SOMETHING’S ROTTEN IN THE STATE OF PARTY-APPOINTED ARBITRATION:
HEALING ADR’S BLACK EYE THAT IS “NONNEUTRAL NEUTRALS”

Seth H. Lieberman *

PURPOSE

Uncertainty within the arbitration process is greatest when party-appointed arbitrators are introduced. An investigation into human nature begs the question whether it is realistic to expect that the same person can honestly act as an amalgam of judge and advocate in a single proceeding. Dean John D. Feerick recently remarked that, “it is vital to the integrity of arbitration to expressly delineate whether a party appointed arbitrator is neutral or non-neutral.” The fluctuating view of the courts, the recent revision of the Code of Ethics for Arbitrators in Domestic and Interna-

* Editor-in-Chief, Cardozo Journal of Conflict Resolution. B.A., James Madison University, 1999; J.D. Candidate, Benjamin N. Cardozo School of Law, Yeshiva University, June 2004. The author would like to thank Dariush Etemad-Moghadam, former Special Projects Manager for the Washington, DC office of JAMS, for his guidance and mentorship during the creation of this Note.


2 See Stephen C. Rogers, Can Tripartite Arbitration Panels Reach Fair Results?, 7 Disp. Resol. Mag. 27, 27 (Fall 2001); see also Arnold, infra note 60, at 9 (questioning if it is humanly possible for a party-appointed arbitrator not to be biased in favor of a party the arbitrator hopes will appoint her again in another case).

3 John D. Feerick, The 1977 Code of Ethics for Arbitrators: An Outside Perspective, 18 Ga. St. U. L. Rev. 907, 923 (2002). Feerick’s article is illustrative of the many current problems facing the field of party-appointed arbitration and his work is admittedly a catalyst for this Note. In particular, his astuteness of the ethical dilemmas facing this area of arbitration is precisely encapsulated in his observation of the changes between the 1977 Code of Ethics and the 2001 revisions. See id.

tional Disputes ("the Code of Ethics"), the differences among dispute resolution providers’ rules, and definitional inconsistencies among party-appointed arbitrators contribute to the confusion surrounding the role of party-appointed arbitrators. Indeed, there is currently a daunting problem concerning how active a role the members of an arbitral tribunal are obliged or permitted to play in conducting the proceedings with respect to procedural or substantive aspects that are inadequately argued by the parties’ counsel or not raised at all by one party by reason of the proceedings being ex parte. Although these questions arise in almost every case, they are rarely discussed in articulate and clear terms. Therefore, for party-appointed arbitration to retain its procedural integrity, disputant satisfaction, and continuing uniform practice, its label must accurately reflect the ADR hybrid process.

INTRODUCTION

This Note will first explore the history of arbitration, particularly within the United States. It will predominantly examine the traditional definitions of arbitrators and any consistencies throughout the various differences of arbitrator definitions. Second, this Note will investigate the traditional definitions of and roles played by advocates in traditional litigation and alternative dispute resolu-
tion. It will contrast advocates with party-appointed arbitrators, particularly focusing on their history, reasons for their creation, and their intended purpose.

Third, this Note will investigate the characteristics of modern party-appointed arbitrators, focusing on what scholars and parties regard as their expected behavior in a tripartite arbitration. It will examine how various dispute resolution providers, including the American Arbitration Association (“AAA”),11 JAMS (formerly Judicial Arbitration Mediation Services and JAMS/Endispute),12 and the Center for Public Resources Institute for Dispute Resolution (“CPR”)13 have incorporated the party-appointed arbitrator model into their respective rules and ethical guidelines, and how the Code of Ethics confronts party-appointed arbitrators’ behavior and *ex parte* communication before and during the arbitration. This Note will also investigate how various courts have discussed, fumbled, and often contradicted each other in their attempts to reconcile and eventually pinpoint appropriate party-appointed arbitrator behavior. Fourth, this Note will reveal varying arbitrators’ expectations regarding the role played by party-appointed arbitrators. This revelation will demonstrate how the problematic state of definitional inconsistencies might sacrifice the legitimacy of the party-appointed process.

Finally, this Note will propose that party-appointed arbitrators should be properly labeled as party-appointed advocates to ensure expectational symmetry among participants in party-appointed arbitrations. By confronting possible detractors of this suggestion, including those scholars who assert that the recent revision to the Code of Ethics will sufficiently ensure consistency among tripartite participants’ expectations of party-appointed arbitrator behavior, this Note supports the presumption that changing the term is necessary to accurately reflect party, arbitrator, and judicial expectations.

11 See AAA-Arbitration, Mediation and Other Forms of Alternative Dispute Resolution- A Brief Overview of the American Arbitration Association (hereinafter “AAA Overview”), at http://www.adr.org/index2.1jsp?JSPssid=15765&printable=true (last visited Nov. 10, 2003). The AAA boasts a panel of more than 11,000 neutrals available in 34 offices nationwide and two International Centres in New York and in Dublin. See id.


THE CONTRASTING HISTORY OF ARBITRATORS AND ADVOCATES

The Roles Played by Arbitrators

An arbitrator is traditionally defined as a neutral person who resolves disputes between parties, especially by means of formal arbitration. However, arbitration is a process that disputants have used for thousands of years. When King Solomon decided which of the disputing women could keep a living baby whom each claimed to be their own, he acted not as an officially appointed judge, nor did he decide this matter according to predetermined rules and procedures. Rather, he acted as an arbitrator with whom they voluntarily entrusted their dispute. Arbitration’s popularity has continued to flourish since Biblical times. It was not only utilized to resolve disputes between neighboring countries in ancient

---

14 See BLACK’S LAW DICTIONARY 80 (7th ed. 2000).

Solomon awoke; and, behold, it was a dream: and he came to Jerusalem, and stood before the ark of the covenant of Yahweh, and offered up burnt offerings, and offered peace-offerings, and made a feast to all his servants. Then there came two women who were prostitutes, to the king, and stood before him. The one woman said, Oh, my lord, I and this woman dwell in one house; and I was delivered of a child with her in the house. It happened the third day after I was delivered, that this woman was delivered also; and we were together; there was no stranger with us in the house, save we two in the house. This woman’s child died in the night, because she lay on it. She arose at midnight, and took my son from beside me, while your handmaid slept, and laid it in her bosom, and laid her dead child in my bosom. When I rose in the morning to give my child suck, behold, it was dead; but when I had looked at it in the morning, behold, it was not my son, whom I bore. The other woman said, No; but the living is my son, and the dead is your son. This said, No; but the dead is your son, and the living is my son. Thus they spoke before the king. Then said the king, The one says, This is my son who lives, and your son is the dead: and the other says, No; but your son is the dead, and my son is the living. The king said, Get me a sword. They brought a sword before the king. The king said, Divide the living child in two, and give half to the one, and half to the other. Then spoke the woman whose the living child was to the king, for her heart yearned over her son, and she said, Oh, my lord, give her the living child, and in no way kill it. But the other said, It shall be neither mine nor yours; divide it. Then the king answered, Give her the living child, and in no way kill it: she is the mother of it. All Israel heard of the judgment which the king had judged; and they feared the king: for they saw that the wisdom of God was in him, to do justice.

Id.

16 See id.
17 See id.
Greece, but it was also used in the Anglo-Saxon and early Norman periods.\(^\text{18}\)

In American history, arbitration dates back to the Jay Treaty of 1794, by which the infant United States and Great Britain resolved differences between them.\(^\text{19}\) Arbitration’s domestic popularity continued into the next century when, the Alabama Claims arose out of the depredations of a Confederate warship of that same name built in England.\(^\text{20}\) That ship caused substantial damage to federal commerce before the U.S.S. Kearsarge sent the Alabama to its ultimate demise at the depth of the English Channel off Cherbourg on June 19, 1864.\(^\text{21}\) The claims of the United States and its merchants to recover losses caused by the Alabama were the subject of arbitration between the United States and Great Britain and were finally decided in 1872 in favor of the United States for $15.5 million in gold.\(^\text{22}\)

Parties resolve their disputes through arbitration for a variety of reasons. Arbitration provides impartial decisions from a third party that can be achieved expeditiously and for less money than traditional litigation.\(^\text{23}\) Speed, privacy, informality, and the ability to obtain a more suitable neutral decision-maker are other advantages often cited in support of arbitration.\(^\text{24}\) As the motivations for utilizing arbitration escalated, the attraction to the practice of arbitration became codified. In fact, Section 10 of the United States Arbitration Act discusses the importance of arbitrator impartiality, even listing it as a reason that an award might be vacated.\(^\text{25}\)

\(^{18}\) See Daniel E. Murray, Arbitration in the Anglo-Saxon and Early Norman Periods, 16 ARB. J. 193, 194-95 (1961) (discussing arbitration’s use into the early twelfth century).

