STATE RULES FOR ARBITRATOR ETHICS

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I. INTRODUCTION

The North Carolina Bar Association recently approved and pub-

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1. The North Carolina Bar Association is a private, nonprofit corporation founded in 1899 and analogous to the American Bar Association, whose purposes are: promoting and improving administration of justice in the state; fostering and encouraging law reform when in the public interest; advancing the science of jurisprudence in all its aspects; improving the standards of service of the Bar to the general public; fostering, protecting and promoting common professional interests of the lawyer; and providing a means of organization through which Association members may pursue these and other objectives common to them as members of a learned profession. The North Carolina State Bar, an administrative agency of the State of North Carolina, is charged with licensure and discipline of lawyers. Compare Act to Incorporate the North Carolina Bar Association, ch. 35, 1899 N.C. Sess. Laws, Private
lished the North Carolina Canons of Ethics for Arbitrators. If approved for court-annexed arbitration in the state courts, and perhaps claims before other North Carolina tribunals, the Canons will be the first statewide arbitrator ethics standards mandated by a state government agency. The Canons will not be binding in arbitrations by agreement unless parties incorporate them by reference in a contract.

The Bar Association Dispute Resolution Section’s Ethics and Professionalism Committee³ drafted the Canons. Besides Committee members’ research and drafting, the Committee received and acted upon comments


2. North Carolina Bar Association Dispute Resolution Section & Its Committee on Ethics and Professionalism, North Carolina Canons of Ethics for Arbitrators (Feb. 12, 1998) (hereinafter Canons), approved by the Bar Association Board of Governors at its Apr. 24-25, 1998 meeting, attached infra at Part VI.

from Section members representing the bar and the courts, and from Council members active in organizations sponsoring arbitration programs, such as the American Arbitration Association, Duke University's Private Adjudication Center, the state Administrative Office of the Courts, and the North Carolina Dispute Resolution Commission. Now that the Bar Association has approved the Canons, state agencies have them under advisement for adoption in court-annexed arbitration and other ADR programs, perhaps in 1999. They can be incorporated by reference in agreements to arbitrate now.

This Article analyzes those Canons, particularly in the context of counsel who may serve as arbitrators. Part I examines sources for the Canons, Part II analyzes priority of law and choice of law rules stated in the Canons, and Part III compares the Canons and their antecedents. Part IV offers conclusions and projections for the future. Part VI reprints the Canons as an Appendix.

II. SOURCES FOR THE CANONS

The 1977 American Bar Association—American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes is the prima-

4. Drafting committee members are listed in the biography. The Bar Association Dispute Resolution Section has always had active liaison with all major ADR institutions in North Carolina, the courts, state administrative agencies, and the legislature. Canons drafters included practitioners; retired and serving judges; law professors; a North Carolina Dispute Resolution Commission representative, a representative of the State Industrial Commission, and an American Arbitration Association representative.

5. See supra notes 1-2 and accompanying text.

ry source for the Canons. The drafters also consulted the North Carolina Dispute Resolution Commission 1996 Standards of Conduct for Mediators,\(^7\) the North Carolina Code of Judicial Conduct,\(^8\) the 1998 North Carolina Revised Rules of Professional Conduct based on the ABA Model Rules of Professional Conduct, and other rules governing arbitrator conduct.\(^9\) North Carolina, like many states, has some conduct standards in legislation\(^10\) or rules of court\(^11\) for some kinds of arbitration or rules governing professionals' conduct as arbitrators,\(^12\) but the Canons are the


\(^11\) E.g., N.C. Ct.-Ord. Arb. R. 2(e), 3(i) (arbitrators must recuse themselves if as judges they would be obliged to recuse themselves; no ex parte party communication with arbitrator in court-annexed arbitration proceedings pursuant to N.C. Gen. Stat. § 7A-37.1 [1995]); see also infra notes 26, 79 and accompanying text.

\(^12\) E.g., N.C. Revised Rules of Professional Conduct, Rule 1.12; compare Model Rules of Professional Conduct, Rule 1.12; see generally Geoffrey C.
first set of general ethics norms to govern arbitrator conduct, regardless of an arbitrator’s business or professional calling. If approved for court-annexed arbitration or similar proceedings, they will be the first arbitrator rules of this kind in the country.\textsuperscript{13}

One of the drafters’ dilemmas was to prepare rules of conduct on a "one size fits all" basis. These Canons will govern in arbitrations by agreement of the parties under the state’s version of the Uniform Arbitration Act,\textsuperscript{14} the North Carolina International Commercial Arbitration and Conciliation Act,\textsuperscript{15} and to a certain extent where federal law controls\textsuperscript{16}


13. The state Dispute Resolution Commission has endorsed the Canons, and the state Administrative Office of the Courts has studied them for possible recommendation to the Supreme Court of North Carolina. See also supra notes 1-2 and accompanying text.


if parties incorporate them by reference in an agreement to arbitrate. They will also apply in court-annexed arbitrations in the state’s District and Superior Courts if the Supreme Court of North Carolina adopts them by court order\(^\text{17}\) and in the North Carolina Industrial Commission, which hears workers compensation cases and tort claims against the State, if the Commission adopts them for its cases.\(^\text{18}\) However, the Supreme Court of North Carolina is not likely to adopt them for cases where courts appoint an arbitrator.\(^\text{19}\) The Canons will also apply to other arbitrations covered by Canon VIII.C.\(^\text{20}\) Whatever an arbitrator’s primary trade, business or profession, the Canons would establish minimum standards of conduct for arbitrator service.\(^\text{21}\)

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federal court might adopt the Canons for court-annexed cases, and parties might agree on Canons standards for Federal Arbitration Act-governed cases.


