



Ethical Considerations in Employment Arbitration

ACC Wisconsin – Annual Ethics Seminar
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Littler

ACC Association of
Corporate Counsel
— WISCONSIN —

Presented by



MICHAEL GOTZLER

Attorney
Madison, WI
608.287.3701
mgotzler@littler.com



MICHAEL YELLIN

Attorney
Milwaukee, WI
414.978.4610
myellin@littler.com



HON. DAVID JONES (RET.)

Resolute Systems, LLC
1661 N. Water Street Suite 501
Milwaukee, WI 53202
djones@resolutesystems.com

Agenda



- Setting the Stage
- Which Ethics Rules Apply in Arbitration?
- Arbitrator Duties of Fairness & Impartiality
- Arbitrator Duty to Disclose Ties & Interests
- Witness Preparation
- Addressing Bad Law

Setting the Stage

Setting the Stage ...

- Since 2010, 80% of Fortune 100 companies have used employment arbitration agreements to some extent.
- The expansion in using arbitration has followed the explosion of employment wage and hour class and collective action litigation.
- Over the past several decades, the U.S. Supreme Court has consistently endorsed and enforced employment arbitration agreements.
- In 2011, the Supreme Court upheld the enforceability of a consumer arbitration agreement under which the consumer waived his right to a class action in favor of arbitration (“a class waiver”).
- In 2018, the Supreme Court rejected the NLRB’s arguments that employment class action waivers in arbitration are unlawful.



Advantages to Arbitration Agreements

- Class & Collective Actions
- PAGA Actions
- Cost Savings
- No Juries
- Nationwide Consistency
- Targeted Roll-Out
- Greater Confidentiality
- Significant Experience

Realities/Disadvantages Of Arbitration Program

- Litigation will not cease and some costs may increase.
- Individual arbitrations are not cheap.
- Following the *Concepcion* and *Epic* decisions, plaintiffs' counsel are bringing and threatening mass sets of arbitration actions.
- An erroneous arbitration decision is harder to overturn on appeal and will only be vacated in rare situations.
- Arbitration cannot supersede or replace state or federal agency jurisdiction.
- Current and pending state laws interfering or impeding arbitration are on the rise.

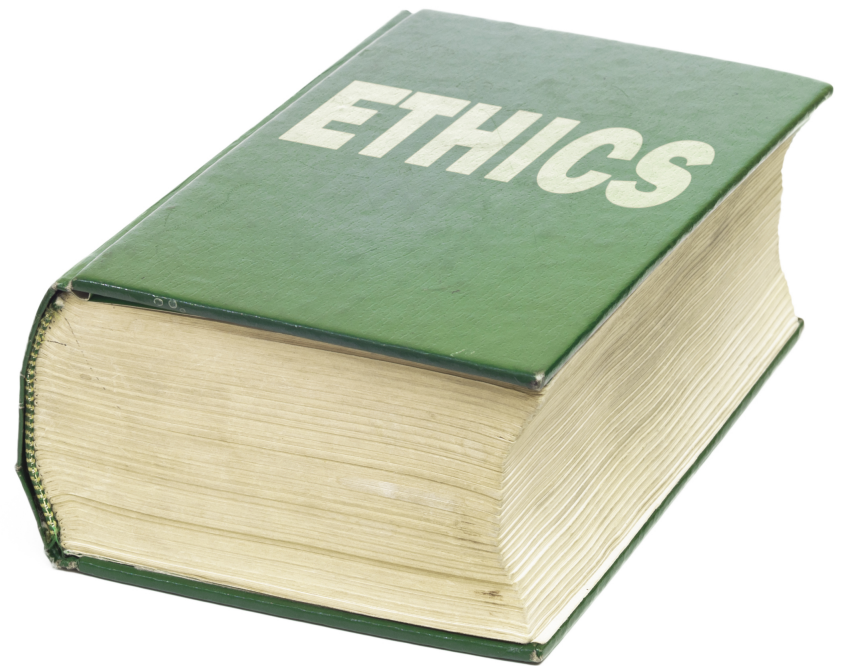


Which Ethics Rules
Apply in
Employment
Arbitration?