\(^{19}\) See Treaty of Amity, Commerce and Navigation, Nov. 19, 1794, United States - Great Britain, 8 Stat. 116. The arbitrators discussed in the Jay Treaty were under a party-appointed regime. See id.

\(^{20}\) See 1 John B. MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 658 (1898); see also The Treaty of Washington, May 8, 1871, United States - Great Britain, 17 Stat. 863, 143 Consol. T.S. 145.

\(^{21}\) See MOORE, supra note 20, at 658.

\(^{22}\) See id. The United States and the United Kingdom each appointed one arbitrator, plus one additional arbitrator was appointed respectively by the King of Italy, the Emperor of Brazil, and the President of the Swiss Confederation. See id.

\(^{23}\) See Leslie Grant, What is Arbitration?, at http://www.mediate.com/articles/grant.cfm (last visited Sept. 27, 2002) (asserting that the benefit “of arbitration is to obtain a fair resolution of disputes by an impartial third party without unnecessary expense or delay”).

\(^{24}\) See LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION & LAWYERS 570 (1997).

\(^{25}\) See 9 U.S.C. § 10(a) (1)-(3) (2000) (codifying wherein an award was rendered where there was evident partiality or corruption amongst the arbitrators, the Court may vacate
The Roles Played by Advocates

In contrast to an arbitrator, an advocate has traditionally played a far different role in American legal history. An advocate is "a person who assists, defends, pleads, or prosecutes for another." Advocacy has long been rooted at the core of our country's adversarial system. The prevailing school of thought is that attorneys should act as advocates on behalf of their clients' interests, yet there still remains competing views about the nature of the lawyer's role as a client advocate. The significance of advocates has not been limited to social commentators and scholarly works. Our highest court has also recognized the importance, the award upon the application of any party to the arbitration). See also Standard Tankers Co. Ltd. v. Motor Tank Vessel, Akti, 438 F. Supp. 153, 159 (E.D.N.C. 1977) (rebutter the predisposition for a policy favoring partisan party-appointed arbitrators with Congressional language in 9 U.S.C. § 10 that does not limit the evident partiality standard to the arbitral umpire).

26 BLACK'S LAW DICTIONARY, supra note 14, at 43.


A lawyer has an affirmative duty in cases to advance the interests of justice within the adversary system. However, adversariness is limited in cases to the presentation of disputed factual or legal issues. It does not extend to the processing of a case or to dealings with other lawyers, the court or citizens. A lawyer has an affirmative duty to cooperate with all persons and opposing counsel in order to minimize the delay and cost associated with adjudication. Id.

28 See Robert Rubinson, Constructions of Client Competence and Theories of Practice, 31 ARIZ. ST. L.J. 121, 128 (1999) (contrasting the view that values a client's autonomy above all else with the view that a client's best interests are determined by the active role of an attorney). See also David M. Majchrzak, The Impropriety of a Constitutional Doctrine: Why Wende Review Should be Terminated, 23. T. JEFFERSON L. REV. 267, 278 (2001) ("[A]n attorney's role as advocate requires that he support his client's appeal to the best of his ability"); see also GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE 2-3 (1989) ("Under the Anglo-American system, the attorney's role is that of an advocate.").

29 See Angela Gilmore, Self-Inflicted Wounds: The Duty to Disclose Damaging Legal Authority, 43 CLEV. ST. L. REV. 303, 312 (1995) (explaining that although there remain competing schools of thought regarding the nature of an attorney's role as a client advocate, attorneys might nonetheless agree on an attorney's tasks while disagreeing on how those tasks should be performed).

30 The attorney's central role is to serve as an advocate for his client. See id. One commentator stated: "The legal profession's basic narrative . . . pictures the lawyer as a partisan agent acting with the sanction of the Constitution to defend a private party against the government." Lord Brougham, in his defense of Queen Caroline before the House of Lords in 1820, eloquently articulated the defense attorney's role.

An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all
2004] *HEALING ADR’S BLACK EYE* 221

and encouraged the continuance, of advocacy within and outside of our judiciary. Advocacy has not only been advanced by societal beliefs and championed by the judiciary, but it has also solidified its magnitude through the legislature’s recognition and codification of statutes that govern the behavior of advocates. These statutes suggest that an advocate’s role is not uninhibited or inherently boundless, but is instead controlled by her duties to others, such as third parties. Despite these extraneous limitations, the advocate’s role remains inherently vital to this country’s legal profession.

THE HISTORY OF PARTY-APPOINTED ARBITRATION

An Examination of the Process

Party-appointed arbitration has been widely utilized for more than two centuries. Most early labor arbitrations in the United

hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.


31 See Anders v. California, 386 U.S. 738, 744 (1967) (Clark, J.) (holding the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his (or her) client).

32 See Geoffrey C. Hazard, Jr. & W. William Hodes, I The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct § 3.9: 101, at 704 (1998). In Article 3, the Model Rules deal with the role of an advocate. Although taking as their dominant advocate model the litigation lawyer, these rules do not apply exclusively to adjudicative proceedings. Instead, Rule 3.9 deals explicitly with the lawyer acting as an “Advocate in Nonadjudicative Proceedings.” A lawyer who represents a client before a nonadjudicative body, such as a legislature or an administrative agency, is still acting as an advocate. “In this context, advocacy entails persuading the decision-making body to adopt or reject rules or policies.” Id. An advocate is that individual who persuades the decision-making body to adopt or reject rules or policies. See also Model Code of Professional Responsibility, DR 7-101, (1980) (reiterating an attorney’s role is to be an advocate of her client’s position). Model Code of Professional Responsibility EC 7-23 further provides that the adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client. See id. Model Rules of Professional Conduct Rules 3.1-3.9 (1995) (defining the lawyer’s role as an advocate).

33 See Katherine Ikeda, Note, Silencing the Objectors, 15 GEO. J. LEGAL ETHICS 177, 201 (2001).

States were tripartite. However, party-appointed arbitrations have not been exclusively utilized for labor disputes and have been preferred for a variety of reasons. Some commentators have been left to ponder the value of the party-appointed arbitration. Although the tripartite arbitration format remains in widespread use, if parties to an arbitration have effective counsel, and if the allegiances of the party-appointed arbitrators leave the neutral as the real decision-maker in the dispute, then an obvious question inevitably arises: what do party-appointed arbitrators add to the arbitration other than expense?

Party-appointed arbitration has been utilized for numerous reasons, including but not limited to: 1) drafters of arbitration clauses do not fully understand the arbitration process and feel more secure in having their own arbitrator; 2) parties fear the irrational neutral arbitrator and therefore the rulings of a “problem” neutral can be overruled by the two party-appointed arbitrators voting together; and 3) parties feel that they have more direct input in the deliberation if they have appointed one of the three arbitrators. However, the rationale for utilizing party-appointed arbitrators in international arbitration might be far different than the reasons for selecting party-appointed arbitrators in domestic arbitration. In international arbitration, the party-appointed arbitrator cannot only reinforce counsel’s confidence in the party-appointed process, but the party-appointed arbitrator can often serve as a translator for his nominating party. For the purposes of this Note, any discussion of party-appointed arbitration will focus on domestic party-appointed arbitration, unless otherwise noted.

The 1794 Jay Treaty utilized party-appointed arbitration to resolve disputes between the United States and Great Britain. See id.

35 See Note, The Use of Tripartite Boards in Labor, Commercial, and International Arbitration, 68 Harv. L. Rev. 293, 294 (1954). A great majority of the early labor arbitrations were under state statutes that provided for tripartite arbitration. See also Mass. Acts and Resolves 1886, c. 263.

36 See Rogers, supra note 2, at 32.

37 See id. at 33.


39 See Symposium on International Commercial Arbitration, The Party Appointed Arbitrator in International Controversies: Some Reflections, 30 Tex. Int’l L.J. 59, 65 (1995) (suggesting that the international party-appointed arbitrator’s role can extend beyond the traditional linguistic translator, and can extend to “the translation of legal culture, and not infrequently law itself, when matters that are self-evident to lawyers from one country are puzzling to lawyers from another”).