19. *N.C. Gen. Stat.* § 7A-34 (1995) provides that “The Supreme Court is . . . authorized to prescribe rules of practice and procedure for the superior and district courts supplementary to, and not inconsistent with, acts of the General Assembly.” While the Court might promulgate the Canons as supplementary to the state’s Uniform Arbitration Act and its International Commercial Arbitration & Conciliation Act for situations where a court appoints an arbitrator pursuant to *N.C. Gen. Stat.* §§ 1-567.4, 1-567.41 (1996), this might raise claims of interference with freedom of contract. Although parties will have breached an agreement to arbitrate if they cannot agree on an arbitrator, that does not mean that a court may impose conditions on its appointment as to ethics standards the arbitrator(s) must follow. The parties might wish to incorporate, for example, ABA-AAA Code, *supra* note 6, or the agreement may already so provide. To be sure, if an arbitrator behaves so that there is a Canons violation, that might be a predicate for setting aside an award; see *infra* note 124 and accompanying text.

20. *See infra* notes 36-45 and accompanying text.

21. The Canons have been recommended for arbitrating North Carolina family
III. PRIORITY OF LAW AND CHOICE OF LAW: CANON VIII

The ABA-AAA Code does not include principles of priority of law or choice of law. Taking a cue from the North Carolina Revised Rules of Professional Conduct governing lawyers, modeled on the ABA Rules, the Canons' drafters included these in Canon VIII, not part of the ABA-AAA Code, to guide those who will be governed by or administer the Canons.

Canon VIII.A provides for subordinating the Canons to applicable state or federal constitutional, statutory, decisional or administrative rules if it is not possible to give effect to both. Three examples illustrate the point. First, for federal law at the constitutional, statutory or treaty level, the Constitution's Supremacy Clause requires that state standards, like those in the Canons, must give way. Second, arbitrators serving in North Carolina court-annexed cases are bound by court rule to follow standards of judicial recusal, which might be higher than those of the Canons. Third, standards in the state's International Commercial Arbi-
tration and Conciliation Act for arbitrator disclosure are more exacting and detailed than those in the Canons and would apply in those cases.

The 1998 draft revisions to the ABA-AAA Code include a provision that an arbitrator has no obligation to comply with procedures or rules in the parties' agreement to arbitrate that are unlawful, which would have the same effect as Canon VIII.A. These revisions would also declare that arbitrators must comply with law regulating arbitrator disclosure, which also would have the same effect as Canon VIII.A. They also declare that any law of privilege or confidential information trumps any disclosure obligation otherwise imposed on an arbitrator, which similarly would have the same effect as Canon VIII.A. If a reasoned award is required by law, new Canon IX in the 1998 draft ABA-AAA Code revisions would require that the arbitrator follow the law, another example of the primacy requirements covered generally by Canon VIII.A. There is no comparable provision in the North Carolina Canons.


27. Compare N.C. GEN. STAT. § 1-567.42 (1996) with Canon II.A; ABA-AAA Code, Canon II.A, supra note 8, at 314; Second Working Draft, Canon II.A, supra note 8, at [382]; see also infra note 71 and accompanying text.

28. Compare Canon VIII.A with Second Working Draft, Canon I.E, supra note 6, at 381; see also infra note 61 and accompanying text.

29. Compare Canon VIII.A with Second Working Draft, Canon I.A(4), supra note 6, at 383; see also infra notes 52, 54 and accompanying text.

30. Compare Canon VIII.A with Second Working Draft, Canon II.F, supra note 6, at 384; see also infra note 77 and accompanying text. Second Working Draft, Canon IV, Comment, supra at 388, says Canon IV.J, governing cases with more than one arbitrator, does not preclude one arbitrator from acting where authorized by the parties' agreement or by applicable rules of law or a majority of arbitrators from acting where authorized by the parties' agreement or by applicable rules of law. Second Working Draft, Canon X, Comment, supra at 395, recites similar law observance principles for non-neutral arbitrators. See also infra notes 114-15 and accompanying text.

31. Compare Second Working Draft, Canon X, supra note 6, at 391 with Canon VIII.A. Contrary to the UNCITRAL Model Law, the North Carolina International Commercial Arbitration & Conciliation Act does not require a reasoned award, analogous to findings of fact and conclusions of law required in judge-tried cases under
The second problem is conflict of different rules of conduct in the Canons and other binding ethics rules, for example, between a lawyer's professional responsibility and the responsibility of a lawyer who serves as an arbitrator where the two sets of rules overlap.\textsuperscript{32} Canon VIII.B says the two sets of rules should be read in pari materia if possible. If an arbitrator is subject to other arbitrator ethics rules, such as the ABA-AAA Code when not binding as law, Canons standards will govern under Canon VIIIA if, for example, a state agency adopts them as standards.\textsuperscript{33} There are two exceptions. The primacy principle does not apply to Canon IV.D's disclosure principles or Canon VI.D(2)'s payment principles.\textsuperscript{34} The Comment to Canon VIII notes the problem if the Canons are not adopted by a state agency, like the Supreme Court of North Carolina, and an arbitrator is confronted with conflicting standards in two sets of voluntary rules, such as the Canons and the ABA-AAA Code. In that case, parties to the arbitration should stipulate as to which voluntary rules apply to the arbitration\textsuperscript{35} before arbitrators are appointed, so that this agreement can inform their decision on whether they wish to serve.

