

Neutral Arbitrators: Special Ethical Issues in American Practice

Introduction

Arbitration has become a central mechanism for dispute resolution in the United States, offering parties a private, efficient alternative to litigation. At the heart of this system is the neutral arbitrator, whose role demands independence, fairness, and integrity. Unlike judges, arbitrators often operate in less formal environments, which gives rise to unique ethical challenges. This document explores the special ethical issues faced by neutral arbitrators in American practice.

The Role of the Neutral Arbitrator

A neutral arbitrator is responsible for ensuring a fair hearing, evaluating evidence, and rendering an impartial decision. Arbitrators may be selected by the parties or appointed by institutions. Their authority derives from party agreement, making trust and ethical conduct fundamental to the legitimacy of the process.

Core Ethical Principles

1. Impartiality and Independence

Arbitrators must remain unbiased and free from external influence. This includes avoiding:

- Financial or personal interests in the outcome
- Prior relationships with parties, counsel, or witnesses
- Any conduct that creates an appearance of bias

2. Disclosure Obligations

Full and timely disclosure is critical. Arbitrators are required to disclose:

- Past or present relationships with parties or counsel
- Financial interests that could affect impartiality
- Any circumstances that might raise doubts about neutrality

Failure to disclose can lead to challenges, removal, or vacatur of awards.

3. Competence and Diligence

Arbitrators must possess the necessary expertise and devote adequate time to the case. Ethical concerns arise when arbitrators:

- Accept appointments beyond their expertise
- Fail to manage proceedings efficiently
- Delay issuing decisions

4. Confidentiality

Arbitration is typically private, and arbitrators must protect:

- Sensitive business information
- Trade secrets
- The integrity of deliberations

However, tensions may arise when disclosure is required by law or public policy.

Special Ethical Challenges

1. Repeat Player Bias

A significant concern in American arbitration is the “repeat player” effect, where arbitrators may subconsciously favor parties or law firms that frequently select them. This creates pressure to maintain future appointments, potentially compromising neutrality.

2. Ex Parte Communications

Unauthorized communications between an arbitrator and one party can undermine fairness. While limited administrative contact may be permitted, substantive discussions outside the presence of all parties are generally prohibited.

3. Issue Conflicts

Arbitrators may have publicly expressed views (e.g., in publications or prior awards) on legal issues relevant to the dispute. Determining whether such views compromise neutrality is a complex ethical question.

4. Dual Roles (Arbitrator and Advocate)

In the U.S., it is common for professionals to serve both as arbitrators and as counsel in different cases. This dual role raises concerns about:

- Role confusion
- Strategic behavior
- Perceived bias

Some jurisdictions and institutions impose restrictions to mitigate these risks.

5. Third-Party Funding

The rise of third-party funding introduces new ethical issues, including:

- Disclosure of funding arrangements
- Potential influence of funders on proceedings
- Conflicts of interest between arbitrators and funders

Institutional Guidelines and Standards

1. Code of Ethics for Arbitrators in Commercial Disputes

Developed by leading arbitration organizations, this code provides guidance on neutrality, disclosure, and conduct. It distinguishes between neutral and party-appointed arbitrators, recognizing different expectations.

2. Federal Arbitration Act (FAA)

The FAA provides the legal framework for arbitration in the United States, including grounds for vacating awards, such as evident partiality or corruption.

3. Arbitral Institution Rules

Organizations such as the American Arbitration Association (AAA) and JAMS have established ethical rules and procedures to guide arbitrators and address conflicts.

Enforcement and Remedies

Ethical breaches may result in:

- Removal of the arbitrator
- Vacatur of the arbitration award
- Reputational harm
- Exclusion from institutional rosters

Courts generally defer to arbitration but will intervene in cases of clear ethical violations.

Best Practices for Arbitrators

- Conduct thorough conflict checks before accepting appointments
- Make ongoing disclosures as new circumstances arise

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- Maintain transparency in communications
- Avoid overcommitment to ensure timely proceedings
- Adhere to institutional rules and ethical codes

Conclusion

Neutral arbitrators play a vital role in maintaining the integrity of the American arbitration system. While the flexibility of arbitration offers many advantages, it also presents unique ethical challenges. By adhering to established principles and remaining vigilant to potential conflicts, arbitrators can uphold fairness, trust, and legitimacy in dispute resolution.

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