traditional methods; and 15.4 percent used binding arbitration less in the past 12 months than they had in previous years. [See “The Truth About ADR,” February 2004, p. 44]. It was also noted at this same CLE Expo in Chicago that companies in the retail and service sectors should be selective about when and how arbitration agreements are implemented as evidenced from decisions in Circuit City Stores v. Adams. Torres concluded that only certain employees, such as more senior management, should be asked to sign mandatory arbitration agreements. Torres continued, “What’s the point of asking the mail clerk to go into arbitration?” [Note: the author does not attempt to justify or understand this quote.]

Lelie M. Turner, an attorney in Washington, D.C., offered, “By forcing a low-level employee into arbitration, you come out as a monster.” She also offered the following advice, (1) for larger or multi-site companies, arbitration agreements should be tailored to comply with state common law or statutes addressing arbitration, (2) ERISA claims do not lend themselves to arbitration, (3) specific notice, extent of coverage, filing deadlines, arbitrator(s) selection and arbitrator fee payment requirements should all be part of the pre-employment agreement to arbitrate. ■

Reflections on Continuing to Use Arbitration in Employment Disputes

By Thomas B. Salzer

In 2003, the BellSouth Corporation investigated using arbitration for 20,000 non-union employees. With the assistance of an outside law firm and Bell South non-attorney labor managers, a senior BellSouth in-house attorney concluded, “Once we had all the data, we pulled the plug on it,” because of the over-riding concern that an arbitration plan “might encourage employees to file unwarranted claims ... Historically, we have tended to do rather well on summary judgment in employment cases. So it [court proceeding] is a weapon we didn’t want to give up.”

BellSouth isn’t the only company to have qualms about mandatory arbitration for employment matters. Corporations such as Merrill Lynch & Co., Inc.; Southern California Edison Company; and MCI (formerly WorldCom, Inc.) have reduced their use of arbitration in employment situations for the following articulated reasons: (1) arbitrations have become increasingly expensive as courts have expanded plaintiffs’ rights and (2) some companies have decided that they don’t want to alienate their employees by requiring them to sign mandatory arbitration clauses. As a result, “We’re not seeing the enthusiasm for mandatory employment arbitration today that we were in the mid- to late 1990s,” according to a senior vice president of the AAA. A New York attorney noted that whenever he speaks at conferences devoted to alternative dispute resolution,
Reflections on Continuing to Use Arbitration in Employment Disputes
(Continued from Page 5)

he canvasses in-house lawyers on arbitration. “These days, not a lot of hands go up when I ask how many are using mandatory arbitration,” he said. “It’s not like it used to be” because the remedies and discovery processes between arbitration and litigation have merged. “So many of arbitration’s benefits have been eviscerated by the [judicial] process. … Arbitration often just isn’t worth the risk,” according to a senior in-house attorney for Southern California Edison.

A Rutgers University Law Journal in 2000 noted legal fees, which, given the ever-growing scope of arbitration proceedings, can be exorbitant.

Businesses have also gotten worried about how mandatory employment arbitration is perceived by their workforce. In 1998, Merrill Lynch became one of the first large companies to abandon the practice.

According to an assistant general counsel, the financial services firm didn’t like the cultural tone set by forcing its employees into arbitration. However, other companies such as Blue Cross and Blue Shield Association, Halliburton Company, and Altera (formerly Philip Morris) say they remain committed to the mandatory employment arbitration policies introduced in the past decade. “It’s my belief that arbitration typically gives us quicker and fairer decisions,” according to a senior attorney at Blue Cross and Blue Shield of Michigan. Not to limit alternative dispute resolution to arbitration, some employers, according to a Morgan, Lewis & Bockius attorney, send the dispute to mediation, then to a court proceeding instead of arbitration because of the lure of appealing a trial decision.