The Canons' drafters followed the North Carolina Revised Rules of Professional Conduct for lawyers in declaring what arbitrations the Canons govern in Canon VIII.C:

These Canons apply to arbitrations in North Carolina, or administered

\begin{verbatim}
FED. R. CIV. P. 52 and N.C. R. CIV. P. 52, unless parties agree on such. N.C. GEN.
STAT. § 1-567.61(b) (1996). However, the Family Law Arbitration Act proposed for
the 1999 North Carolina legislative session would require a reasoned award.
BURLESON ET AL., supra note 21, at 12-14. The Canons, supra note 2, have no
provision similar to Canon X, supra. If North Carolina adopts the Revised Uniform
Arbitration Act, its disclosure principles will supersede Canon II standards under
Canon VIIIA unless parties contract otherwise and if the Act as adopted allows
contracting for different standards. See also Canon II; Heinsz, supra note 14, at 17;
infra notes 71-82 and accompanying text.

32. Canon I.D cures one of these problems by incorporating the representation
standards of N.C. REVISED CODE OF PROFESSIONAL RESPONSIBILITY, Rule 1.12(a).
See also supra note 12, infra notes 60, 115, 120 and accompanying text.

33. For example, the Supreme Court of North Carolina and its N.C. GEN. STAT.

34. See infra notes 92, 111 and accompanying text.

35. See infra at 33; cf. IBA Ethics, Introductory Note, supra note 9, at 585;
Second Working Draft, Preamble, supra note 6, at 380. The 1998 draft revisions to
the ABA-AAA Code have a similar rules primacy provision; i.e., arbitrators are not
bound to follow parties' agreement on procedures or rules if they are inconsistent
with the Code. Second Working Draft, Canon I.E, supra at 381.
\end{verbatim}
by a court in North Carolina, to arbitrations where the parties choose North Carolina law exclusive of conflict of laws principles in the contract or other agreement, or where it is determined that North Carolina law exclusive of conflict of laws principles applies, regardless of where the arbitration is conducted. 36

Like any provision of conflict of laws, Canon VIII.C is subject to federal law standards and to other provisions of state law, as Canon VIII.A declares. 37 The first two applications of Canons’ standards will be the most common. If an arbitration is conducted within the state and the parties agree on the Canons as the standard, the Canons apply. If a North Carolina court appoints the arbitrator, in court-annexed arbitration 38 or pursuant to state law, 39 the Canons will apply if adopted for the courts and the particular proceeding. 40 On the other hand, if a federal court appoints an arbitrator, 41 the issue is less clear, but more likely than not the federal


37. See supra notes 24-29 and accompanying text.


court would apply state standards if parties incorporate the Canons by reference in an agreement to arbitrate, at least insofar as they do not conflict with federal law. If parties include a valid choice of law clause in a contract and select North Carolina law exclusive of conflicts principles, or if a court determines that North Carolina law applies exclusive of conflicts principles, the Canons govern. In these situations it will often be incumbent on parties to advise the arbitral tribunal, a sponsoring institution like the AAA, or the court, of the Canons' applicability. As its Comment emphasizes, Canon VIII.C's purpose is regulating arbitrator conduct in transactions where there are significant North Carolina interests or contacts. Parties and arbitrators should not be allowed to step across the state line and thereby escape Canons principles.


44. Although Restatement (Second) of Conflict of Laws § 187(3) (1971) says a choice of law clause declaring application of a state's law to a transaction means local law and not conflicts principles, North Carolina cases have not addressed the issue. Nor are they likely to do so in the future; N.C. Gen. Stat. § 22B-2 (1996) to a certain extent supersedes approval of choice of law clauses in Perkins v. CCH Computax, Inc., 423 S.E.2d 780, 783-84 n.1 (N.C. 1992) and Johnston County v. R.N. Rouse & Co., 414 S.E.2d 30 (N.C. 1992).

45. Rules like the Canons are never published in other than the official State reports, although if adopted they should appear in the Annotated Rules of North Carolina in the General Statutes and similar publications. Mediator Standards, supra note 7, appear in 344 N.C. 753.

46. See infra at 24.
IV. ANALYSIS OF THE OTHER CANONS: COMPARISON WITH THE ABA-AAA CODE

The rest of the Canons have the ABA-AAA Code as their benchmark. There are several general observations:

1. Use of the term “Canon” instead of “Code” was deliberate. Although a holdover from the long-superseded Canons of Ethics for lawyers, use of a different word will distinguish these rules from similar ones in the ABA-AAA Code and from obligations for lawyers in the North Carolina Revised Rules of Professional Conduct.

