Disclosure and other Ethical Issues during Arbitration and Mediation

J. William Frank, III[1]

Introduction

Although there are some different disclosure and ethical concerns during a mediation compared to an arbitration proceeding, there are also a number of similarities. Also, depending on the rules and other norms under which the mediation or arbitration is occurring, the arbitrator or mediator can face in some tricky and difficult situations. In addition, acting as a neutral in a highly technical area can also add some issues and ethical challenges. Lastly a mediator or arbitrator who is also an attorney can also face added challenges based on the ethical rules associated with their law license.

There have been a number of excellent articles written on the subject of arbitrator and/or mediator disclosure requirements.[2] This paper has a synthesis of my thoughts as well as the thoughts of a number of people who have written on this subject. For more detail, the reader is invited to look at some of the cited articles and source materials.

Arbitration

Although the disclosure and other ethical rules can vary widely depending on the particular rules and the law of the place and/or seat of the arbitration, the first rule is "When in doubt, disclose." A Second and corollary rule is "Do everything to protect the award and nothing that would make it subject to attack." If you keep these two "rules" in mind, you will be a long way toward satisfying your duty to the parties and to the ethical rules and laws.

US National Practice

For arbitrators in the US, a good starting point is the ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes[3], hereafter the "ABA/AAA Code." The ABA/AAA Code recognizes that many arbitrators, unlike judges, have other practices and/or occupations. It also recognizes that arbitrators, unlike mediators, as discussed below, actually make decisions that affect the rights of the parties.

There are a number of Canons of the ABA/AAA Code that need to be considered during arbitration: Canons IC, IIC-H, III, IV, V, VI, and IX. One principle that is part of many of these Canons is that the Canons are subject to the agreement of the parties. Because arbitrators derive their powers from the parties' agreement to arbitrate, that agreement controls unless adherence to the agreement would result in a violation of law.

Because in many three person arbitration panels, one panelist is appointed by each side of the dispute, Canon IX makes it clear that unless the parties expectation is that the party appointed arbitrators are not neutral and therefore subject to Canon X, party appointed arbitrators are neutral arbitrators and are subject to Canons I to VIII just like non-party appointed arbitrators. Once a party appointed arbitrator has been appointed they should act just like a neutral non-party arbitrator, absent some agreement to the contrary by the parties.

The recent case of Northwestern Nat'l Insurance v. Insco, Ltd[4] demonstrates the problems that can occur when a party appointed arbitrator does not act in a completely neutral manner. The basic facts are relatively simple. The parties were engaged is a dispute over the neutrality of one of the party appointed arbitrators. The concern was raised by the arbitrator appointed by one of the parties that the other party appointed arbitrator was too closely involved

with counsel for the other side. The first issue that is not specifically addressed by the case but raised by the facts is was it proper for the first party appointed arbitrator to discuss his concerns about another arbitrators' neutrality with the party that appointed him. In this instance it appears to have been proper because the parties' agreement seems to have contemplated ex parte discussions with their party appointed arbitrator in certain circumstances and so long as it did not involve issues relating to pending motions before the panel.

However, assume the more normal situation where there is no such understanding. What should one arbitrator do when they have a concern about the neutrality of another member of the panel? First, you should try to convince the other panel member to make a disclosure of the possible issue. Disclosure is required under Canon II and this is a continuing duty of each arbitrator. Absent unusual circumstances as in the Northwestern case, one arbitrator should not disclose information learned in intra-arbitrator discussions to the parties. In the Northwestern case even where there was an ability to discuss certain matters with the party that appointed the arbitrator, care should be exercised in this area as the disclosure of the intra-arbitrator emails and other documents was the cause of the disqualification of counsel. Because any decision is possibly tainted by a lack of disclosure, this places the arbitrator who knows of the information in a difficult position.

In the Northwestern case the arbitrator resigned after the other arbitrator refused to deal with the situation. This is a difficult situation because by resigning you are in effect denying the party that appointed the arbitrator with their choice of arbitrator. Also, should you resign because of the "bad behavior" of another arbitrator? An alternative if the arbitration is being conducted under administered rules, like the AAA, you should make a disclosure to the case manager at AAA or the other appointing organization. That organization has an interest in having the arbitration conducted in accord with their rules and also the ABA/AAA Canons, if appropriate.