Comparing The Original With The Revised ABA - AAA Code Of Ethics For Arbitrators In Commercial Disputes

By Stephen G. Yusem

The Code of Ethics for Arbitrators in Commercial Disputes (Code), originally formulated in 1977 by a special joint committee of the American Bar Association (ABA) and the American Arbitration Association (AAA), was revised in 2003 and became effective March 1, 2004. This article compares the original with the revised Code.

The Code does not apply to labor arbitration, which is conducted under the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes. Further, the Code will have limited effect in cases having international components, as the United States is in a class by itself in institutionalizing the concept of party-appointed non-neutral arbitrators. In international arbitrations, party-appointed arbitrators are expected to be neutral and to avoid ex parte communications with the appointing party after appointment. ICC Rules of Arbitration, Art. 7; AAA International Arbitration Rules, Art. 7.

The original Code consisted of seven “canons” covering the following topics:

- Canon I — The Arbitration Process
- Canon II — Disclosure
- Canon III — Communicating with the Parties
- Canon IV — Fairness and Diligence
- Canon V — Decision Making
- Canon VI — Confidentiality
- Canon VII — Party-Appointed Arbitrators

The revised Code is comprised of 10 canons, which relate to the original Code as follows:

- Canons I-V same subject matter as original Code
- Canon VI same subject matter as original Code except for the question of compensation, which comprises Canon VII
- Canon VII — Compensation
- Canon VIII — Promoting Arbitral Services (new)
- Canon IX — Party-Appointed Arbitrators. Same topic as original Canon VII.
- Canon X — Neutrality for Party-Appointed Arbitrators (called “Canon X Arbitrators,” originally called “Non-Neutral Arbitrators”)

There are important revisions to all of the canons of the original Code, excepting Canon V (Decision Making). The other six original canons have been revised as follows:

**CANON I — An Arbitrator Should Uphold the Integrity and Fairness of the Arbitration Process.**

While the title of Canon I remains unchanged, and several changes are merely rhetorical, there are the following significant revisions:

1. Canon I-A. The revised Code notes that the arbitrator’s responsibility to the arbitration process “may” include pro bono service “where appropriate.”

2. Canon I-B (originally I-C), addressing the acceptance of appointment as an arbitrator, notes that in addition to the matter of availability, an arbitrator should ensure that he or she can serve competently and can also serve impartially and independently from the parties, witnesses and other arbitrators. However, Canon X

(Continued on Page 7)
Comparing The Original With The Revised ABA - AAA Code of Ethics for Arbitrators In Commercial Disputes
(Continued from Page 5)

arbitrators are exempt from the requirements of impartiality and independence.

3. Canon I C (originally I D) notes, consistent with the principle of party autonomy, that notwithstanding a conflict of interest, it is not unethical to serve if, after full disclosure, the parties consent. Canon X arbitrators are excepted.

4. Canon I D (originally I E), referring to avoiding being swayed by various interests, notes that an arbitrator should avoid giving even the appearance of partiality, except for Canon X arbitrators.

5. Canon I E (originally I F) provides that an arbitrator should not exceed his or her authority, but an arbitrator has no ethical obligation to comply with any agreement, procedure or rule that is unlawful or "would be inconsistent with this Code."

6. Canon I H (new). An arbitrator may withdraw where compelled "by unanticipated circumstances that would render it impossible or impractical to continue" or where a party breaches a compensation agreement.

7. Canon I I (new). An arbitrator who withdraws should protect the interests of the parties, which includes returning evidence and protecting confidentiality.

The Comment to Canon I clarifies what is meant by "partiality." It states that an arbitrator is not considered partial merely by having acquired knowledge of the parties, the applicable law and the practices of the business involved. The Comment acknowledges that arbitrators may have experience or expertise in the commercial area and that Canon I is not violated if, by reason of such experience or expertise, the arbitrator has views on issues likely to arise in the arbitration. However, the arbitrator "may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration."