40 See id.
What to Expect of a Party-Appointed Arbitrator

Although there is some discrepancy over the exact role played by party-appointed arbitrators, a general consensus has formed that these “neutrals” are not neutral. The shared belief over the nonneutrality of party-appointed arbitrators is a concept that was first discussed more than forty-five years ago. If the two party-appointed arbitrators are nonneutral, it is expected that each party-appointed arbitrator will vote with his party. In fact, some scholars have asserted that party-appointed arbitrators will blindly vote for their nominating party and provide “a frequent and high pro-

41 See Telephone Interview with Party-Appointed Arbitrator J, infra note 149. The ultimate benefit of retaining party-appointed arbitrators (the nonneutral variety) is their presence in informal conferences with the umpire. See id. This access allows the party-appointed arbitrator to “clarify the legal issues and help the umpire understand the validity of his nominating party’s case.” Id. During those privatized conferences, it is also the party-appointed arbitrator’s responsibility to “correct the umpire when he has come to an incorrect legal conclusion.” Id. Party-Appointed Arbitrator J was unable to explain how these responsibilities differ from that of an advocate, except that the party-appointed arbitrator might have greater access to and perceived influence over the umpire, the ultimate decision-maker. See id. See generally ADRWorld.com Staff Reporters, Support Growing for New Code of Ethics for Commercial Arbitrators, infra note 100 (citing the Code of Ethics for Arbitrators in Domestic and International Commercial Disputes (Working Draft 2001)). “Unless the parties agree otherwise, ‘a partisan arbitrator may not communicate orally with the neutral arbitrator concerning the subject matter of the arbitration in the absence of the other partisan arbitrator’ and if a ‘partisan arbitrator communicates in writing with the neutral arbitrator, he or she shall simultaneously provide a copy of the written communication to the other partisan arbitrator.’” Id.

42 See Tate v. Saratoga Sav. & Loan Ass’n, 265 Cal. Rptr. 440, 449 (Cal. Ct. App. 1989) (reiterating an understanding that disclosures are only required of the neutral arbitrator because the party-appointed arbitrator was expected to be biased, though the arbitrators’ award may be vacated if the party-appointed arbitrator’s actions amount to corruption). See generally Code of Ethics for Arbitrators in Domestic and International Commercial Disputes (Working Draft 2001) (codifying that in some types of domestic arbitrations, that party-appointed arbitrators are not expected to serve in a neutral fashion and should be referred to as partisan arbitrators).

43 See C. Davis, Administrative Law, § 12.01 at 157 (1958). “In tripartite tribunals, two members are frankly partial or partisan and only the third member is in theory or fact impartial or neutral.” Id.

44 See Farber, supra note 38, at col. 4. But see Eugene Wollan, Unanimity Among Arbitrators, 228 N.Y.L.J. 2, Oct. 3, 2002, at col. 6. (asserting that in reinsurance arbitrations, it is commonplace for most decisions to be three-to-nothing, thereby suggesting that party-appointed arbitrators’ ultimate decisions are made independently from the influence of their nominating parties).

45 Compare J. Martin Hunter, Ethics of the International Arbitrator, 53 Arb., 219, 223 (1987) (asserting that most nonneutral arbitrators will not allow their appointment by one party to dictate the outcome of the proceedings, and they will not allow the fact that they are favorably disposed toward their appointing party to overrule their conscience and pro-
file advocacy to the [rest of] the panel of the appointer’s briefs and evidence.”

Consequently, parties contract for the choice of their own arbitrator to make certain that their sides’ views will be represented on the tribunal.

Consistent with the statute’s overall purpose of validating private arbitration agreements, Section 5 of the Federal Arbitration Act requires that the method for selecting arbitrators contained in the parties’ agreement shall be followed. If the agreement allows each party to designate one arbitrator and places no limitations on who may be chosen, courts will infer that partisans may be appointed. Most courts also typically interpret the Act to prevent a court from overriding the arbitration agreement by requiring a party to appoint a neutral.

Many courts have expressed acceptance of nonneutral neutrals. There has been some substantive support for the implementation of nonneutral party-appointed arbitrators, specifically stemming from the parties’ insecurities and discomfort that their interests will not be heard without their own representative on the arbitrator panel. Some judges have observed that party-appointed arbitrators may become diligent advocates to the panel of the appointer’s case, and may even advocate a willfully false and dishonest conclusion [to the rest of the arbitral panel].

|\server05\products\C\CAC\5-2\CAC209.txt unknown Seq 10 18-JUN-04 9:24|
pointed arbitrators’ experience in the given field of the dispute might add an element of expertise to the arbitrator panel.\(^{53}\) Other scholars have argued that communication and other artificial barriers between the party-appointed arbitrators and their nominating parties are practically ineffective in the effort to prevent partiality, because a party-appointed arbitrator cannot help but realize that counsel who selected him was motivated by the desire that his selection would contribute to the favorable result he seeks and, to some extent, the arbitrator may act upon that realization.\(^{54}\) In contrast, the umpire of the arbitration panel will not be able to as easily discern which of the parties will be compensating a greater majority of his fees, if indeed a single party is more responsible than the other for the fee payment.\(^{55}\) The umpire will also face difficulty in discerning which party’s party-appointed arbitrator was more instrumental in ultimately leading to the selection of the umpire.\(^{56}\) Consequently, a potential dilemma might arise when a party selects an arbitrator for the purpose of having its viewpoint represented on the arbitrator panel, while the party-appointed arbitrator believes that its role is to vote for the most convincing case. As a result, the party-appointed arbitrator ends up disappointing the expectations of the party who might have picked him in hoping to have a guaranteed vote.\(^{57}\) In the end, although the parties or the neutral have some ability to regulate aspects of the behavior of party-appointed arbitrators, to a large degree the policing of partisanship will be left to the conscience of the arbitrator.\(^{58}\)

\(^{53}\) See Astoria Med. Group v. Health Ins. Plan of Greater N.Y., 11 N.Y.2d 128, 138 (1962) (stating that “arbitrators selected by the parties are, generally speaking, experts on the subject in controversy and bring to their task a wealth of specialized knowledge”).


\(^{55}\) See id.

\(^{56}\) See id.

\(^{57}\) See Doak Bishop & Lucy Reed, Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration, 14 ARB. INT’L 395, 401 (1998) (asserting that a neutral arbitrator may include “a party-appointed arbitrator who is expected to vote for the party with the better case, despite having sympathy toward the party who appointed him or her because of a shared background, tradition or culture.” This begs the question whether a party-appointed arbitrator who is sympathetic to and cognizant of his nominating party can ever really remain neutral. Because a majority of courts have weighed in on this issue with a resounding “no” and instead would feel more comfortable to label the party-appointed arbitrator as a nonneutral, I will leave this topic for another Note).

\(^{58}\) See Rogers, supra note 2, at 32.
The privatized nature of the dispute resolution process can act as an obstacle to independent studies of party-appointed arbitration. While it might be apparent that there is an imminent ethical dilemma facing party-appointed arbitrators if the governing dispute resolution bodies released details of their arbitrations, the privatized nature of the process often inhibits the necessary troubleshooting by outsiders to remedy those problems. For example, if the AAA revealed that 90% of all party-appointed arbitrators vote in favor of their nominating party, this disclosure might give cause to investigate the validity and effectiveness of the party-appointed process. Such an inflated figure might provoke scholars to question whether the goals of party-appointed arbitration are actually being realized. Unfortunately, arbitration’s confidentiality, which often persuades parties to enter into the process, can also ironically serve as one of its inhibiting downfalls. Confidenti-

59 See Deborah Masucci & Richard Naimark, Ethical and Administrative Considerations in International Arbitration, Session at the Fifth Annual Conference of the American Bar Association Section of Dispute Resolution (Mar. 22, 2003) (transcript available from the American Bar Association Section of Dispute Resolution). In response to an audience member’s question, JAMS Vice President of Professional Development and Training and the Executive Director of Global Center for Dispute Resolution Research, respectively, both concurred that neither JAMS, AAA, nor any other ADR provider keep records of or publish the frequency that party-appointed arbitrators vote with their respective nominating parties. See id.

60 At the 1996 Chartered Institute of Arbitrators’ conference, Tom Arnold delivered a paper where he asserted that “[i]f a statistically meaningful survey could be performed accurately, the party appointed arbitrator would be found to have resolved some doubt or issue in favor of his appointee, 50% more times than a third arbitrator who was a stranger independently appointed by a judge or ADR agency.” Tom Arnold, The Unacceptable Common Partiality of “Neutral” Party Appointed Arbitrators 10 (last revised Mar. 22, 1997) (unpublished paper presented at the Chartered Institute of Arbitrators’ Sept. 1996 conference in Boston).