During the arbitration, the continuing duty of making disclosure under Canon IIC helps to minimize attacks on the award by the losing party that the award was tainted by "evident partiality."[5] Even where an initial disclosure is made during the proceedings, the arbitrator is bound to conduct periodic follow up investigations to make sure that situation has not changed. In Applied Industrial Materials Corp. v. Ovalar,[6] the appeals court affirmed a holding that vacated an award based on evident partiality where one of the arbitrators had made a disclosure of a relationship and the erected a "Chinese Wall" relative to future dealings between a subsidiary and a third party. The court found that the Chinese Wall was not appropriate in this situation where the relation between the subsidiary and the third party became more substantial. The court specifically stated they were not creating a free standing duty of arbitrators to investigate, but in this instance where there was knowledge of an ongoing relationship, there was a duty to further investigate to make sure that a party was not mislead into believing that the relationships previously disclosed had remained at a "trivial" level. This was an international arbitration that was based in New York. The district court mentioned the International Bar Association's Guidelines on Conflicts of Interest[7] and the ABA/AAA Canons and decided that there was evident partiality based on these standards. However, the 2nd Circuit decided the case based on principles from the Supreme Court Commonwealth Coatings Case[8] instead.

Depending on the law and/or place of the arbitration, there may be additional disclosure standards that must be observed by arbitrators. For instance California has enacted laws and rules requiring extensive disclosures by arbitrators.[9] California courts have held[10] that the

California disclosure stands are not preempted by the FAA except in the limited area of SEC arbitrations.

The Uniform Arbitration Act[11] that is still law in many states has a very limited requirement relative to disclosure, in many ways similar to the FAA. However, the Revised Uniform Arbitration Act[12] in section 12 has an expanded disclosure requirements. One important aspect of the RUAA is that Section 12(d) makes failure to make required disclosures a specific ground to vacate an award. The RUAA is in force in 14 states and the District of Columbia.[13]

In highly technical areas of the law and technology, an arbitrator must not only be competent to serve but also should have sufficient knowledge of the technical aspects of the case to be able to render a fair and efficient decision. Clearly this does not mean that the arbitrator be an expert in the area of technology or law, although that might be desirable. Further, arbitrators should disclose their knowledge of the area of the arbitration as the parties may view this prior experience as somehow predisposing the arbitrator to the position of one side of the other. While this generally is not grounds for removal of an arbitrator, it is better to make a disclosure than to have this come up after an award has been delivered.

During the arbitration Canon III requires that the arbitrators communicate with all parties in writing and that any communication that is received by the arbitrators from a party is to be forwarded to the other party unless that document has also been served or provided to the other party directly. This is the sort of issue that should be handled by the procedural order from the arbitrators early in the proceedings.

In a similar manner, Canon IV requires all parties including the arbitrators behave in fair and courteous manner and that the arbitrators encourage similar conduct from the parties. The arbitrators set the tone for the proceeding and by making it clear that the parties will behave in a civil fashion, the arbitrators can go a long way to minimize bad behavior that in the end causes the parties time and money without leading to an award.

Because arbitration is a private matter between the parties, arbitrators should be very careful relative to confidentiality. This is especially true in technical cases. One of the reasons the parties may have chosen arbitration is to avoid making disclosures of technical information to the public. Arbitrators must be aware that may of the facts that have been presented to them may involve valuable trade secrets that can be destroyed by a breach of confidence. Maintaining confidentiality also maintains the integrity of the arbitration process. Although it is less likely that a lawyer arbitrator will observe acts on the part of an attorney appearing before him that would require reporting to disciplinary authorities, you should note that the rules discussed below relative to lawyer mediators also apply to lawyer arbitrators.