2. Standards throughout the Canons are tighter than those of the Code, now over 20 years old; the Canons substitute the mandatory “shall” for the less clear “should” in nearly all instances. In this regard the Canons follow the state Revised Rules of Professional Conduct.

3. The Code was drafted for commercial arbitrations, and the Canons must serve for all arbitrations, whether court-annexed, ordered by a court pursuant to legislation such as the Federal Arbitration Act or state legislation like the Uniform Arbitration Act, or voluntary arbitration pursuant to the parties’ agreement. Therefore, references to “commercial” have been dropped.

4. The language of the Code in the Canons version has been tightened to eliminate surplus language or to clarify the rules.

5. The Canons refer to court-administered arbitration or court-annexed arbitration and never to court-ordered arbitration. Court-administered arbitration is a generic term, referring to situations where a court has intervened during an arbitration by agreement to, e.g., appoint arbitrators, as well as court-annexed arbitration, where a civil action initially filed with the court is referred for non-binding arbitration. Court-annexed

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arbitration refers exclusively to the latter procedure. The term, court-ordered arbitration, is never employed, because it might be confused with what is denominated court-administered arbitration or court-annexed arbitration in the Canons.\footnote{49}

With these general comments in mind, let us examine North Carolina Canons I-VII.\footnote{50}

A. \textit{Canon I: Arbitrator's Obligation to Uphold the Integrity and Fairness of the Process}

In the main, Canon I, reciting arbitrators' obligations to uphold the integrity and fairness of the arbitration process, follows the ABA-AAA Code.\footnote{51} Material from the Mediator Standards was added to conform arbitrators' obligations to those expected of North Carolina mediators.\footnote{52} Canon I also follows the state Code of Judicial Conduct and other general standards for neutrals.\footnote{53}

Canon I.A recites the need for fair, just procedures for resolving disputes, and that arbitration is an important method for achieving this goal. For arbitration to be effective, there must be public confidence in and understanding of the integrity and fairness of the process. An arbitrator has responsibilities to the parties, the courts, the public and the process of arbitration itself. The arbitrator must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Canon I.A declares that the Canons shall be construed and applied to

\footnote{49. By contrast, Second Working Draft, \textit{supra} note 6, is not intended to apply to persons engaged in mediation, conciliation, court-annexed arbitration, mini-trial, etc. \textit{Id.}, Preamble, at 380.}

\footnote{50. Canon VIII, setting priority of law and choice of law standards, has been analyzed \textit{supra} notes 22-46 and accompanying text.}

\footnote{51. \textit{Compare} Canon I with ABA-AAA Code, Canon I, \textit{supra} note 6, at 312-13; Second Working Draft, Canon I, \textit{supra} note 6, at 380-82.}


\footnote{53. \textit{Compare} Canon I with Code of Judicial Conduct, Canons 1-3, \textit{supra} note 8, 283 N.C. at 771-75, as amended, 346 N.C. at 806-07; 1972 ABA Code, \textit{supra} note 8, Canons 1-3; 1990 ABA Code, \textit{supra} note 8, Canons 1-3; ABA-AAA Code, Canon I, \textit{supra} note 6, at 312-13; Academy Code, \textit{supra} note 9, \$ 1.A-1.C.2; IBA Ethics, Arts. 1-2, \textit{supra} note 9, at 585-86; SPIDR Standards, General Responsibilities & Responsibilities to the Parties \$ 1, \textit{supra} note 9, at 327-28; \textit{see generally} SHAMAN ET AL., \textit{supra} note 8, chs. 2-4.}
further these goals. 54

Canon I.B differs from the Code, which prohibits solicitation of appointments by arbitrators. The Canon, because of court decisions recognizing that professionals may advertise under some circumstances, declares that it "may be" inconsistent for arbitrators to solicit appointment 55 and provides explicitly that "[a]rbitrators may advertise consistent with the law." 56 The Canon adds that it is not inconsistent with the policy against solicitation for prospective arbitrators to list themselves with sponsoring institutions (like the AAA) or with courts that have court-annexed arbitration programs. 57 The 1998 draft revision of the ABA-AAA Code also allows advertising or promotion of arbitral services "in a discreet and professional manner." 58

Canon I.D differs from the ABA-AAA Code in prohibiting, for a year, those who have served as arbitrators from entering into relationships that might reasonably create an appearance that they have been influenced in the arbitration by anticipating or expecting the relationship, unless all parties to the arbitration consent to the contrary. 59 Canon I.D also copies the rule from the state Revised Rules of Professional Conduct: "Lawyers shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as an arbitrator unless all parties to the arbitration consent after consultation." 60


56. Compare Canon I.B with ABA-AAA Code, Canon I.B, supra note 6, at 313.

57. N.C. CT.-ORD. ARB. R. 2(a)(1) requires courts to maintain lists of qualified arbitrators, which must be a public record. The drafters recognized the reality that although judges, clerks and court staff may know of and encourage lawyers to submit their names to serve as arbitrators some lawyers may volunteer for this program, which is essentially a public service.