The dysfunction of the judicial process gave rise to the need for arbitration and other alternatives to the judicial trial. As the use of arbitration grew in subject matter and popularity, it began to acquire more of the trappings of judicial litigation. Privatization simply shifted the burdens of adjudication to another adjudicatory structure that eventually began to resemble the original mechanism. The willingness of courts and arbitrating parties to undermine the confidentiality of arbitration, a fundamental feature of the process, and the difficulty of articulating adequate regulatory provisions on the question may indicate a need to return to the prior form of adjudication. Id.
ality is a selling point to those who utilize dispute resolution, but it can ultimately hamper its effectiveness if it conceals the information necessary to troubleshoot its own pitfalls.

AAA Rules and Guide for Commercial Arbitrators

The AAA is the world’s largest and most visible dispute resolution provider. Nearly seven hundred companies and six million employees turn to this non-profit, public service organization, which administered 218,000 dispute resolution processes in 2001. A dispute resolution provider this large and widely used will have crafted rules that are depended upon by a multitude of disputants and will have influenced countless conflicts. AAA Rule R-15(a)-(c) permits and acknowledges the appointment of party-appointed arbitrators. AAA Rule R-19(a)-(b) mandates that any neutral arbitrator ensure his impartiality and disclose any circumstance that might affect his independence. AAA Rule R-20(a)-(b) forbids any unilateral communication between the neutral arbitrator and any one party, disallows any unilateral communication between one arbitrator panel member and one party, but permits the parties or arbitrators to agree that no party shall communicate unilaterally concerning the arbitration with any party-appointed arbitrator once the panel has been constituted.
The AAA Guide for Commercial Arbitrators (the “Guide”) suggests that the arbitrator is on safest ground when communications with the parties are avoided except in the presence of both parties. While the Guide recommends that arbitrators should avoid unilateral contacts during the pendency of the case, it also recognizes the existence of party-appointed arbitrators, and recommends that the neutral arbitrators ascertain from the party-appointed arbitrators the nature and extent of any relationship between that arbitrator and the party that appointed the arbitrator, and whether there will be any direct communication between such arbitrators and the parties that appointed them.

JAMS Rules and Ethical Guidelines

JAMS is a dispute resolution provider that specializes in resolving complex, multi-party, multi-issue commercial issues. Founded in 1979, JAMS claims to provide the highest quality dispute resolution services to its clients. As one of the premier domestic and international ADR providers, JAMS has developed its own arbitration rules. Specifically, the rules addressing the party-appointed procedure have consequently affected the thousands of party-appointed arbitrations following JAMS arbitration rules. JAMS Rule 7(a) permits an arbitration conducted by a panel of arbitrators in a tripartite arbitration. JAMS Rule 7(b) allows the

---


71 See id.

72 See JAMS Overview, supra note 12. JAMS is formerly known as Judicial Arbitration Mediation Services and JAMS/Endispute.

73 See id. JAMS is the world's largest for-profit dispute resolution provider. JAMS is distinct from other well-known dispute resolution providers because nearly one-half of the company's neutrals are former judges. See id. JAMS boasts twenty locations within the United States and a resolution rate of 90% of the cases that their neutrals hear. See id. After twenty years of ADR services, a group of forty-five JAMS neutrals and management purchased the company from institutional investors in August 1999, and have continued to own the company to the present day. See id.


75 See id. at Rule 7(a).

76 See id.
parties to individually agree on the non-chairpersons, or party-appointed, arbitrators.77

JAMS Ethics Guidelines for Arbitrators G(2) provides that nonneutral arbitrators need not disclose any matters that might affect independence, while the opposing party ordinarily may not preclude a party-appointed arbitrator from serving in that capacity.78 G(4) provides that all arbitrators, by whomever appointed, are expected to be independent of the parties as a neutral.79 They are sometimes expected to communicate ex parte with the party that appointed them solely for the purposes of the selection of the chairman and not otherwise.80 JAMS has separate guidelines applicable to “Non-Neutral Arbitrators” (“Section X”), specifically noting that a nonneutral arbitrator may be predisposed towards a party who appointed him or her but in all other respects is obligated to act in good faith and serve with integrity and fairness.81

CPR Rules and Commentary

Founded in 1979 as the Center for Public Resources, CPR has vowed to install alternative dispute resolution into America’s legal mainstream as to eventually transform it into appropriate dispute resolution.82 Unlike AAA and JAMS, CPR is the leading proponent of ADR that is managed by the parties and a highly qualified neutral, without the involvement of an intervening administrative body.83 As a more “hands-off” ADR provider, CPR’s rules are as influential as the rules of any other provider.84 CPR Arbitration Rule 5.1 implements the party-appointed system as the default arbitration format.85 Unless the parties have agreed in writing on a tribunal consisting of a sole arbitrator or three arbitrators not ap-

---

77 See id. at Rule 7(b).
79 See id. at Rule G(4).
80 See id.
81 See id. at Section X.
82 See CPR Institute: ABOUT CPR, supra note 13.
83 See id. CPR is engaged in an integrated agenda of research and development, education, advocacy, and dispute resolution. See id. It is the leading proponent of self-administered ADR, whereby the parties and a highly qualified neutral manage the process. See id.
85 See id. at Rule 5.1.
pointed by parties or appointed as provided in Rule 5.4, the tribunal shall consist of two arbitrators, one appointed by each of the parties as provided in Rules 3.3 and 3.5, and a third arbitrator who shall chair the tribunal, selected as provided in 5.2. CPR Rules attempt to combat some of the party-appointed criticisms by mandating in Rule 5.4(d) that neither CPR nor the parties shall advise or otherwise provide any information or indication to any arbitrator candidate or arbitrator as to which party selected either of the party-designated arbitrators. No party, or anyone acting on its behalf, shall have any ex parte communications relating to the case with any arbitrator or arbitrator candidate designated or appointed pursuant to this Rule 5.4.

Rule 5.4, added to the Rules in 2000, is intended to offer the benefits, while avoiding some of the drawbacks, of having party-appointed arbitrators. Any party-appointed arbitrator who does, in fact, learn which party appointed him or her should disclose that fact to each of the parties and the other members of the tribunal in order to ensure a level playing field. In the event that an arbitrator discovers the source of his or her appointment, such knowledge would not be the basis for disqualification per se, and the arbitration can continue on a non-screened basis.

Canon VII of the Code of Ethics for Arbitrators in Commercial Disputes

The Code of Ethics for Arbitrators in Commercial Disputes, prepared by the AAA and the American Bar Association ("ABA"), has a separate set of canons governing the ethical con-
siderations relating to arbitrators appointed by one party, or “non-neutral arbitrators.” 94 Canon VII of the Code of Ethics governs the behavior of party-appointed arbitrators. 95 The Code allows communication between the party and the party-appointed arbitrator on all aspects of the case at any time, provided that the other parties are informed of their intention to communicate with each other. 96 Canon VII requires that nonneutral arbitrators must disclose the general nature and scope of any interest or relationship, but need not include as detailed information as is expected from persons appointed as neutral arbitrators. 97 Canon VII also states that nonneutral arbitrators are not obligated to withdraw if requested to do so by the non-nominating party, and prohibits an ADR agency from removing a nonneutral arbitrator because of its disclosure. 98 Therefore, Canon VII does not restrict who may be appointed as a party-appointed arbitrator; therefore he or she may be of any relation to the appointing party, or even the party itself, as a party-appointed arbitrator. 99

However, the most updated revision to the Code of Ethics similarly notes that, in an effort to ensure neutrality amongst all arbitrators, party-appointed arbitrators are to be neutral absent any express provision to the contrary. 100 The effort to change the