<u>International Practice</u>

Historically disclosure requirements for arbitrations outside the United States have less exacting. However, this has been changing and most ADR providers and organizations have some requirement for conflict checking and disclosure.[14] These requirements can be very general as in The Chartered Institute's recent Code of Professional and Ethical Conduct for Members[15] or much more detailed as in the recent rule changes for the ICC.[16] In many jurisdictions the guidelines from the IBA Guidelines referenced above with the red, orange and green lists are followed and used for guidance both by practitioners and the courts.[17]

For international arbitrations that are either sited in the US or will need to be enforced by a US court, ADR practitioners would be well advised be careful in their disclosures of "conflicts." There have been cases in the US that have enforced an award and vacated an award where an arbitrator had relied on the IBA Guidelines but the US court used reasoning from US law rather than accept the IBA Guidelines.[18] Other cases have explicitly followed the IBA Guidelines.[19] Because this area is sufficiently unsettled, ADR practitioners should be very careful relative to ongoing disclosure requirements even for international arbitrations where a US based court might be involved at some point in the future.

Mediation

As neutrals, mediators have similar disclosure requirements to arbitrators. While a mediator does not make decisions for the parties in mediation, a mediator can have an impact on influencing the parties to reach a settlement. The ABA has Model Standards of Conduct for Mediators.[20] Standard III relating to Conflicts of Interest in paragraph D has a specific reference an ongoing obligation relating to disclosure of actual or potential conflicts. Paragraph F also has a statement relative to refraining from post mediation activity that might call a mediator's neutrality or impartiality into questions. Just like arbitrators, mediators should be extremely careful in documenting in writing any facts or relationships that someone could view as compromising the mediator's impartiality.

Because of the dynamic nature of mediation verses arbitration where the roles of the participants are generally well defined, a mediator may encounter more ethical issues during mediation than an arbitrator encounters during arbitration. In Standard VI, paragraph A(4), there is a statement that the mediator "should promote honesty and candor between and among all participants." Because mediation in many ways resembles a negotiation where a certain amount of puffing, etc. is allowed and expected, how can a mediator make sure that the parties are "playing fairly." These types of truth stretching usually only surface when there is a dispute over enforcement of the mediated agreement. In the recent Facebook cases[21] the court upheld enforcement of an agreement where there had been a misrepresentation of the value of Facebook stock. The settlement fell apart during the negotiation over the final deal documents. The defendant's position was that there was a significant misrepresentation of the value of Facebook stock of $35.90/share vs. $8.88/share. The court however excluded evidence of what was said during the mediation based on the pre-mediation confidentiality agreement that included the following language "No aspect of the mediation shall be relied upon or introduced as evidence in any arbitral, judicial, or other proceeding." This case is a win for mediation confidentiality, but it does point to difficulties when one party is being less than completely forthright.

The more difficult question raised by this case is what should the mediator have done if anything to ensure that the stock valuation that was an important part of the deal was at least close to the correct valuation. In my view a mediator satisfies his duty by making an inquiry to the party stating a value as to the basis for that value. This can be done in a relatively non-adversarial way by reminding the party that this is likely to come up in the final documents and that a wide variation here is likely to undo the settlement. Another way to handle this is to build that value into the informal settlement document by including language like "The parties have used a valuation of $XX per share for the [insert use here]. If the final valuation is either greater or less than $XX, the number of shares shall be adjusted up or down proportional to the difference in share price."

The Facebook case also raises the difficulty in preparing post mediation settlement agreements. While in my view the mediator can assist the parties in crafting these documents, the parties themselves should take the major role in creating the document. The mediator's role should be suggesting concepts that might break an impasse or help the parties consider issues to be included in the document versus those that will have to be in the final deal document. If the mediator prepares the informal post mediation agreement, language should be included to make it clear that the mediator was acting as a scribe for the parties and that the document is the parties' agreement. This is an area where a mediator can subject themselves to potential professional liability if an important term is missed, etc. in a document drafted by the mediator.

It is often difficult to craft a comprehensive agreement on the day of mediation, but any document, term sheet or other writing should include as many of the core facts and agreements as possible without requiring the parties (and the mediator) to stay up all night to complete the document. Also we need to understand that the parties are often interested in getting on with their travel arrangements and will not want to spend significant time on the document. However, the more complete the document, the less opportunity there will be for the deal to crater at a later date.