58. Second Working Draft, Canon VIII, supra note 6, at 391.

59. The ABA-AAA Code says it should be a "reasonable . . . time." Compare Canon I.D with ABA-AAA Code, Canon I.D, supra note 6, at 313; Second Working Draft, Canon I.C, supra note 6, at 381 (same as to "reasonable . . . time"). A one-year limit was chosen to coincide with the time within which parties can move to set aside an award under the Federal Arbitration Act, 9 U.S.C. §§ 9-11, 208, 307 (1994); state legislation follows a 90-day set-aside rule. N.C. GEN. STAT. §§ 1-567.13-1-567.14, 1-567.64 (1996). FED. R. CIV. P. 60(b) and N.C. R. CIV. P. 60(b) have a one-year limit for certain post-judgment set-aside motions in civil litigation.

60. Compare Canon I.D with ABA-AAA Code, Canon I.D, supra note 6, at 313; N. C. REVISED RULES OF PROFESSIONAL CONDUCT, Rule 1.12(a); MODEL RULES OF
Canon I.E requires arbitrators to decline appointment if they feel they cannot serve impartially or to withdraw from serving if appointed. However, if an arbitrator has been appointed by a court in court-annexed arbitration or pursuant to legislation, the arbitrator must notify the court. The court must make the final decision in these cases, not the arbitrator.

Canon I.F requires that arbitrators must not exceed authority granted them in an agreement to arbitrate; they must follow rules and procedures the parties have selected. In court-annexed arbitration, however, the arbitrator must follow court rules or orders. The 1998 draft revisions to the ABA-AAA Code also say an arbitrator has no obligation to comply with any procedures or rules that are unlawful or inconsistent with the Code.

Canon I.G requires arbitrators to make reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process. If the matter is in court-annexed arbitration, however, the arbitrator's role is different. To be sure, the arbitrator would have these ethical obligations, but also would be required to govern the arbitration hearing with the authority of a trial

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PROFESSIONAL CONDUCT, Rule 1.12(a). Ethics opinions under Rule 1.12(a) should be applied to decisions under this aspect of Canon I.D. See also 1 HAZARD & HODGES, supra note 12, § 1.12:201.

61. Compare Canon I.E with ABA-AAA Code, Canon I.E, supra note 6, at 313; Second Working Draft, Canon I.D, supra note 6, at 381 (adding admonitions against conduct and statements giving appearance of partiality, and partiality or prejudice based upon a party's personal characteristics, background or performance at arbitration); Mediator Standard II.C, supra note 7, at 754. "During an arbitration, the arbitrator may be expected to engage in vigorous discourse with the parties or their counsel, to draw out arguments or contentions, to comment on the law or the evidence, to make interim rulings, and otherwise to control or direct the arbitration. These are integral parts of an active adjudicative process. . . . If an arbitrator is a member of a law firm or business organization, the arbitrator should endeavor to assure that the firm or organization does not enter into or structure relationships which may affect the arbitrator's neutrality or create a reasonable appearance of partiality, bias or post-award remuneration." Second Working Draft, Canon I.D, Comment, supra at 382.

62. Canon VIII.A, consistent with Second Working Draft, Canon I.E, supra note 6, at 381; see also supra notes 24-31 and accompanying text.

63. Compare Canon I.F with ABA-AAA Code, Canon I.F, supra note 6, at 313; Second Working Draft, Canon I.E, supra note 6, at 381.

64. Compare Canon I.G with ABA-AAA Code, Canon I.G, supra note 6, at 313; Second Working Draft, Canon I.F, supra note 6, at 381.
judge, except contempt citations, which must be referred to the court. The arbitrator also reports any party failing or refusing to participate in an arbitration proceeding in a good faith and meaningful manner for possible sanctions. To the extent that there is inconsistency between these requirements and Canon I.G, the rules of court govern.

Canon I.H says the arbitrator’s ethical obligations begin upon acceptance of appointment and continue throughout the proceeding. Other parts of the Canons specify certain ethical obligations that begin when a person is asked to become an arbitrator and may continue for up to a year after conclusion of the arbitration.

Canon I.I is not in the ABA-AAA Code; it advocates but does not require experienced arbitrators to participate in development of new practitioners in the field and to engage in efforts to educate the public about the value and use of arbitration procedures. The Canon also encourages arbitrators to provide pro bono services. Canon I.I is consistent with North Carolina attorneys’ obligations to take twelve hours of continuing legal education a year. Other lawyers teach this CLE, and these teaching lawyers have the same role the Canon would contemplate for experienced arbitrators.

B. Canon II: Disclosure Standards

Canon II’s disclosure standards follow those of the ABA-AAA Code, except for adding a degree of kinship requirement taken from the state Code of Judicial Conduct. Canon II.A also requires that if a court