---

94 See Code of Ethics for Arbitrators in Commercial Disputes, at http://www.adr.org/index2.jsp?JSPssid=15727&JSPsrc=upload\LIVESITE\Rules_Procedures\ADR_Guides\Resources\Roster\Arbitrators\code.html (last visited Nov. 8, 2003).
95 See id.
96 See id.
97 See id.
98 See id.
99 See id. But see Astoria Med. Group v. Health Ins. Plan of Greater N.Y., 182 N.E.2d 85, 88 (N.Y. 1962). “This is not to say that . . . a person may serve as his own arbitrator. When the agreement authorizes the party to ‘appoint’ an arbitrator, it is implicit in that very provision that he may not appoint himself.”
100 See Code of Ethics for Arbitrators in Domestic and International Commercial Disputes (Working Draft 2001). See also ADRWorld.com Staff Reporters, AAA Withholds Endorsement, Hopes for Future Joint Revisions (Oct. 29, 2002), at http://www.adrworld.com (remarking that the latest draft was agreed upon in October 2002, with the ABA Dispute Resolution, International Law & Practice, and Torts and Insurance Practice Sections, the CPR Institute for Dispute Resolution and the College of Commercial Arbitrators “on board” with the changes. However, the AAA did not support the draft code because of concerns about case administration and the supporting organizations are not planning on moving ahead without the AAA “on board.” Florence Peterson, general counsel for the AAA, said the Association “must make internal changes to accommodate” the new default in the revised code that arbitrators are neutral and that only the parties can agree to allow arbitrators to serve in a nonneutral fashion). However, before endorsing the new draft code, the AAA must first make a “huge number of internal changes,” which she hopes the
presumption of party-appointed nonneutrality to party-appointed neutrality was spearheaded by the International Law and Practice Section of the American Bar Association,\textsuperscript{101} because unlike the role party-appointed arbitrators traditionally played in domestic party-appointed arbitrations, party-appointed arbitrators in international disputes are presumed to be neutral unless otherwise noted.\textsuperscript{102} The revised Code suggests that arbitrators have a duty to ensure that their status is known and communicated to all parties and the other arbitrators.\textsuperscript{103} According to the revisions, this should happen at the earliest possible time before consideration of procedural or substantive matters.\textsuperscript{104} This determination can be made by the agreement of the parties, applicable arbitration rules, or by governing law.\textsuperscript{105} If these are silent, the arbitrator is expected to act according to the same standards as the third arbitrator, meaning the party-appointed arbitrators are to be neutral absent any express provision to the contrary.\textsuperscript{106} The proposed revisions also address the area of \textit{ex parte} communications prior to any determination of whether a party-appointed arbitrator will be neutral or nonneutral; the revisions call for such an arbitrator to act in the same manner as neutral arbitrators, with the same general restrictions and specific exceptions.\textsuperscript{107} These revisions would address many commentators’ concerns about the “embarrassment” of \textit{ex parte} communications of party-appointed arbitrators on private arbitral tribunals.\textsuperscript{108}

AAA will be able to complete by June 2003. See Slate, \textit{infra} note 109. See also ADRWorld.com Staff Reporters, \textit{Support Growing for New Code of Ethics for Commercial Arbitrators} (Apr. 4, 2002), at http://www.adrworld.com (mentioning that the latest draft was renamed accordingly “to reflect the need to highlight the difference between certain domestic arbitrators, and it outlines separate responsibilities for commercial arbitrators in domestic practice, specifically addressing the role of party-appointed arbitrators both neutral and partisan”).

\textsuperscript{101} See Telephone Interview with Party-Appointed Arbitrator C, \textit{infra} note 139.
\textsuperscript{102} See id. As previously mentioned, this Note primarily concentrates on the expectational differences among parties and arbitrators within domestic party-appointed arbitrations. An exploration into the expectations of parties in international disputes will not be covered in this Note.
\textsuperscript{103} See Code of Ethics for Arbitrators in Domestic and International Commercial Disputes (Working Draft 2001), at Canon IX.A.
\textsuperscript{104} See id. It remains a substantial matter of interpretation as to how exactly to define “the earliest possible time” within the revised Code of Ethics. These vagaries might perpetuate the expectational confusion among participants in party-appointed arbitrations.
\textsuperscript{105} See id.
\textsuperscript{106} See id.
\textsuperscript{107} See id.
\textsuperscript{108} See Vagts, \textit{supra} note 1, at 258.
There has been great discussion regarding the changing face of the party-appointed arbitrator and the supposed neutrality he or she may have. This discussion has provoked disagreement and confusion among varying courts about the exact role that party-appointed arbitrators should play and the degree of neutrality they should possess. Some earlier decisions failed to provide a pre-

109 See William K. Slate, II, Issues and Answers, 57 Disp. Resol. J. 1 (May 2002). The 1977 Code of Ethics for Arbitrators in Commercial Disputes is currently undergoing further change and review by the American Bar Association. Of particular interest . . . is the emphasis being placed on the preference for neutrality for party-appointed arbitrators. The current AAA position is that when parties cannot agree that their party-appointed arbitrators be neutral or non-neutral, the default is for non-neutrality. A swing of the pendulum toward neutrality in these instances would affect large numbers of AAA cases, AAA rules, administrative processes and, indeed, client expectations. Also impacted would be thousands of arbitration clauses that cite to AAA rules and administration. Since AAA rules that incorporate the non-neutrality default are in the public domain, informing all current and potential parties of a change to neutrality of party-appointed arbitrators would be a task of monumental proportions. Therefore, the AAA’s potential endorsement of the revised Code must, at least in part, be predicated on an assessment of the impact that the change will have on our rules, procedures and clients.

110 See Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co., 307 F.3d 617, 621-22 (7th Cir. 2002) (Easterbrook, J.) (holding that a party-appointed arbitrator’s failure to disclose the full extent of prior unrelated representation of his nominating party might discolor his reputation for arbitral candor but does not establish evident partiality because the party-appointed arbitrator met the other standards for service as a sitting judge). See also ADRWorld.com Staff Reporters, Party Arbitrator’s Failure to Disclose Not Grounds to Vacate (Oct. 16, 2002), at http://www.adrworld.com; Employer’s Ins. of Wausau v. Nat’l Union Fire Ins. Co., 933 F.2d 1481, 1490 (9th Cir. 1991). A party-appointed arbitrator who “survey[s] the relevant issues and concerns” for his nominating party, without any evidence that he “came to the arbitration hearings with a closed mind or a predilection to rule for [his nominating party],” is not necessarily acting as a predisposed partisan. Id. Party-appointed arbitrators, often selected for their vast expertise in a particular field, might inevitably come with a price; “[f]amiliarity with a discipline,” while in some aspects a virtue of arbitration, “often comes at the expense of complete impartiality.” Id. (quoting Morelite Constr. Corp. v. N.Y. City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 83 (2d Cir. 1984)). But see ADRWorld.com Staff Reporters, Support Growing for New Code of Ethics for Commercial Arbitrators, supra note 100 (citing the Code of Ethics for Arbitrators in Domestic and International Commercial Disputes (Working Draft 2001)). The revised draft code explains that “[p]arty-appointed arbitrators should make the same disclosures
cise measurement or guideline as to the appropriate conduct of the party-appointed arbitrators, but instead asserted that “party-designated arbitrators are not and cannot be 'neutral' at least in the sense that the third arbitrator or judge is.”\textsuperscript{111} Some courts found that all arbitrators, party-appointed or neutral, must adhere to high standards of honesty, fairness and impartiality.\textsuperscript{112} However, other courts have eased that standard, allowing for the impartial party-appointed arbitrator,\textsuperscript{113} specifically permitting “party-appointed arbitrators to have \textit{ex parte} communications with parties, counsel and witnesses on matters of substance.”\textsuperscript{114}

More recent cases out of the Eleventh Circuit have indicated that a party-appointed arbitrator is permitted, and should be expected, to be predisposed toward the nominating party’s case,\textsuperscript{115}

---

\textsuperscript{112} See Barcon Assocs., Inc. v. Tri-County Asphalt Corp., 430 A.2d 214, 218 (N.J. 1980) (holding that every arbitrator, whether party-designated or “neutral,” must disclose to the parties, prior to the commencement of arbitration proceedings, any relationship or transaction that he has had with the parties or their representatives. This disclosure should also include any other fact that would suggest to a reasonable person that the arbitrator is interested in the outcome of the arbitration or which might reasonably support an inference of partiality.).

\textsuperscript{113} See Party-Appointed Arbitrator Must Be Impartial, \textit{The New Jersey Lawyer}, Nov. 19, 2001 at col. 1. (remarking that party-appointed arbitrators could “approach the . . . proceedings with some sympathy for the position of the party designating him.” The party-designate, like the neutral, should have no predisposed view, sympathetic or otherwise, about the merits of the case that he or she will eventually decide. He or she should not know enough about the case to feel sympathetic toward the party that appointed him.). See also Michael v. Aetna Life & Cas. Ins. Co., 106 Cal. Rptr.2d 240, 251 (Cal. Ct. App. 2001) (holding a tripartite award would not be reversed where a party-appointed appraiser did not disclose his limited business connection with the party appointing him).