Particularly in technical disputes, a mediator often will be asked at some point for their evaluation of the situation. In this instance, so long as the mediator believes they are sufficiently competent to provide an opinion (have the requisite background and or training) then Standard IV should not prevent the mediator from giving an advisory opinion. Also, before the mediator give a "formal" opinion on some aspect of the merits of the dispute, the mediator should under Standard VI have clear agreement from the parties that the mediator is stepping into a different role. Also as an attorney mediator, you are subject to Model Rule 2.4 that requires informed consent in this type of situation. I am contrasting this evaluative opinion to reality testing that mediators commonly employ to test a party's view of the case and to inject some doubt to that party in the correctness of their position. In this instance you are not necessarily offering a direct opinion on the merits but are suggesting that the situation may be viewed in different ways than that party currently views the dispute.

When a mediator provides something similar to an Early Neutral Evaluation, the mediator must understand that by doing so the dynamics of the process are changed and that the mediator may now be identified along with the party that is happiest with the evaluation. While there are ways to minimize this from happening it is human nature that the unhappy party may be less receptive to the mediator after the evaluation. That is why this should be done as a last resort "when all else has failed" process. Because of this the mediator should get written agreement from the parties allowing them to do the evaluation and this agreement should make it clear that this evaluation is non-binding and that under the confidentiality provisions of the mediation the evaluation cannot be used in any fashion outside the mediation except for possibly facilitating future settlement of the dispute.

In technical disputes, confidentiality is critical to mediation. Typically there will be disclosures to the mediator that are highly confidential to one party. It goes without saying that this confidence must be scrupulously followed. Standard V sets out obligations of secrecy for mediators. In complex technical disputes the mediator is often made aware of highly confidential and valuable trade secrets as part of the mediation process. Violation of the secrecy obligations by the mediator even long after the mediation has concluded will have serious legal

consequences for the parties and possibly the mediator. A disclosure by the mediator without permission by the secret owner could result in the loss of very valuable rights.

If the mediator is well versed in either the field of technology or the area of law, having the parties disclose information in confidence to the mediator can assist the mediator in helping the parties find creative solutions to the dispute. Understanding that there are related products and that the other party may have technology that will assist these products may enable the mediator to help the parties craft a suitable license agreement or cross licensing agreement to resolve the dispute.

If the mediator is an attorney, they should be aware of Canon 1.6 of the Model Rules of Professional Conduct. While the parties to a mediation are not technically clients are set out in the rules, many ethical opinions indicate that the attorney mediator is subject to the confidentiality obligation of Rule 1.6. As an attorney mediator you should be aware that in most states there is an exception to Rule 1.6 for reporting attorney malfeasance. For instance, see New Hampshire Ethics Opinion 2011-12/4.[22] There the committee decided that the attorney mediator needed to report an attorney to the disciplinary authorities for attempting during mediation to have the former client agree not to report the attorney as a condition for settling the dispute. Most states have similar rules requiring attorneys to report "bad acts" by other attorneys especially where the acts relate to the other lawyer's fitness to practice law.

Occasionally parties to mediation will ask the mediator to decide the dispute, so called med-arb. While this sounds like a good idea at first, there are a number of difficult issues that must be addressed. Also from the mediator's view, they must be aware of Standard VI that deals with a change is status and particularly in paragraph 8 where it states that a mediator is "not to undertake a different dispute resolution role in the same manner without the consent of the parties." Because of the very difficult issues, this consent must be well informed consent with a disclosure of the relative risks and benefits. In mediation, the mediator routinely receives ex parte communications for each side. These disclosures are made in confidence and without the knowledge of the other party to the dispute. In arbitration, the arbitrator must be careful to only receive information from both parties and never to receive ex parte communications. Because the mediator will have already received this information from one party, it is very difficult to go back and "unlearn" this information. Any decision that is or could have been based on ex parte information is subject to being vacated on the grounds of partiality or the inability to fully present a party's case because they were not aware of all information provided to the arbitrator by their opponent.