66. Canon VIII.A; see supra notes 24-31 and accompanying text.
67. Compare Canon I.H with ABA-AAA Code, Canon I.H, supra note 6, at 313; Second Working Draft, Canon I.G, supra note 6, at 381.
68. Cf. Canon I.D; see also supra notes 59-60 and accompanying text.
69. It was adapted from SPIDR Standards, Support of the Profession, supra note 9, at 329. The Revised North Carolina Rules of Professional Conduct do not include the equivalent of the Model Rules of Professional Conduct, Rule 6.1, which says a lawyer should aspire to provide 50 hours of public service a year. See 2 HAZARD & HODES, supra note 12, § 6.1:102; WOLFRAM, supra note 12, § 16.9; Moseley et al., supra note 12, at 990-91.
70. N.C. STATE BAR, RULES & REGULATIONS § D.1518(a) (1997).
71. Compare Canon II with ABA-AAA Code, Canon II, supra note 6, at 312-15; Second Working Draft, Canon II, supra note 6, at 382-84; Code of Judicial Conduct, Canon 3C, supra note 8, 283 N.C. at 773-75; 1972 ABA Code, supra note 8, Can-
administers the arbitration, arbitrators must disclose information required by the court, notify a court if they are asked to withdraw by parties, and follow court decisions on these points. Canon II.B requires that those asked to serve as arbitrators make a reasonable effort to inform themselves of conflicts of interest.\footnote{Compare Canons II.A-II.B with ABA-AAA Code, Canons II.A-II.B, supra note 6, at 314; Second Working Draft, Canons II.A-II.B, supra note 6, at 382-83, the latter adding requirements that arbitrators also disclose the nature and extent of any prior knowledge they have of the dispute, and "any other matters, relationships or interests which they are obligated to disclose by the agreement of the parties, the rules or practice of the institution which is administering the arbitration, or applicable law regulating arbitrator disclosure." See also id., Comment to Paragraph B, supra at 385. Whether to keep the language in the Comment to Canon II.A, supra at 382-83, relating to life experiences is a remaining issue for the drafters of Second Working Draft. Holtzman, supra note 6, at 372. Another open issue is continuing the language of Second Working Draft, Canon IX supra at 391, which has no counterpart in ABA-AAA Code, supra, or the North Carolina Canons. See Holtzman, supra at 372-74, discussing circumstances of when arbitrators should make reasoned awards. In present North Carolina practice, reasoned awards are not necessary in cases falling under the International Commercial Arbitration & Conciliation Act. N.C. GEN. STAT. § 1-567.61(b) (1996). The proposed North Carolina Family Law Arbitration Act would require reasoned awards unless the parties agree otherwise, because of the need for a detailed award in custody and support cases. See generally BURLESON ET AL., supra note 21, at 12-14.} Under Canon II.C disclosure requirements are a continuing obligation.\footnote{Compare Canon II.C with ABA-AAA Code, Canon II.C, supra note 6, at 314; Second Working Draft, Canon II.C & Comment to Paragraph C, supra note 6, at 383, 385.} Disclosure must be made to all parties, and to the court in court-annexed arbitration cases, under Canon II.D. If more than one arbitrator has been appointed, each must inform the others of interests and relationships that have been disclosed.\footnote{Compare Canon II.D with ABA-AAA Code, Canon II.D, supra note 6, at 314-15; Second Working Draft, Canon II.D, supra note 6, at 383.} Canon II.E establishes procedures for asking an arbitrator to withdraw, differing from the ABA-AAA Code in its requirement of informing the court of a party's request that the arbitrator withdraw. Canon II.E also requires complying with court orders incident to a request by a party that the arbitrator withdraw.\footnote{Compare Canon II.E with ABA-AAA Code, Canon II.E, supra note 6, at}
Code, parties may waive disqualification of an arbitrator upon full disclosure; if a case is under court administration, the court must approve the waiver.\textsuperscript{76} The 1998 draft revisions to the ABA-AAA Code include a disclaimer that nothing in the Code requires or is deemed to require an arbitrator or prospective arbitrator to disclose confidential or privileged information without consent of the person furnishing the information or the holder of the privilege; North Carolina Canon VIII.A accomplishes this in a general requirement that rules of law trump the Canons.\textsuperscript{77}

As noted earlier,\textsuperscript{78} Canon II is subject to rules of disclosure in statutes\textsuperscript{79} or rules of court.\textsuperscript{80} In those cases the statute or rule governs. Canon II thus states minimum disclosure requirements, and a court may impose lesser or more stringent ones.\textsuperscript{81} Arbitrators should err on the side of disclosure.\textsuperscript{82}

\begin{center}
C. Canon III: Communication with Parties: \\
Avoiding Impropriety
\end{center}

Canon III follows the ABA-AAA Code, except for omitting Code, Canon III.B(2), which was considered redundant with Canon IV.F.\textsuperscript{83} What was Canon III.B(3) in the Code is Canon III.B(2) in the North
Carolina version. Canon III.A requires arbitrators to follow rules in the arbitration agreement for communication procedures. Unless there are rules in the agreement to the contrary, Canon III.B(1) requires an arbitrator not to discuss a case with a party in the absence of other parties unless the discussion concerns logistics of the hearing, and these discussions must be promptly reported to other parties. No final determination on these matters can be made until all parties express their views. Canon III.B(2) adds that these discussions on the case can take place if all parties ask for or consent to it.84

With respect to court-annexed arbitration, North Carolina Arbitration Rule 3(i) permits no ex parte communications between parties or their counsel and arbitrators. Rule 3(i) would trump Canon III, which allows communications under certain circumstances.85 The reason for Rule 3(i) is that arbitrators in court-annexed proceedings have no part in pre-hearing action, scheduling a hearing, which is the court's responsibility, unless parties choose an arbitrator who is not on the court list.86 The arbitrator appears for the hearing, set for an hour, conducts the hearing, perhaps reports on appropriateness of sanctions, renders the award and files it within three days. The court sends copies of the award to parties or counsel.87

