

MEDIATION

dispute resolution process

CONSIDERATIONS OF **NEUTRALITY AND IMPARTIALITY** IN ADR

BY PAUL HAIRE, ESQ.

Arbitration and mediation continues to expand in Nevada, as does the number of ADR practitioners. The ethics governance of ADR practitioners is not uniform, with mandatory ethics obligations selectively imposed. Ethics standards relating to neutrality and impartiality are particularly ambiguous, and they are common concerns for ADR practitioners and the disputants they serve.

Ethics Governance

No state-mandated ethics requirements apply to private mediations. Parties may use mediators of their choice, who may adopt model ADR ethics standards or not, or adhere

to their own. For example, one national ADR services provider publishes its own “Mediators Ethics Guidelines.” ADR provisions in contracts may specify arbitration through the American Arbitration Association (AAA), which publishes various rules and standards for arbitration and mediation proceedings including ethics provisions.¹ AAA ethics standards are also regularly adopted in non-AAA proceedings.

Court-connected or legislatively imposed ADR proceedings are governed by a mixed bag of unique or model ethics standards. For example, the Nevada Supreme Court Settlement Program operates under its own code of conduct. Clark County’s family court mediation program adheres to the Model Standards of Conduct for Mediators (model standards), while Washoe County’s program does not. Specific ethics codes are not dictated for NRS 40.680 construction defect mediations or for district court-annexed mediations. Mediators serving in Nevada’s Foreclosure Mediation Program are subject to the Nevada Code

of Judicial Conduct (NCJC) and the model standards. Mediation and arbitration of claims relating to residential property in common-interest communities ostensibly do not require adherence to a particular ethics guide.

Nevada has also enacted the Uniform Arbitration Act (UAA), applicable to “an agreement to arbitrate whenever made” after October 1, 2003.² The UAA includes ethics mandates and vacatur of awards for improprieties. The district court-annexed arbitration program does not impose unique ethics standards, but it references arbitrator disqualification “for any reason that would disqualify a judge under the NCJC.”

Neutrality and Impartiality

While governance varies, guidance relating to neutrality and impartiality is largely uniform in admonition, but it can differ in specificity, obligation and standard by which each is evaluated.

In the ADR lexicon, “neutrality” and “impartiality” are often used in tandem or interchangeably. There is overlap in their conceptualization, but the terms are distinct in some features. Nevada’s Rules Governing Alternate Dispute Resolution define arbitration and mediation as processes utilizing “a neutral third person.” The model standards reference an “impartial third party.” The AAA Code, recognizing that organization’s use of party-appointed arbitrators, states “it is preferable for all arbitrators ... to be neutral, that is, independent and impartial.” The UAA equates neutrality with a lack of “a known, direct and material interest in the outcome of the ... proceeding, or a known, existing and substantial relationship with a party.”³

Dictionary definitions of “neutral” include “not aligned with or supporting any side or position in a controversy” or “not supporting or helping either side in a conflict.” These definitions in an ADR context imply a *distance* from the parties and their dispute, created by a lack of affiliation to any party, a disinterest in the matter and an open-minded approach to confronting the dispute. The ADR practitioner comes from outside the parties’ conflict, having no commitment or connection to either side or to the contest.⁴

The model standards define “impartiality” as “freedom from favoritism, bias or prejudice” and state a mediator “should not act with partiality or prejudice based on any participant’s personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.”⁵ Other guides add that bias based on a pre-existing opinion about the merits of the dispute should also be avoided. The AAA Code contemplates an arbitrator’s knowledge of the parties and expertise in the area surrounding the dispute. However, prejudgment of factual or legal matters is proscribed.⁶ Then in contrast to

neutrality, impartiality may be viewed as an *equidistance* from the parties and dispute, meaning fair and equal attention and consideration to all parties and their positions regardless of the characteristics of the parties or dispute.

Impartiality is also addressed in terms of conflicts of interest presumed antithetic to impartiality. The model standards state a mediator “shall avoid a conflict of interest or the appearance of a conflict of interest [that] can arise from involvement ... with the subject matter of the dispute or from any relationship between a mediator and any mediation participant ... that reasonably raises a question of impartiality.” A mediator “shall make a reasonable inquiry” into facts a “reasonable individual” would consider likely to create a conflict of interest. Further, a mediator “shall disclose ... all actual and potential conflicts of interest that are reasonably known ... and could reasonably be seen as raising a question about the mediator’s impartiality.”