\textsuperscript{115} See Del Monte Corp. v. Sunkist Growers, Inc., 10 F.3d 753, 760 (11th Cir. 1993). “The fact that [the party-appointed arbitrator] may have been predisposed toward [his client] is not sufficient to vacate the arbitration award.” \textit{Id.} See also Stef Shipping v. Norris Grain Co., 209 F. Supp. 249, 251 (S.D.N.Y. 1962) (“concluding that [the fact that [a party-appointed arbitrator] consulted with his nominator is not shocking. It would be unrealistic to expect a party engaged in an arbitration dispute to nominate an arbitrator without telling him what the dispute is about. . . . This is not the type of irregularity which [the statute] contemplates as being sufficient to vacate an otherwise valid arbitration award”).
while the party-appointed arbitrator’s behavior need not be reflective of that of the neutral arbitrator’s behavior. The Eleventh Circuit held that a party-appointed arbitrator’s predisposition toward his nominating party is not sufficient to vacate an arbitration award. This predisposition might come in the form of a party-appointed arbitrator assisting the party in preparing its case by attending and participating in meetings with witnesses, suggesting lines of testimony, helping select one of the party’s consultants, and advising an expert witness on how to improve a chart related to the expert’s testimony. The Eleventh Circuit has held that this type of involvement is not only unobjectionable, but is actually commonplace among party-appointed arbitrators.

Even those party-appointed appellate decisions that recognize the importance of arbitrator neutrality have simultaneously conceded that the party-appointed arbitrators may be partisan representatives of each side. This is due in part to the selection by the partisan arbitrators of an impartial arbitrator and chairman. Most recently, the Eighth Circuit upheld an arbitration award despite claims of evident partiality and misconduct on the part of a party-appointed arbitrator. In that matter, the party-appointed arbitrator had disclosed his long consulting relationship with its nominating party, and since the parties’ agreements expressly authorized nonneutral party arbitrators, the party-appointed arbitrator saw no need for additional disclosure. Despite this apparent

116 See Lozano v. Maryland Cas. Co., 850 F.2d 1470, 1472 (11th Cir. 1988). “An arbitrator appointed by a party is a partisan only one step removed from the controversy and need not be impartial.” Id.
117 See Del Monte, 10 F.3d at 760.
118 See id.
119 See id.
120 See W. Towns Bus Co. v. AFL-CIO, 168 N.E.2d 473, 477 (Ill. App. Ct. 1960) (admitting that an arbitrator must possess the judicial qualifications of fairness, disinterestedness and impartiality. Consequently, the existence of any facts which may operate to affect the impartiality of arbitrators, providing such facts are unknown to the party adversely affected, will render such arbitrators incompetent to make a valid award.).
121 See id.
123 See Delta Mine Holding, 280 F.3d at 821 (asserting that parties are free to contract to the desired method of arbitration, including the use of non-neutral party-appointed arbitrators who are partial).

It does not seem that the general statutory language calling for the arbitrators to be impartial should be interpreted as refusing enforcement to the awards of arbitrations in which the parties contract for partisanship or waive objections to partiality. An interpretation under which a party could wait until it lost and then successfully raise the objection of partiality should be avoided.
acceptance of partisan party-appointed arbitrators who freely engage in \textit{ex parte} communication with their nominating parties, some courts have still held that this behavior is sufficient to vacate an arbitration award.\textsuperscript{124} Meanwhile, in a case of first impression, the Second Circuit recently weighed in with a decision that decidedly tested the party-appointed arbitrator’s ethical boundaries.\textsuperscript{125} The court found that if the arbitration process in contention was “not de facto corrupted by the designation of an interested arbitrator who acts as an advocate for his chosen side, such [a nonneutral party-appointed] arbitrator would not be betraying his, or any other, interest in acting as the same advocate \textit{after} the arbitral process was complete.”\textsuperscript{126} In fact, the court astutely concluded that the party-appointed arbitrator’s subsequent involvement as the nominating party’s attorney was also supported by legislative doctrine.\textsuperscript{127} Both arbitrators and the highest U.S. courts are unclear about the role of party-appointed arbitrators.\textsuperscript{128} This lack of clarity

\textsuperscript{124} \textit{See} Metro. Prop. & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co., 780 F. Supp. 885, 889-92 (D. Conn. 1991) (disqualifying an arbitrator who met with representatives of the party that had appointed him, evidently saw a document relating to the case and engaged in some degree of discussion about the merits). \textit{See also} ADRWorld.com Staff Reporters, \textit{Support Growing for New Code of Ethics for Commercial Arbitrators}, supra note 100 (citing the Code of Ethics for Arbitrators in Domestic and International Commercial Disputes (Working Draft 2001)). “Partisan arbitrators may not discuss the deliberations of the arbitration panel or communicate with the party that appointed them on issues submitted to them for a determination.” \textit{Id.}

\textsuperscript{125} \textit{See} Feinberg v. Katz, No. 01 Civ. 2739, 2003 U.S. Dist. LEXIS 1677, at *29 (S.D.N.Y. Feb. 3, 2003) (holding that an attorney who served as a party-appointed arbitrator is allowed, after the arbitral process has been completed, to serve as counsel in a related matter for that nominating party).

\textsuperscript{126} \textit{Id.} at *15 (emphasis added). The court supported its decision by pointing out that “[I]f a partisan arbitrator is not expected to be neutral, he cannot then be acting in a ‘judicial capacity,’ at least insofar as the obligation of judges to remain impartial and disinterested is concerned.” \textit{Id.} at *19. In continuing to distinguish the ethical differences between judges and arbitrators, both party-appointed and jointly selected, the court clarified “[t]hat arbitrators and judges are functionally comparable [although] they are not identical.” \textit{Id.} at *21-2.

\textsuperscript{127} \textit{See id.} at *28. “Model Rule 1.12(d) [of the Model Rules of Professional Conduct] specifically allows a partisan arbitrator to represent a party in a related matter, and no conflicting provision exists in either the New York or Model Codes.” (referring to NY St Cpr Ec 5-20 (2001)). “A lawyer representing one party to the dispute may serve as a nonneutral arbitrator on a public arbitration panel.” \textit{Id.}

\textsuperscript{128} \textit{See} Astoria Med. Group v. Health Ins. Plan of Greater N.Y., 182 N.E.2d 85, 89 (N.Y. 1962) (opining that arbitrators may be partisan, must not be dishonest, and must faithfully and fairly hear and examine the matters in controversy and make a just award according to the best of their understanding).
will only perpetuate the confusion already existing among practicing arbitrators\textsuperscript{129} and the parties that appoint them.

\textbf{Differing Views Among Party-Appointed Arbitrators}

Courts are not the only entities that share differing views about the role of party-appointed arbitrators. Party-appointed arbitrators themselves have perpetuated many of the inconsistencies and confusion about the roles they play in the process. To support this expectational confusion, the author of this Note conducted five telephone interviews with party-appointed arbitrators to discuss their impressions and thoughts on the role that is played by party-appointed arbitrators.\textsuperscript{130}

Party-Appointed Arbitrator V ("V") has served as the umpire and party-appointed arbitrator in various party-appointed arbitrations.\textsuperscript{131} As a former judge, V does not feel comfortable acting as a nonneutral party-appointed arbitrator due to concern of being "pulled back into partisan assignments."\textsuperscript{132} V hesitates to take on an impartial role, such as a nonneutral neutral, because any such role might "call into question [V's] competence and integrity" which could consequently have "an impact on [V's] market as a

\textsuperscript{129} Compare Telephone Interview with Party-Appointed Arbitrator C, infra note 139 (contending that party-appointed arbitrators are not inherently neutral or nonneutral, but their level of neutrality is contingent on their nominating parties' expectations), with Telephone Interview with Party-Appointed Arbitrator J, infra note 149 (asserting that the nature of the party-appointed arbitrator's role does not enable him or her to act as a truly neutral party).

\textsuperscript{130} The five separate telephone conversations occurred between the author and the five arbitrators from February 18, 2003, through February 27, 2003. The arbitrators have all been candid about their impressions on the effectiveness of the process in exchange of the author’s assurance that their identities will not be revealed. The arbitrators are all affiliated with reputable dispute resolution organizations and have years of experience participating in party-appointed arbitrations as both party-appointed arbitrators and as neutral umpires. In addition, some of the arbitrators have experience writing on party-appointed arbitration for various journals and law reviews. The author took copious notes during the telephone interviews, which is reflected by this Note. For confidentiality reasons, the interviewees will be known and referred to as Party-Appointed Arbitrator V, Party-Appointed Arbitrator C, Party-Appointed Arbitrator Y, Party-Appointed Arbitrator J, and Party-Appointed Arbitrator T. Their specific experience within the arbitration field will be explicated as their testimony is discussed in further detail.