Conclusion

Arbitrators and mediators need to remain vigilant during the dispute resolution process to update their disclosures to the parties of potential conflicts and associations. Failure to do so will undermine the confidence in the process, may well lead to failure of the neutral's obligation to the parties to conduct a fair and impartial dispute resolution process, as can be seen from the cases may end up not resolving the dispute and creating an added dispute between the parties.

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[1] Mediator/Arbitrator: www.frankadr.com

[2] DISCLOSURE AND DISQUALIFICATION STANDARDS FOR NEUTRAL ARBITRATORS: HOW FAR TO CAST THE NET AND WHAT IS SUFFICIENT TO VACATE AWARD, M. T. Rossein, St. John's L. Rev Vol 81, 203 (2007): www.tci.edu/media/3/020e93b18e5542efb5721ea7f727f1da.pdf; Should Parties' Disclosure Requirements for Arbitrators be Honored by Courts: Positive Software Solutions, Inc. v. New Century Mortgage

Corporation , L. E. Gross (Unpublished): http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=leonard_gross;

[3] Available on either the ABA or AAA websites: [Insert links here]

[4] Northwestern Nat'l Ins. Co. v. Insco, Ltd., 2011 U.S. Dist. LEXIS 113626, 2011 WL 4552997 (S.D.N.Y. Oct. 3, 2011).

[5] FAA Section 10a(2); UAA Section 12a(2); RUAA section 23a(2A).

[6] District Court: 2006 U.S. Dist. lexis 44789; 2nd Circuit:492 F.3d 132 (2nd Cir. 2007)

[7] http://www.ibanet.org/images/downloads/guidelines%20text.pdf

[8] Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968)

[9] California Code Section 1281.9; http://www.courts.ca.gov/documents/ethics_standards_neutral_arbitrators.pdf

[10] Ovitz v. Schulman, 35 Cal.Rptr.3d 117 (2005).

[11] http://www.adr.org/sp.asp?id=29567

[12]http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm

[13] Alaska, Arizona, Colorado, District of Columbia, Hawaii, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, Washington.

[14] WIPO Arbitration Rules Section 22: http://www.wipo.int/freepublications/en/arbitration/446/wipo_pub_446.pdf: LCIA Rules 5.2 and 5.3: http://www.lcia.org/media/download.aspx?mediaId=74; CIETAC Article 29: http://www.cietac.org/index.cms (Click on "Rules")(New rules effective May 1, 2012);CPR Rule 7.3: http://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Clauses%20&%20Rules/2007%20CPR%20Rules%20for%20Non-Administered%20Arbitration.pdf; UNCITAL Article 9: http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf

[15] Rule 3 Conflicts of Interest

> Both before and throughout the dispute resolution process, a member shall disclose all interests, relationships and matters likely to affect the member's independence or impartiality or which might reasonably be perceived as likely to do so.
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> Where a member is or becomes aware that he or she is incapable of maintaining the required degree of independence or impartiality, the member shall promptly take such steps as may be required in the circumstances, which may include resignation or withdrawal from the process.

[16] Rule 11: http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/2012_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf

[17] Supra Note 6; See 2010 Report on IBA Guidelines: http://www.ibanet.org/Document/Default.aspx?DocumentUid=18DB5162-50F1-4D6D-ABE9-93C7CE86B659

[18] HSN Capital LLC (USA) v Productora y Comercializador de Televisión SA de CV (Mexico), 2006 WL 1876941 (M D Fla) (2006)

[19] New Regency Productions, Inc v Nippon Herald Films, Inc, 501 F.3d 1101, 1108, 2007 (2006)

[20] http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf

[21] The Facebook, Inc. v. Pacific Northwest Software, Inc., 640 F.3d 1034 (9th Cir. 2011)

[22] New Hampshire Bar Assn. Ethics Committee Advisory Opinion #2011-12/4: http://www.nhbar.org/legal-links/Ethics-Opinion-2011-12_04.asp