84. ABA-AAA Code, Canon III.B(2), supra note 6, at 315, says that if a party fails to be present at a hearing after notice, the arbitrator may discuss the case with any party present. Canon IV.F says that if a party fails to appear without due notice, an arbitrator may proceed with arbitration when authorized to do so by the parties or by law. Compare Canon III with ABA-AAA Code, Canon III, supra at 315-16; Second Working Draft, Canon III, supra note 6, at 386-87. See also Code of Judicial Conduct, Canon 2, supra note 8, 283 N.C. at 771, for which Canon III is a rough parallel in some respects; 1972 ABA Code, supra note 8, Canon 2; 1990 ABA Code, supra note 8, Canon 2; Academy Code, supra note 9, ¶ 2.D; IBA Ethics, Art. 5, supra note 9, at 587-88; see also SHAMAN ET AL., supra note 8, ch. 5.
85. See Canon VIII.A and supra notes 24-31 and accompanying text.
87. Id. R. 3(l), 3(n)-3(o), 4(a), 4(d).
D. Canon IV: Conducting Proceedings

In general, Canon IV follows the ABA-AAA model.88

Canon IV.A requires the arbitrator to conduct proceedings in an evenhanded manner and to treat all parties with equality and fairness throughout the proceedings.89 The arbitrator must perform duties diligently and end the case as promptly as circumstances reasonably permit, according to Canon IV.B.90 Canon IV.C, requiring the arbitrator to “be patient, dignified and courteous to parties, their lawyers, witnesses, and all others with whom the arbitrator deals with in that capacity,” and to encourage similar conduct by other participants, has been amended to follow the state Code of Judicial Conduct.91

Canon IV.D requires arbitrators to accord to all parties a right to appear in person and to be heard after due notice of the time and place of a hearing, unless the parties otherwise agree or arbitration rules to which the parties have agreed provide otherwise. Along with Canon VI.D(2), Canon IV.D's standards may be trumped by arbitration institution rules.92 Canon IV.E, echoing state law,93 says an arbitrator may not de-

88. Compare Canon IV with ABA-AAA Code, Canon IV, supra note 6, at 316; Second Working Draft, Canon IV, Canon IV, supra note 6, at 387-88; see also Academy Code, supra note 9, ¶ 1.A, 2.J, 4-5; IBA Ethics, Arts. 7-8, supra note 9, at 589; SPIEDR Standards, Responsibilities to the Parties §§ 2, 5-6, Responsibilities of Neutrals Working on the Same Case, supra note 9, at 328-30.

89. Compare Canon IV.A with ABA-AAA Code, Canon IV.A, supra note 6, at 316; Second Working Draft, Canon IV.A, supra note 6, at 387.

90. Compare Canon IV.B with ABA-AAA Code, Canon IV.B, supra note 6, at 316; Second Working Draft, Canon IV.B, supra note 6, at 387.

91. Compare Canon IV.C with ABA-AAA Code, Canon IV.C, supra note 6, at 316; Second Working Draft, Canon IV.C, supra note 6, at 387; Code of Judicial Conduct, Canon 3.A(3), supra note 8, 283 N.C. at 772; 1972 ABA Code, supra note 8, Canon 3.A(3); 1990 ABA Code, supra note 8, Canon 3.B(4); see also SHAMAN ET AL., supra note 8, §§ 3.01-3.10.

92. Compare Canon IV.D with ABA-AAA Code, Canon IV.D, supra note 6, at 316; Second Working Draft, Canon IV.D, supra note 6, at 387-88; see also supra note 34, infra note 111 and accompanying text.

ny a party the opportunity to be represented by counsel. If a party fails to appear after due notice, Canon IV.F allows the arbitrator to proceed when authorized to do so by the parties or by law. The arbitrator may do so only after being satisfied that notice has been given the absentee. Court-annexed arbitration differs slightly on the circumstances of failure to appear, and its rule would trump in conflicts with Canon IV.F. Canon IV.G allows the arbitrator to ask questions, call witnesses, or request documents or other evidence if the arbitrator determines that more information is needed than has been presented. In court-annexed arbitration different procedures apply, however. It is up to parties to prepare their cases for the one-hour hearing, and although the arbitrator may ask questions and perhaps call back witnesses or reexamine documents during the hour, the nature of the procedure is such that the arbitrator would not have an opportunity to call witnesses or ask for documents or other evidence not prepared by parties for the hearing.

Canon IV.H says that it is not improper for an arbitrator to suggest to parties that they consider settlement. The arbitrator may not be present during settlement negotiations unless parties ask the arbitrator to be there. An arbitrator may not pressure a party to settle. This Canon is consistent with Canons IV.I and VI.C, allowing an arbitrator to conduct post-arbitral proceedings, perhaps using another dispute resolution mechanism, e.g., conciliation.