\textsuperscript{131} See Telephone Interview with Party-Appointed Arbitrator V (Feb. 18, 2003). Party-Appointed Arbitrator V has handled over 1,000 cases as a mediator, arbitrator, special master, settlement judge or neutral case evaluator.

\textsuperscript{132} Id.
neutral." V readily admits the flexibility of the party-appointed arbitrator’s role by indicating that the degree of neutrality that a party-appointed arbitrator possesses is “a matter of personal style and temperament.” Despite this recognition, V will only play a traditional neutral’s role when asked to be a party-appointed arbitrator. From the moment that V’s services are sought, V respects certain ethical boundaries and expects that the other party’s party-appointed arbitrator will follow those same neutral guidelines. In order to clarify parties’ possible misunderstandings and expectational differences concerning the party-appointed arbitrator’s neutrality, V recommends that the parties establish a “written understanding about the neutrality of [the party-appointed arbitrators].” In V’s opinion, this would be the most effective means to limit later surprises among parties who expect varying degrees of neutrality from their party-appointed arbitrators.

Party-Appointed Arbitrator C (“C”) is widely regarded as the foremost authority in the area of party-appointed arbitration. C has participated in dozens of party-appointed arbitrations as a neutral umpire, a neutral party-appointed arbitrator, and a nonneutral party-appointed arbitrator. C describes the party-appointed process as one that involves “a lot of intricacy and legal consequences” with “not much guidance and protection.” When approached to become a party-appointed arbitrator, C will instantly inquire about C’s expected neutrality. However, C believes that the obligation of determining a consensus about arbitrator neutrality ultimately lies with the umpire upon the umpire’s appointment. C does not believe that a party-appointed arbitrator is, by nature, neutral or nonneutral because C believes that a party-appointed arbitrator’s

133 Id. A separate Note topic might explore V’s suspicions, and consequently investigate the subsequent impact that accepting nonneutral party-appointed arbitrator roles has on that individual’s market as a neutral arbitrator.

134 Id.

135 See id.

136 See id.

137 Id.

138 See id.

139 See Telephone Interview with Party-Appointed Arbitrator C (Feb. 18, 2003). Party-Appointed Arbitrator C frequently serves as chair or party-appointed arbitrator in tripartite arbitrations and has conducted hundreds of large and complex arbitrations and mediations before all major administering institutions, both nationally and internationally.

140 See id.

141 Id.

142 See id.

143 See id.
behavior should adapt to the varying expectations of the specific nominating party.\textsuperscript{144}

Party-Appointed Arbitrator Y (“Y”) has acted as an umpire in tripartite panels, and is comfortable acting as a neutral and non-neutral party-appointed arbitrator.\textsuperscript{145} Like C, Y believes that there is no neutrality default for party-appointed arbitrators, but instead considers neutrality to be contingent upon the parties’ individual expectations.\textsuperscript{146} C asserts that in order to avoid any expectational confusion among the parties, it is the responsibility of the party-appointed arbitrator to “take the bull by the horns” and clarify the party-appointed arbitrator’s roles within the arbitration.\textsuperscript{147} However, unless the parties explicitly agree that the party-appointed arbitrator will or will not be neutral, there should be a continued presumption that a “party-appointed arbitrator is [no more than] an advocate.”\textsuperscript{148}

Party-Appointed Arbitrator J (“J”) has acted as an umpire and a party-appointed arbitrator in a series of party-appointed arbitrations.\textsuperscript{149} However, J insists that J has “never run across a truly neutral party-appointed arbitrator.”\textsuperscript{150} Instead, J believes that as long as the party-appointed arbitrator is aware of its respective nominating party’s identity, and consequently which party is responsible for paying its fees, then that party-appointed arbitrator will be incapable of observing the same neutrality as the umpire.\textsuperscript{151} When a nominating party or fellow arbitrator requests J to act as a neutral party-appointed arbitrator, J suggests that “[J] will be as

\textsuperscript{144} See id.
\textsuperscript{145} See Telephone Interview with Party-Appointed Arbitrator Y (Feb. 21, 2003). Party-Appointed Arbitrator Y has conducted over 750 complex or multi-party mediations and arbitrations in over thirty U.S. states and abroad.
\textsuperscript{146} See id.
\textsuperscript{147} Compare Telephone Interview with Party-Appointed Arbitrator Y, supra note 145, with ADRWorld.com Staff Reporters, Support Growing for New Code of Ethics for Commercial Arbitrators, supra note 100 (citing the Code of Ethics for Arbitrators in Domestic and International Commercial Disputes (Working Draft 2001)). “Partisan arbitrators must disclose their status to the parties as soon as practicable [and] may consult with the parties that appointed them, but they must inform the other arbitrators and the other party whether they intend to communicate with the party that appointed them.” Id.
\textsuperscript{148} Telephone Interview with Party-Appointed Arbitrator Y, supra note 145.
\textsuperscript{149} See Telephone Interview with Party-Appointed Arbitrator J (Feb. 26, 2003). Party-Appointed Arbitrator J has mediated and arbitrated disputes involving general business litigation, torts, accounting malpractice, legal malpractice, class actions, contracts, covenants not to compete, employment, trademarks, copyrights, brokers commissions, securities, pending appeals, and personal injury.
\textsuperscript{150} Id.
\textsuperscript{151} See id.
neutral as [J] possibly can be.” 152  However, J believes that the varying expectational differences about party-appointed arbitrators’ neutrality is not nearly as great of a concern to practitioners as it is to academics. 153  Although J recognizes the theoretical difficulties faced by differing party expectations, J is not personally aware of any occasion where the parties possessed varying expectational differences over the party-appointed arbitrator’s neutrality. 154  If there were a great concern among the parties about potentially differing neutrality of party-appointed arbitrators, then J would ameliorate that concern by suggesting that the party-appointed arbitrators sign an oath agreeing upon an acceptable standard of neutrality they agree to follow. 155

The final party-appointed arbitrator interviewed was Party-Appointed Arbitrator T (“T”), who has acted as a nonneutral and neutral party-appointed arbitrator. 156  In addition, T has acted as an umpire on various tripartite panels. 157  T assumes that when T is asked to act as a party-appointed arbitrator, T will be playing the role of a nonneutral, though T will inevitably inquire into the nominating party’s expectations about T’s neutrality. 158  T suggested that the original intention of implementing party-appointed arbitrators is to appoint a nonneutral representative party. 159  However, the concept of neutrality was only first introduced into the domestic party-appointed arbitrator during the past two decades. 160  This introduction of neutrality and “the shades of gray that ha[ve] stemmed from ‘pseudo-neutral,’ party-appointed arbitrators” have caused great confusion and influenced the development of this Note. 161  The debate over the neutrality of party-appointed arbitrators would be quickly decided if party-appointed arbitrators “stopped pretending to wear a cloak of neutrality,” and instead

---

152 Id.
153 See id.
154 See id.
155 See id.
156 See Telephone Interview with Party-Appointed Arbitrator T (Feb. 26, 2003).  With more than thirteen years of ADR experience in virtually all areas of civil litigation and similar disputes, including numerous high stakes and complex cases, Party-Appointed T has acted as mediator, arbitrator, special master or other neutral in over 500 cases, including business, class action, construction, employment, environmental, government, health care, intellectual property/technology, and tort cases.
157 See id.
158 See id.
159 See id.
160 See id.
161 Id.
recognized their behavior for what it is. T readily admits that the traditional nonneutral party-appointed arbitrator “has the same look as an advocate” and is practically indistinguishable to the role played by an advocate. Although T has been a neutral party-appointed arbitrator, T is personally more comfortable playing the role of the traditional nonneutral; in the latter capacity, T believes the inherent tension of neutrality is eliminated and T need not be as concerned about limited ex parte contact with T’s nominating party.