Codes of Conduct and Ethics – Employment Arbitration

What are the ethical rules or standards in the employment arbitration forum?

- For attorneys, the same rules of professional responsibility apply regardless of the forum – judicial, mediation, arbitration, other.
- The answer is not as straightforward for arbitrators.
 - There is not a universally accepted set of ethical rules for arbitrators.
 - Instead, there are several sets of potential standards.



Common Codes of Conduct & Ethics for Arbitrators

- Common codes of conduct and ethics for employment arbitrators:
 - AAA – Code of Ethics for Arbitrators in Commercial Disputes (10 Canons; “Arbitrator should...”)
 - JAMS – Arbitrators Ethics Guidelines
 - NAA – Code of Professional Responsibility for Arbitrators of Labor Management Disputes
- SCR 20:2.4 – Lawyer Serving as Third-Party Neutral
 - (a) Rule applies in arbitration, mediation, other
 - (b) Inform unrepresented parties you are not their attorney
 - (c) Specific rules when serving as mediator:
 - (1) Informed consent from parties if prior work done
 - (2) Work by mediator doesn’t create Attorney-Client relationship
 - (3) Mediator must act with same competence and diligence

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CONDUCT**



Arbitrator Duties of Fairness and Impartiality

Arbitrator Generally Accepted Ethical Standards

- Duty of Integrity and Fairness
 - AAA, Canon I: “must observe high standards of conduct so that the integrity and fairness of the process will be preserved.”
 - JAMS, Guideline I: “should uphold the dignity and integrity of the office of the arbitration process.”
- Duty of Impartiality
 - AAA, Canon II: “should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality.”
 - JAMS, Guideline V: “should ensure that he or she has no known conflict”
- Inherent tension with “Repeat Players”?
 - Advantages of knowledgeable arbitrator who knows industry, but. . .
 - Attempting to please both parties (see JAMS, Guideline VIII)
 - Tendency to split the decision or not issue home run awards

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Monster v. City Beverages (9th Cir., October 22, 2019)

- Parties arbitrated commercial dispute through JAMS
- Arbitrator ruled in favor of Monster
- Arbitrator's pre-dispute disclosures noted:
 - "Each JAMS neutral, including me, has an economic interest in the overall financial success of JAMS.
 - ...parties should assume that one or more of the other neutrals who practice with JAMS has participated in an arbitration, mediation or other dispute resolution proceeding with the parties, counsel or insurers in this case and may do so in the future."
- Arbitrator's disclosures did not indicate:
 - JAMS handled 97 other Monster disputes in 5 prior years
 - Arbitrator had "ownership" in JAMS
- City Beverages discovers above facts after award
- District court denied effort to vacate award. On appeal: ???



Monster v. City Beverages (9th Cir., October 22, 2019)

- 9th Circuit reverses district court and vacates award
- Which Ethics rules applied?
 - Court referenced CA and MT statutes, but did not find Arbitrator violated any statute/code
 - City Beverages not given “fundamental” opportunity to assess arbitrator’s neutrality
- Sets forth new Arbitrator disclosure requirements:
 - **Any** ownership in arbitration provider organization
 - Any prior “non-trivial” business/matters with a party
- Dissent:
 - Disclosures were sufficient and City Beverages could have learned of prior JAMS work elsewhere, including on the JAMS website
 - All arbitrators, owners or not, have same motivation as to repeat parties
 - Majority’s new rules are unworkable – too vague
 - How many recent arbitration awards subject to being vacated?!?!?



Scope of Arbitrator Duty to Disclose Ties and Interests

- When to disclose?
 - Preliminary disclosures
 - What about potential interests formed after proceeding begins?
- What to disclose and how much?
 - Ownership in ADR provider organization
 - Arbitrator's prior work with parties
 - ADR provider organization's prior work with parties
- Ability to challenge an aware for failure to disclose
- Will 9th Circuit decision result in more detailed Arbitrator disclosures?