It should be noted that the judiciary has generally supported the concept of non-neutrality both before and after the adoption of the original Code. Compare Astoria Medical Group v. Health Ins. Plan of Greater New York, 11 N.Y.2d 128, 182 N.E. 85 (1962), with Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753 (11th Cir. 1993). The original Code assumed that the business community desired and expected non-neutrality; however, the modern rules of the major institutional ADR providers require neutrality for party-appointed arbitrators.

Courts recognize that party-appointed arbitration provides an advantage, as a party-appointed arbitrator may give technical assistance to the neutral member. It also provides a better opportunity for the parties to "keep the neutral arbitrator informed as to their real positions, which may not be exactly as their formal positions."


The courts recognize that the commercial community prefers a tribunal "knowledgeable about the subject matter of their dispute to a generalist court with its austere impartiality but limited knowledge of subject matter." ANR Coal Co., Inc. v. Cogentrix of North Carolina, Inc., 173 F.3d 493 (4th Cir. 1999), citing Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673 (7th Cir. 1983). Thus, the judiciary recognizes a tradeoff between impartiality and expertise. "No one would dream of having a judicial panel composed of one part-time judge and two representatives of the parties, but that is the standard arbitration panel, the panel [appellant] chose — presumably because it preferred a more expert to a more impartial tribunal — when it wrote an arbitration clause into its reinsurance contract with [appellee]." Merit Ins. Co., 714 F.2d at 679.

The Comment to Canon I further notes that during the arbitration, an arbitrator may engage in discourse with the parties or their counsel, draw out arguments, comment on the law or the evidence and make interim rulings.

CANON II— An Arbitrator Should Disclose Any Interest or Relationship Likely to Affect Impartiality or Which Might Create an Appearance of Partiality.

The Canon II includes three primary areas of revision:

1. In addition to the disclosures originally required, including interests or relationships likely to affect impartiality and independence, Canon II A requires disclosure of the extent of an arbitrator’s prior knowledge of a dispute and “other matters” required to be disclosed by law or the rules of an institutional provider.

2. Canon II F (new) provides that where the parties know an arbitrator’s interest and relationship and nevertheless desire the arbitrator to serve, the arbitrator may properly do so.

3. Canon II H (new) provides that if, to comply with the Code, a prospective arbitrator would be obliged to disclose confidential or privileged information, the arbitrator must either obtain appropriate consents or withdraw.

In Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968), the only Supreme Court case addressing an arbitrator’s duty to disclose, Justice Black, writing for a plurality of four, suggested, in dictum, that arbitrators are subject to the same ethical standards as judges. However, the Code effectively adopted the approach of Justice White, who, concurring, drove (Continued on Page 8)
Comparing The Original With
The Revised ABA - AAA
Code of Ethics for Arbitrators
In Commercial Disputes
(Continued from Page 7)

home the point that “the court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges.” Commonwealth Coatings Corp., 393 U.S. at 150, 89 S.Ct. at 340. Justice White stated that arbitrators “should err on the side of disclosure” but recognized that “an arbitrator’s business relationships may be diverse indeed, involving more or less remote commercial connections with great numbers of people” and that therefore an arbitrator cannot be expected to provide “his complete and unexpurgated business biography,” nor is an arbitrator required to disclose interests that are merely trivial. Commonwealth Coatings Corp., 399 U.S. at 151-152, 89 S.Ct. at 340-341. See also ANR Coal Co., Inc., 173 F.3d at 498-499; Merit Ins. Co., 714 F.2d at 682.

An arbitration award can be reversed for “evident partiality,” Federal Arbitration Act, §10(a) (2); Revised Uniform Arbitration Act, §23 (a) (2) (A); however, “mere non-disclosure does not in itself justify vacatur.” ANR Coal Co., Inc., 173 F.3d at 500.

To determine whether there is “evident partiality,” the court may examine four factors:
(1) the extent and character of the personal or pecuniary interest of the arbitrator of the proceeding;
(2) the directness of the relationship between the arbitrator and the party alleged to be favored;
(3) the connection of that relationship to the arbitration; and
(4) the proximity in time between the relationship and the arbitration proceeding. ANR Coal Co., Inc., 173 F.3d at 500.