POSSIBLE REMEDIES FOR RESOLVING THE EXPECTATIONAL INCONSISTENCIES OF PARTY-APPOINTED ARBITRATION

Some commentators have suggested that the inherent partiality of party-appointed arbitrators will only be resolved when dispute resolution providers mandate that they select the “party-representative arbitrators” instead of the parties appointing them themselves. Tom Arnold, in his controversial paper delivered at the 1996 Chartered Institute of Arbitrators’ conference, proposed that the unilateral, ex parte, party-appointed arbitrator should be eliminated altogether. Other commentators have insinuated that the solution behind the conflicting dilemmas facing party-appointed arbitrators lies in a revision of the Code of Ethics for Arbitrators in Commercial Disputes. Indeed, the most recent

162 Id.
163 Id.
164 See id.
165 See Arnold, supra note 60, at 12. Arnold observed that party-appointed arbitrators will too often “have a partiality materially greater than an independently appointed, a partiality that too often is influential in close complex cases, influential in judging credibility of doubtful witnesses, etc.” Id. at 13. As a result, he suggested that parties should be admonished to be explicit in their contracts to arbitrate in order to avoid all party-appointed procedures. See id. at 13. “At the very least...the [arbitral] rules [should] be explicit in requiring detailed revelation of all communications [by a party-appointed arbitrator] with a potential nominee.” Id.
revision of the Code of Ethics attempts to dissuade much of the tension surrounding the appropriate role of the party-appointed arbitrator, by operating upon the assumption that, absent any express provision to the contrary, party-appointed arbitrators are to be neutral.\textsuperscript{168} However, one might ultimately consider whether a revision to the Code will effectively alter the expectations of the appointing parties, or contemplate a more efficient means by which to remedy the confusion surrounding the party-appointed arbitrator’s role.

\section*{Call It Like We See It: Altering the Term “Party-Appointed Arbitrator” Instead of Altering the Party-Appointed Arbitrator’s Behavior}

The party-appointed arbitrator’s role has been seen as wide-ranging from the same neutral stance of the traditional arbitrator to the impotent “armless ambidextrian.”\textsuperscript{169} The likening of the party-appointed arbitrator to a nonneutral judge can be jarring and distasteful.\textsuperscript{170} However, the balance of the party-appointed arbitrator’s impartiality with the umpire’s neutrality has continually legitimized the process.\textsuperscript{171}

The task of this Note is not to decide the party-appointed arbitrator’s best-suited role. Although many of the most recent court decisions have accepted the nonneutrality of the party-appointed arbitrator,\textsuperscript{172} the most recent revisions to the Code of Ethics have continue to live with him/her, clearer rules of conduct are necessary. A revised Code of Ethics should seek a consensus on this issue. Perhaps rules drafters and legislators might then follow their lead.” \textit{Id.}


\textsuperscript{169} Symposium on International Commercial Arbitration, \textit{supra} note 39, at 69 (quoting \textsc{Archibald MacLeish}, \textsc{The End of the World}, \textsc{Streets in the Moon} 101, 101 (1926)).

\textsuperscript{170} See \textsc{Steven P. Garmisa}, \textit{Reexamining Built-In Bias of Party-Appointed Arbitrators}, \textsc{Chi. Daily L. Bull.}, Mar. 11, 2002, at 48.

\textsuperscript{171} See \textsc{Harold I. Abramson}, \textit{Protocols for International Arbitrators Who Dare to Settle Cases}, 10 \textsc{Am. Rev. Int’l Arb.} 1, 13 (1999) (proposing that “[t]he impartiality of the panel may survive because any partiality by the party-appointed arbitrators would offset each other, leaving the chair with the neutral and decisive role in the deliberations”).

indicated a default preference for a neutral party-appointed arbitrator. Fox and Simpson first coined the memorable phrase “judge advocates,” or in the candid French expression, arbitres-parties, to help describe the role and nature of party-appointed arbitrators. This Note questions the feasibility of a “judge advocate,” due to the contradictory roles that a judge and an advocate often play. Specifically, this Note questions the value of the “judge advocate,” and admonishes parties to take heed before concluding that the arbitrators they have appointed shall act as judges or advocates.

This Note proposes that instead of changing the role of the party-appointed arbitrator, which the most recent revision of the Code of Ethics attempts to achieve, the term “party-appointed arbitrator” should more accurately reflect the realization of the neutral’s nonneutral role. This Note proposes that the dispute resolution community should adopt the term “party-appointed advocate” to describe what is presently accepted and referred to as a party-appointed arbitrator. After all, the traditionally labeled party-appointed arbitrator often consists of nonneutral traits that are contradictory to how an arbitrator is traditionally defined. A consensus has recently developed identifying the party-appointed arbitrator in a tripartite tribunal as a blend of judge and advocate. The term “advocate” includes the concepts of representa-
tion and partiality,\textsuperscript{182} while the term “arbitrator” conjures notions of neutrality and forthrightness.\textsuperscript{183} A party-appointed arbitrator’s role is more closely aligned with the definition of what the dispute resolution community and the general public know as an advocate.

Admittedly, this proposed solution will face criticism. Some have contended that the role of party-appointed arbitrators can in fact be distinguished from the role of advocates.\textsuperscript{184} For instance, Party-Appointed Arbitrator C contends that even in C’s role as a nonneutral, C would not vouch for a party who has a meritless claim.\textsuperscript{185} Instead, C might use that claim as a forfeitable bargaining chip to convince the umpire and the other party-appointed arbitrator about the value of the other claims of C’s nominating party.\textsuperscript{186} In contrast, C suggests that many advocates will represent a client while knowing that their client’s claim is without legal grounds.\textsuperscript{187} C claims that this misrepresentation is an action that even a nonneutral party-appointed behavior would not take.\textsuperscript{188} Although C suggests that C would not vouch for a meritless claim from C’s nominating party, C also acknowledges that advocates often knowingly represent parties with meritless claims.\textsuperscript{189} C also ignores that many advocates might refuse to knowingly represent a client with a meritless claim while there might be an abundance of nonneutral party-appointed arbitrators who would knowingly vouch for a party with a meritless claim. An ethical advocate or an ethical nonneutral party-appointed arbitrator would each theoretically refuse to represent or vouch for a party with a meritless claim. The line drawn between the two and their respective roles is so fine that it becomes virtually nonexistent.

In addition, other commentators have opined that revising the Code of Ethics will inherently lead to the industry’s revision of
party-appointed arbitrator behavior. However, the Code of Ethics latest revision will not necessarily alter the differing expectations of participants in party-appointed arbitrations. History has shown that a revision to a law will not instantly dictate the revision to the citizens’ behavior toward that law. To that end, the author of this Note realizes that those critics might conclude that a change in the term “party-appointed arbitrator” to the term “party-appointed advocate” might have as minimal effect as revising the neutrality default within the Code of Ethics. Admittedly, there is some level of conjecture in attempting to ascertain the effectiveness of a not yet revised Code of Ethics or a not yet altered term “party-appointed advocate.” However, when balancing the two suggested means of creating uniformity among participants’ expectations during party-appointed arbitrations, the more effective way will be realized by altering the disputed term itself. Changing the term “party-appointed arbitrator” to the term “party-appointed advocate” will be a more telltale sign of how to define the party-appointed arbitrator’s role as opposed to revising a Code of Ethics that theoretically regulates the party-appointed arbitrator’s behavior. Accurately labeling the party-appointed advocate according to its actual role can most aptly reconcile the previously documented controversy surrounding the nonneutrality of these supposed neutrals. Without this seemingly radical step, the confusion surrounding the party-appointed arbitrator’s role will continually be perpetuated.

---

190 See Carter, supra note 167, at 305 (suggesting that the revised Code of Ethics should serve as a remedy to the “embarrassment” that is the nonneutral party-appointed arbitrator).

191 For example, although Brown v. Board of Education held that “separate but equal” was unconstitutional in the context of public education, the Civil Rights Act of 1964 was not passed until ten years after that landmark decision, thereby suggesting that inequalities continued within the workplace after 1954. See 42 U.S.C. 2000 (1964). See also Brown v. Board of Educ., 347 U.S. 483 (1954) (Warren, J.). Even after the initial passage of the Civil Rights Act, Americans did not instantly alter their behavior in accordance with Congressional legislation.

192 The two suggested means of creating uniformity among participants’ expectations within party-appointed arbitrations are the proposed revision of the Code of Ethics or the alteration of the term “party-appointed arbitrator” to the term “party-appointed advocate.”

193 If this Note’s suggestion is adopted, any party-appointed arbitration participant will be forced to confront the new term “party-appointed advocate.” In contrast, there is some uncertainty over how many party-appointed arbitration participants will have referred to the revised Code of Ethics, which contains a markedly different neutrality presumption for party-appointed arbitrators than the 1977 Code of Ethics.