Is a Neutral Party-Appointed Arbitrator an Oxymoron?

By Ralph G. Wellington

“On Professional Practice” examines how professional responsibility principles apply to our work. Sharon Press, a member of the Dispute Resolution Magazine editorial board, serves as the “On Professional Practice” editor. We encourage readers to submit ideas for future columns to her at sharon.press@mitchellhamline.edu.

Although the subject of party-appointed arbitrator neutrality has been written about and debated for some time, significant uncertainty remains. Three crucial questions continue to present potential challenges for individuals serving in this role and those making the appointments:

- Is a party-appointed arbitrator ever completely neutral?
- Do parties who appoint an arbitrator expect that arbitrator to favor their position?
- Do party-appointed arbitrators think that it is part of their role to make sure the position of the party who appointed them is effectively presented?

Raising and resolving these questions about neutrality is crucial to the continued long-term health of the arbitration process, just as arbitration itself is crucial to the overall rule of law.

This article examines the rules related to these issues and uses the insights of two leading arbitrators, Timothy K. Lewis and Noah J. Hanft, to draw some conclusions. Timothy K. Lewis, a former federal appeals judge, is a co-chair of the ADR Practice Group for Schnader Harrison Segal & Lewis LLP (where the author is a co-chair of the same group) and serves as a mediator, arbitrator, settlement counselor, and trial and appellate practitioner. Noah J. Hanft is a mediator, arbitrator, and ADR advisor at AcumenADR LLC, based in New York City. He served as general counsel of MasterCard Worldwide for 13 years and as president and chief executive officer of the International Institute for Conflict Prevention & Resolution (CPR).
The rules

Most arbitration rules allow parties to agree to appoint non-neutral arbitrators who are not bound by the limits of impartiality. For example, the American Arbitration Association Commercial Arbitration Rules and Mediation Procedures Section R-13 reads:

“Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Section R-18 [addressing arbitrator disqualification] with respect to impartiality and independence unless the parties have specifically agreed pursuant to Section R-18(b) that the party-appointed arbitrators are to be non-neutral and need not meet those standards.”

Section R-18(b) specifies:

“The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-13 shall be non-neutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.”

But absent an agreement of parties to appoint non-neutral arbitrators, most rules require the party-appointed arbitrators to comply with the independence and impartiality standards of the governing tribunal. For example, AAA Section R-18(a) provides:

“Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith and shall be subject to disqualification for:

i. partiality or lack of independence,

ii. inability or refusal to perform his or her duties with diligence and in good faith, and

iii. any grounds for disqualification provided by law.”

Similarly, the International Institute for Conflict Prevention & Resolution’s Rule 7.1 states: “Each arbitrator shall be independent and impartial.”

But let’s get real. Even when parties choose the neutral party-appointed method, they might expect their appointed arbitrator to be an inside advocate, someone who can convince the one “true neutral” of their position. Indeed, both counsel and appointed arbitrators have encountered situations where the actions of a party-appointed arbitrator reflect advocacy on behalf of the party that appointed them. That could be through becoming aggressive in particular witness examinations; refusing to accept clear evidence; offering one-sided arguments during panel deliberations; and acting in other ways as an advocate.

Yet getting a court to overturn an award by asserting arbitrator bias is challenging, requiring more than an inference of partiality. Proof of corruption, fraud, evident partiality, or misconduct is required. And even more challenging is asking a court to intervene during an arbitration process based on allegations of partiality. Courts have found that, “Rather than enhancing the arbitral process by court enforcement of interim relief designed to ensure any eventual award will be meaningful, allowing a disqualification during the arbitration could spawn endless applications to the courts and indefinite delay.” Other court decisions have concluded, “The time to challenge an arbitration, on whatever ground, including bias, is when the arbitration is completed and an award entered.”

Analysis

So if party-appointed arbitrators are supposed to be “impartial and independent” while also sometimes expected to be “advocates” for the party that appointed them, what are the proper boundaries between those two expectations, and what are some circumstances where the advocacy role is overstepped? To get some additional perspective on these issues, I posed these questions by email to Lewis and Hanft in a context where party-appointed arbitrators are neutral, not non-neutral, appointees.