Witness Preparation

Witness Preparation – Relevant Ethics Rules

- SCR 20:3.3 – Candor Toward the Tribunal

(a)(3) A lawyer shall not knowingly offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

- SCR 20:3.4 – Fairness to Opposing Party and Counsel

A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.



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Witness Preparation - Hypothetical

- ABC Corp. is defending a hostile work environment sexual harassment claim in arbitration. Counsel is preparing a front-line ABC manager to testify at the hearing. ABC manager has never given testimony before and tells Counsel he has a “foggy memory.”
- Claimant alleges that manager was advised of sexual workplace banter and took no action. Prior to prep session, Counsel learns that some employees voiced some concerns to manager, but Counsel does not have specifics.
- What should Counsel tell witness?
- What should Counsel NOT tell witness?
- What else must / should Counsel consider?



Addressing Adverse Law

Addressing Adverse Law – Relevant Ethics Rules

- Not just a best practice! You want to run and hide, but...
- SCR 20:3.3 (2) – Candor Toward the Tribunal
 - (a) A lawyer shall not knowingly. . . (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel
- SCR 20 Preamble – Lawyer’s Responsibilities [2, 8 and 9]
- SCR 20:1.3 – Diligence, ABA Comment [1]

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyers, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client.

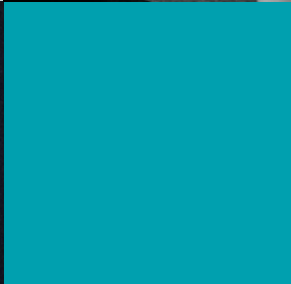
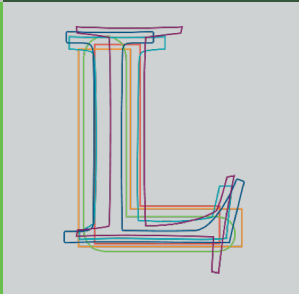
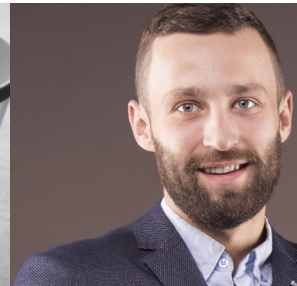


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Addressing Adverse Law – Considerations

- Bounds of zealous advocacy
- Obligation to cite adverse authority
 - Scope of duty?
 - What is “adverse” authority?
- Special challenges with pro se opponents
- Confronting bad authority in other side’s briefs
- Cherry picking or partial, misleading quotes

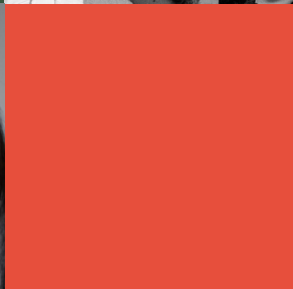
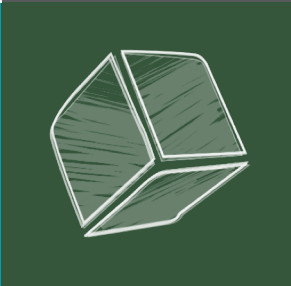
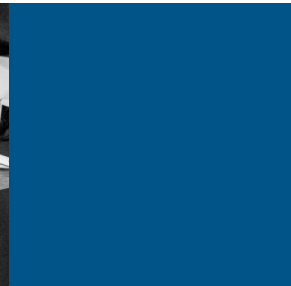
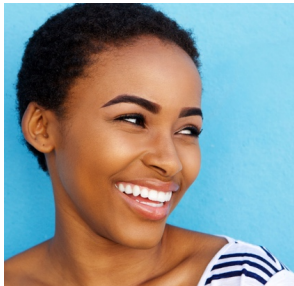




Questions?

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