Waiver of disclosed conflicts is possible, unless a conflict “might reasonably be viewed as undermining the integrity of the mediation.”⁷

The AAA Code states arbitrators “should make a reasonable effort to inform themselves of any interests or relationships” that could present conflicts. The code adds that “[a]ny doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure.” Relative to relationships, the AAA Code specifically points to existing or past relationships with “any party or its lawyer [and] with any co-arbitrator.” Waiver of disclosed conflicts in arbitration may also occur, absent an arbitrator’s subjective belief that a conflict prevents even-handedness.⁸

The UAA requires disclosure of “any known facts that a reasonable person would consider likely to affect impartiality,” including financial or personal interest in the outcome, “an existing or past relationship with any of the parties ... [or] their counsel.” NRS 38.227(1). The failure of an appointed neutral arbitrator to make such disclosures “is presumed to act with evident partiality,” mandating vacatur of the arbitration award. NRS 38.227(5); NRS 38.241(1). In Nevada, evident partiality is established when nondisclosure gives rise to a “reasonable impression of partiality.”⁹

The NCJC requires the performance of all judicial duties “fairly and impartially” and “without bias or prejudice” and disqualification is required where “impartiality might reasonably be questioned.”

A mediator “shall make a reasonable inquiry” into facts a “reasonable individual” would consider likely to create a conflict of interest.

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Disqualification is also required where enumerated conflicts (like those in the model standards, AAA Code and UAA) are known, unless upon disclosure the parties waive the conflict on the proceeding's record.

Considerations

Ethics standards operate in varying degrees to promote neutrality and impartiality. Some standards state ADR practitioners "should not" act with partiality, or "should" avoid bias, or may state the arbitrator or mediator "should" affirmatively inform themselves of threats to neutrality or impartiality and disclose them. Doubts about disclosure "should" be resolved in favor of disclosure. Other standards are less aspirational. An arbitrator or mediator "shall" avoid conflicts of interest or even their appearance, or "shall" disclose conflicts of interest or facts that might affect impartiality. Depending on the guide, ADR practitioners "shall" affirmatively investigate conflicts.

Neutrality and impartiality, while central to ADR processes, may be ignored, presumed or simply subordinated to the perceived effectiveness of an ADR practitioner to resolve disputes.

Ethics guides employ different standards to evaluate impartiality. In some, the subjective view of the mediator or arbitrator about conflicts of interest or the ability to be neutral and act impartially controls. Others institute an objective, "reasonable person" or "reasonable impression" standard. The difference in standards is significant. The latter operates to instill in the ADR practitioner an elevated self-introspection concerning neutrality and impartiality, favoring more disclosure in benefit to the disputants. The former risks a more cavalier evaluation.

The letter and spirit language of neutrality and impartiality also merits consideration. Rarely will an ADR practitioner be familiar with the actual parties. Very common is familiarity with the parties' lawyers or representatives. Relationships and experiences with the parties' lawyers can lead to concerns with favoritism or bias and prejudice. Familiarity and likeability can alter one's view and approach to a dispute. An ADR practitioner's unconscious predisposition toward one side's cause or perceived virtue may cloud awareness

for neutrality and impartiality. The ADR practitioner's sensibilities, shaped by world views, background, politics and ideals may further impact views of neutrality and impartiality.

Neutrality and impartiality, while central to ADR processes, may be ignored, presumed or simply subordinated to the perceived effectiveness of an ADR practitioner to resolve disputes. Perceptions of neutrality and impartiality may derive from reputation or past experiences. Active vetting by disputants may give way to mere assumptions that an ADR practitioner is neutral and impartial, because he or she must be required to adhere to some ethics standards found somewhere. While not, per se, inappropriate, such ad hoc approaches to neutrality and impartiality are risky. Understanding governance, distinctions in terms, and standards by which neutrality and impartiality are evaluated raises awareness to the issues, invites scrutiny and ultimately promotes trust in ADR processes. **NL**

1. See, e.g. AAA Commercial Arbitration Rules and Mediation Procedures available at www.adr.org.
2. NRS 38.216(3)
3. NRS 38.226(2)
4. Neutrality, as defined here, may be intentionally lacking. Disputants may believe their interests are better served by an ADR practitioner who lacks distance from the parties or dispute, as in the case of some AAA arbitrations.
5. Std. II (A) and (B)
6. Canon I and comment
7. Std. III (A), (B), (C) and (E).
8. Canon II (4).
9. *Thomas v. City of North Las Vegas*, 122 Nev. 82, 127 P.3d 1057, 1068-69 (2006).



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