Ralph G. Wellington: In your experience, does the party appointing an arbitrator expect that arbitrator to assure that their position is fully presented and understood?

Timothy K. Lewis: My direct answer is yes, but I try to downplay both the significance of that and the party’s expectations of me as their party-appointed arbitrator from the first inquiry about my service.

And I’ve found that most experienced lawyers understand that while the process does allow their input in the selection process, each panel member is supposed to remain neutral throughout the entire proceeding. This is a quasi-judicial body. While it
is important to make sure that all parties’ positions are fully presented and understood, the integrity of the panel’s decisions must come before any party’s particular interest.

Noah J. Hanft: It may be expected, but such an expectation is problematic, and all “users” should be disabused of that perception. When I was general counsel, I had reservations about arbitration because I believed that some parties expected arbitrators that they appointed to be not only responsible for ensuring that their position is presented but to advocate for the party that chose them. I also think the line between ensuring a position is fully presented and understood and advocating is a murky one. For this reason, I believe that trust in arbitration would be advanced if it were clear that the responsibilities of arbitrators were identical, regardless of which party selected them.

Ralph: How should a party-appointed arbitrator handle a clearly stated expectation by the party that the arbitrator will act to assure that their position is fully presented and understood during the proceedings and deliberations?

Timothy: I believe candor — from the initial conversation with the side making the inquiry — is critical. And I think the same candor applies when discussing the matter (and it should be discussed) with the other panel members. I tell the party that I cannot and will not “advocate” for either side during the proceeding and that I will instead do all I can to make sure both sides have an opportunity to fully present their positions. I make sure there is no expectation of anything more or less than that. And I tell them that if that’s not what they had in mind, I’m not the person they should be talking to. I also tell my fellow panel members that I hope we all understand that we are to remain neutral no matter who appointed us. With rare exception, I have found that getting clarity on that issue from the very beginning makes it a lot easier as the matter unfolds because it’s almost as if we are policing ourselves throughout to ensure fundamental fairness in our encounters with the parties and in our decisions.

Noah: Consistent with my prior answer, I would indicate that they should rest assured that I would require a clear presentation from all parties so that I, as well as the other arbitrators, am able to gain a clear understanding of the positions of all sides. I do think that it is essential to have that be the common understanding of the entire panel and that all parties understand that all arbitrators are truly neutral.

Ralph: Have you experienced circumstances where a party-appointed arbitrator in an “independent and impartial” proceeding has acted in non-objective ways during the proceedings and deliberations?

Timothy: Yes, I have. And it is an unseemly thing to behold. It distorts the process and pits one or two arbitrators against the non-objective partisan. I find that this undermines the purpose of arbitration, which is to provide a neutral forum in which to air and decide important issues. Instead, it becomes an intellectually dishonest enterprise and fosters a lack of confidence in a field in which confidence is the coin of the realm.

Noah: Only once in an overt way. It is destructive of the process and contributes to, and indeed exacerbates, the lack of trust that a good number of “users” have in arbitration.

Ralph: If counsel for a party fails to ask some key questions or leaves an evidentiary gap, is it a breach of neutrality for that party’s appointed arbitrator to jump into the examination, to ask questions, or to ask for more evidence?

Timothy: I believe it is a breach of neutrality, unless the party-appointed arbitrator is attempting to assist the other panel members in better understanding something in doing so. When an arbitrator becomes an advocate and starts to do cleanup in order to make it more likely that one side will prevail, that arbitrator has abdicated the traditional role of a neutral in favor of a bias that undermines the entire process.

Noah: The party-appointed arbitrator is not a second counsel or relief pitcher. This would indeed be a breach of neutrality. Of course, if the panel collectively sees the need for additional questions or more evidence, that is a different story. But, even in such a case, it would be advisable for any such request to not come from the particular party-selected arbitrator so as to not give rise to any concern about neutrality.

Ralph: If a party-appointed arbitrator or the joint or institutional selected third arbitrator believes a party-appointed arbitrator is crossing the line of
neutrality during the proceedings, what actions, if any, should the other arbitrators take?