The courts recognize that although the Code is entitled to “great respect,” it does not have the force of law. Merit Ins. Co., 714 F.2d at 680. The grounds for setting aside an arbitrator’s award under the statutory “evident partiality” test are distinctly narrower than the grounds for disqualification under the Code. “The fact that the AAA went beyond the statutory standards in drafting its own code of ethics does not lower the threshold for judicial intervention.” Merit Ins. Co., 714 F.2d at 681. The judiciary cautions against encouraging the losing party to conduct a background investigation of each arbitrator in an effort to uncover evidence of a former relationship with the adversary. Merit Ins. Co., 714 F.2d at 683.

Thus, vacatur was denied for non-disclosure in Daichi Hawaii Real Estate Corp. v. Lichter, 82 P.3d 411 (Haw. 2003) (arbitrator’s disclosure of prior representation of party lessor held sufficient); Sphere Drake Ins. Ltd. v. All American Life Ins. Co., 307 F.3d 617 (7th Cir. 2002) (failure to fully disclose extent of prior representation of appointing party does not constitute evident partiality); Michael v. Aetna Life & Casualty Ins. Co., 88 Cal. App. 4th 925 (2001) (business connection insufficient to support vacatur); ANR Coal Co., Inc. v. Cogentrix of North Carolina, Inc., 173 F.3d 493 (4th Cir. 1999) (attenuated connections between arbitrator’s law firm and one of parties in arbitration); Betz v. Pankow, 38 Cal.Rptr.2d 107 (App. Ct. 1995) (arbitrator held former partnership interest in law firm that previously represented party to arbitration); Devore v. IHC Hospitals, Inc., 884 P.2d 1246 (Utah 1994) (arbitrator held church positions with witness who testified on behalf of employer in wrongful termination dispute). The burden of proof is on the objecting party to prove that the partiality of a party-appointed arbitrator prejudicially affected an award. Delta Mine Holding Co. v. AFC Coal Properties, 280 F.3d 815 at 822.

Arbitration awards were vacated for non-disclosure in Houston Village Builders, Inc. v. Fulbaum, 105 S.W.3d 28 (Tex.App. 2003) (arbitrator represented home builders association of which party builder and party builder’s parent company were members); Morgan Guaranty Trust Company of New York v. Solow Building Co., LLC, 720 N.Y.S.2d 69 (App. Div. 2001) (arbitrator appointed by defendant did not disclose close involvement with plaintiff’s counsel on prior arbitrations; arbitrator was scheduled to testify against defendant in unrelated matter); Valrose Maui, Inc. v. Maclyn Morris, Inc., 105 F.Supp.2d 1118 (D.Haw. 2000) (arbitrator did not disclose ex parte discussion with plaintiff’s attorney concerning possibility of service as mediator in upcoming unrelated action) and Texas Commerce Bank v. Universal Technical Institute of Texas, Inc., 985 S.W.2d 678 (Tex.App. 1999) (arbitrator formerly represented party bank in a $1.5 million lawsuit).

CANON III — An Arbitrator Should Avoid Impropriety or the Appearance of Impropriety in Communicating With Parties.

Canon III revisions address ex parte communications between a prospective or sitting arbitrator and a party as follows:
1. Prospective arbitrators may ask about the identities of the parties, counsel or witnesses and the general nature of the case, and may respond to inquiries regarding his or her suitability, during which discussion the prospective arbitrator may receive information regarding the general nature of the dispute but not the merits of the case.
2. Party-appointed arbitrators may consult with the appointing party concerning the choice of the third arbitrator.
3. Party-appointed arbitrators may consult with the appointing party concerning the party appointed-
Comparing The Original With The Revised ABA - AAA Code of Ethics for Arbitrators in Commercial Disputes
(Continued from Page 8)

The arbitrator’s compensation, and requests for payment need not be sent to other parties.