Timothy: If any arbitrator believes a party-appointed arbitrator is crossing the line of neutrality during the proceedings, I think it is incumbent upon that person to raise the issue in a meeting with the panel behind closed doors. The difficulty here is determining what constitutes “crossing the line.” That is a matter of degree for most, and some arbitrators will allow and even expect a party-appointed colleague to be somewhat of an advocate instead of an unbiased neutral. I do not share that view, but I would still allow some latitude before raising the issue. As I said, I think it’s a matter of degree. One can only determine that in the moment, and it involves weighing the context, the impact, and other factors. But I do think that if anyone feels the line has been crossed, it has to be addressed. If it continues, the other panel members will have to do what they can to control the proceeding. When it’s over, they should consider reporting this behavior to the institution overseeing the arbitration and sending a transcript that shows why it was over the top.

Noah: I wholeheartedly agree. Should an institution administering an arbitration receive a report that an arbitrator has violated neutrality, my personal opinion is that it has an obligation to investigate. Certainly the co-arbitrators should be spoken to and the circumstances fully evaluated. As I understand it, the institutions generally survey the parties after an arbitration, so it would be interesting to know if there were any prior complaints and such should be taken into account. If the evidence of a lack of neutrality is clear, the institution has the obligation to take action. Depending on how egregious the conduct was, the arbitrator should either be removed from the panel or, at a minimum, be given a clear and strong warning.

Ralph: What can be done in an institutional or systemic way to restrain excessively partisan influences caused in some cases by the party appointment system?

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Timothy: I believe the most helpful institutional approach is to utilize a selection process that does not reveal which side selected the party-appointed arbitrators. I also think party-appointed arbitrators should sign an oath that requires them to remain neutral under all circumstances throughout the proceeding. And finally, I think it’s important for a newly constituted panel to have an open discussion about their expectations of one another and to commit that each will remain neutral no matter which party appointed them.

Noah: A number of years ago, CPR came up with the idea of a process where each party can select a neutral arbitrator of its choice. That selection is kept confidential so that the designated arbitrator does not know which party put her or his name forward. Known as the Screened Selection Process, this allows the arbitrators to avoid feeling any pressure toward a particular side but still allows a party to choose an arbitrator so long as that arbitrator has no conflicts. I also believe that ADR institutions should do two things. First, they should provide continuing education on the proper role of arbitrators and highlight the importance of neutrality. Second, they should seek and respond to feedback on arbitrators and act if there are recurring complaints of partisanship by dropping such individuals from panels.

Conclusions

So based upon my own experience and the insights of Timothy K. Lewis and Noah J. Hanft, I offer the following observations:

Is a party-appointed arbitrator ever completely neutral? Yes, sometimes and no, sometimes. Absent agreement on non-neutral status, party-appointed arbitrators are ethically required to be impartial. Many arbitrators fully appreciate that standard and explain it to the party appointing them. Others, aware that they are expected by the appointing party to make sure that party’s position is fully understood and perhaps even advocated, do view those roles as part of their responsibility as well, even if they keep an open mind as to the result. And some may lean so far one way that they cross the line of neutrality.

Do parties who appoint an arbitrator expect that arbitrator to favor their position? Yes and no. Many parties understand that neutrality is part of the ethical duty of an arbitrator they appoint. What matters to them in their selection are things such as sophistication, intelligence, experience in the subject area, and reputation. What they expect is someone who will listen, understand, and consider their positions. But as noted before, sometimes parties expect their appointee to lean toward their position. In those cases, it is the responsibility of the appointee to make clear his or her responsibilities of impartiality.

Do party-appointed arbitrators think that it is part of their role to make sure the position of the party who appointed them is effectively presented? There is a line here. Making sure that all issues or facts are fully understood by the panel is in general a good initiative of any appointee. Limiting that to the side that appointed the arbitrator and jumping in as the main cross-examiner of opposing witnesses are examples of steps over the line.

In short, even in a required neutral proceeding, advocacy for the party making the appointment sometimes does happen. We all have a responsibility to make sure that the neutrality of party-appointed arbitrators is never an oxymoron.

Endnotes

1 American Arbitration Association (AAA) Commercial Arbitrator Rules and Mediation Procedures R-13(b).
6 Smith v. American Arbitration Ass’n, Inc. (7th Cir. 2000).