4. Party-appointed arbitrators may consult with the appointing party regarding communications between any other arbitrator and the party appointing that arbitrator pursuant to Canon IX C.

CANON IV — An Arbitrator Should Conduct the Proceedings Fairly and Diligently.

The revisions add a new subsection, IV B, which requires that the arbitrator afford all parties the right to be heard and represented by counsel “or by any other person chosen by the party,” and that the arbitrator provide due notice of the time and place of all hearings. The revision also adds a clause to the subsection regarding settlement, stating that an arbitrator should not participate in settlement discussions or act as a mediator unless requested to do so by all of the parties.

CANON V — An Arbitrator Should Make Decisions in a Just, Independent and Deliberate Manner.

No change from original Code.

CANON VI — An Arbitrator Should be Faithful to the Relationship of Trust and Confidentiality Inherent in That Office.

The revised Code extracts from the original Code the subsection relating to compensation and constitutes it as Canon VII. The revision also adds to the general confidentiality caveat that an arbitrator may obtain help from an associate “or other persons in connection with reaching his or her decision,” if (1) the arbitrator informs the parties, and (2) such other persons agree to be bound by Canon VI.

CANON VII (new) — An Arbitrator Should Adhere to Standards of Integrity and Fairness When Making Arrangements for Compensation and Reimbursement of Expenses.

The revisions add a new subsection regarding compensation, e.g., a clause to the subsection regarding settlement, stating that an arbitrator should not participate in settlement discussions or act as a mediator unless requested to do so by all of the parties.

1. Negotiating all compensation components, e.g., cancellation fee, study time, expenses, before accepting the appointment and putting compensation terms in writing except for party-appointed arbitrators.

2. Where there is an institutional provider, compensation arrangements should be made through the provider. If there is no such provider, communications regarding compensation should be made in the presence of all of the parties except for party-appointed arbitrators.

3. Arbitrators should not request compensation increases “absent extraordinary circumstances.”

CANON VIII (new) — An Arbitrator May Engage in Advertising or Promotion of Arbitral Services Which is Truthful and Accurate.

Statements regarding the quality of the arbitrator’s work or the success of the practice must be truthful and must not imply any willingness to accept an appointment other than in accordance with the Code.

CANON IX (originally Canon VII) — Arbitrators Appointed by One Party Have a Duty to Determine and Disclose Their Status and to Comply With This Code, Except as Exempted by Canon X.

1. Canon IX A provides that in tripartite arbitrations, all three arbitrators are “presumed to be neutral and are expected to observe the same standards as the third arbitrator.” This is contrary to Canon VII of the original Code, which presumed party-appointed arbitrators to be non-neutral. This states the single most significant distinction between the original and revised Code.

2. Canon IX B provides that notwithstanding this presumption, in “certain types of tripartite arbitration party-appointed arbitrators” may be predisposed toward the party appointing them. These arbitrators, originally called “non-neutral arbitrators,” now referred to as “Canon X arbitrators,” are not held to the same standards of neutrality as other arbitrators.

3. Canon IX C provides that a party-appointed arbitrator must ascertain, as early as possible, but not later than the first meeting of the arbitrators and parties, whether he or she is appointed as neutral or as Canon X arbitrator and also must provide a report of his or her conclusions to the parties and the other arbitrators. To do this, a party-appointed arbitrator should review the arbitration agreement, applicable rules and law as well as the course of dealings of the parties. Unless and until the party-appointed arbitrator concludes that he or she is not neutral, he or she should observe all the Canons applicable to neutral arbitrators.”

In Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753 (11th Cir. 1993), the court refused to vacate an award where the party-appointed arbitrator assisted the party in preparing its case by participating in meetings with witnesses, suggesting areas of testimony, selecting a consultant and advising an expert witness on how to improve his testimony where “none of [the party’s] representatives nor the third party witness...” (Continued on Page 10)
Comparing The Original With The Revised ABA - AAA Code of Ethics for Arbitrators In Commercial Disputes (Continued from Page 9)

were placed under oath before being interviewed, and none gave testimony in any sense of the word,” and appellant “made no showing that [the arbitrator] discussed any information that he received during the pre-hearing interviews with the other arbitrators, or that any of the arbitrators, including [the subject arbitrator] based their deliberations and award on anything other than the evidence of record.” Sunkist Drinks, Inc. at p. 759. The subject arbitrator had announced in his formal disclosure letter that he had been in contact with the appointing party and its experts before the parties were notified of his appointment and that he intended to continue to communicate with the appointing party after his formal appointment. The court characterized the arbitrator’s conduct as “commonplace.”

In Aetna Casualty & Surety Co. v. Grabbert, 590 A.2d 88 (S.C.R.I. 1991), a party-appointed arbitrator was held to have violated his ethical obligation by charging a contingent fee, but the court refused to vacate the award because appellant failed to demonstrate that there was a “causal nexus” between the arbitrator’s improper conduct and the award, and because the appellant did not know of the contingent fee arrangement until six months after the award was rendered.

In Metropolitan Property and Casualty Ins. Co. v. J.C. Penney Casualty and Co., 780 F.Supp. 885 (D.Conn. 1991), where a party-appointed arbitrator had ex parte meetings with the non-appointing party to discuss the merits of its defenses and also examined potential documentary evidence prior to selection of the arbitration panel, the award was vacated for both evidential partiality and arbitrator misconduct.

CANON X (new) — Exemptions for Arbitrators Appointed by One Party Who Are Not Subject to Rules of Neutrality.

Canon X expands on the original Canon VII, and refers to the extent to which Canon X arbitrators must observe the other Canons.

1. A Canon X arbitrator should observe all of the process obligations of Canon I, except that a Canon X arbitrator may be predisposed toward the appointing party. However, notwithstanding this predisposition, a Canon X arbitrator should not engage in delaying tactics, harassment or misleading statements to the other arbitrators. A Canon X arbitrator is obviously not subject to Canon I requirements requiring impartiality.

2. A Canon X arbitrator should observe all the disclosure requirements of Canon II, except that he or she is not obligated to withdraw if requested to do so by the party who did not appoint them.

3. A Canon X arbitrator is subject to the communication requirements of Canon III except as follows:
   a. A Canon X arbitrator must, at the earliest practicable time, disclose to the other arbitrators and to the parties whether he or she intends to communicate with the appointing party. Only after doing so may he or she thereafter communicate with the appointing party concerning the merits or “any other aspect of the case.” If a Canon X arbitrator communicates with the appointing party prior to the first hearing, the Canon X arbitrator must inform the other arbitrators of the fact that ex parte communications occurred but need not disclose the content of pre-hearing communications.
   b. During the arbitration, a Canon X arbitrator may not disclose any deliberations on any matter or issue submitted to the arbitrators for decision and may not communicate with the appointing party concerning any matter or issue under consideration by the panel after the record is closed and may not disclose any final decision or interim decision in advance of the time that it is disclosed to all parties.

c. A Canon X arbitrator may not communicate with the neutral arbitrator concerning “any matter or issue” unless the other Canon X arbitrator is present, and may not communicate in writing with the neutral without providing a copy to the other parties or arbitrators.

4. A Canon X arbitrator should observe the Canon IV obligations regarding fairness and diligence, the Canon VI obligations regarding confidentiality, the Canon VII obligations regarding compensation, the Canon VIII obligations regarding promoting arbitral services and the Canon V obligations regarding independence, except that a Canon X arbitrator may obviously be predisposed before deciding in favor of the appointing party.

Stephen G. Yusem is an attorney with significant ADR experience, especially in Montgomery County where he also offered his time for many pro bono efforts. He is a senior member of the JAMS office in Philadelphia where he can be reached at syusem@jamsadr.com.