94. Compare Canon IV.E with ABA-AAA Code, Canon IV.E, supra note 6, at 316; Second Working Draft, Canon IV.E, supra note 6, at 388.
95. Compare Canon IV.F with ABA-AAA Code, Canon IV.F, supra note 6, at 316; Second Working Draft, Canon IV.F, supra note 6, at 388; see also supra notes 82-83 and accompanying text (Canon III.B omits a similar provision).
97. Canon VIII.A; see also supra notes 24-31 and accompanying text.
98. Compare Canon IV.G with ABA-AAA Code, Canon IV.G, supra note 6, at 316; Second Working Draft, Canon IV.G, supra note 6, at 388.
99. See generally N.C. Ct.-Ord. Arb. R. 1(b), 3(b)-3(h), 3(n)-3(o), which would trump Canon IV.G insofar as the Canon is inconsistent with the arbitration rules. See Canon VIII.A and supra notes 24-31 and accompanying text.
100. Compare Canon IV.H with ABA-AAA Code, Canon IV.H, supra note 6, at 316; Second Working Draft, Canon IV.H, supra note 6, at 388, the latter permitting the arbitrator to suggest ADR procedures such as mediation or conciliation.
Canon IV.I has been modified to allow one who has been appointed as an arbitrator to serve as an early neutral evaluator, mediator, conciliator or other neutral in the same dispute if the parties request it or the arbitrator is required to do so by law.\footnote{102} This might happen where parties agree to arbitrate and then decide, perhaps informally, that a quick look by the arbitrator before expensive discovery begins might resolve the case. An arbitrator could serve as a mediator after rendering an award. If more than one arbitrator has been appointed, Canon IV.J requires that arbitrators afford their colleagues full opportunity to participate in all aspects of the proceedings.\footnote{103}

State Mediator Standards suggested Canon IV.K, which is not in the ABA-AAA Code. In court-annexed arbitration cases, if one or more parties proceed pro se, the arbitrator must discuss the nature of the arbitration process with all parties and counsel present at the hearing. This discussion must include the arbitrator’s role, time for each party’s case, order of proceedings, and the right to trial de novo (if applicable) if a party not in default is dissatisfied with the award. Parties may waive these explanations.\footnote{104}

\textbf{E. Canon V: Just, Independent and Deliberate Arbitrator Decisionmaking}

Canon V tracks the ABA-AAA Code requirements that an arbitrator decide only what parties have agreed are on the table for arbitration, and that an arbitrator must decide all issues justly, using independent judg-

\footnote{102} Compare Canon IV.I with ABA-AAA Code, Canon IV.I, supra note 6, at 316; Second Working Draft, Canon IV.I, supra note 6, at 388.

\footnote{103} Compare Canon IV.J with ABA-AAA Code, Canon IV.J, supra note 6, at 316; Second Working Draft, Canon IV.J, supra note 6, at 388. See also Comment to Canon IV, supra at 388, stating Canon IV.J is “not intended to preclude one arbitrator acting in limited circumstances (i.e., when on discovery issues) where authorized by the agreement of the parties or by applicable rules of law. Nor does it preclude a majority of the arbitrators from proceeding with any aspect of the arbitration if an arbitrator is unable or unwilling to participate and such action is authorized by the agreement of the parties or applicable rules of law.”

\footnote{104} Compare Canon IV.K with Mediator Standard IV.A, supra note 7, at 755; see also N.C.R. IMPLEM. STATEWIDE MEDIATED SETTLEMENT CONFS. IN SUPER. CT. CIV. ACTIONS, R. 6.B(1). Waiver might occur if all parties have counsel familiar with court-annexed arbitration procedure, or if the parties are familiar with the procedure. Second Working Draft, supra note 6, does not have such a provision; its ethics rules are not designed to apply in court-annexed arbitration. Id., Preamble, at 380.
ment. If the parties settle and ask the arbitrator to incorporate the settlement in an award, the arbitrator may do so unless dissatisfied with the propriety of the settlement. The arbitrator must state in the award that it is based on the parties' agreement. Canon V.C would allow an arbitrator to delegate decisionmaking if the parties agree, unlike the ABA-AAA version. This would allow an arbitrator to remit a matter to, for example, conciliators under the North Carolina International Commercial Arbitration and Conciliation Act.

F. Canon VI: Faithfulness to the Relationship of Trust and Confidentiality

Canon VI recites a basic principle of arbitration, which is that an arbitrator occupies a relationship of trust to the parties and must not use confidential information gotten during arbitration to gain personal advantage or advantage for others or to adversely affect another's interest. Unless the law requires it, or the parties agree otherwise, an arbitrator may not disclose matters relating to the arbitration or decision. An arbitrator must not inform anyone of a decision in an arbitration before it is given to all parties. After an award is made, it is not proper for an arbitrator to participate in post-arbitral proceedings, unless required by law or agreed by the parties, the last an addition in the North Carolina version to permit arbitrators to conduct other alternate dispute resolution procedures, like mediation. The Canon also sets standards for paying arbitrators, adding in the state version that, in court-administered cases, court rules, orders and practices must be followed. The 1998 draft revisions to the ABA-AAA Code include a requirement that after an award has been made arbitrators may offer to return evidentiary materials to producing parties or their representative, unless the parties have agreed otherwise. If the offer is not accepted after notice, the arbitrator may dispose of these materials in a manner reasonably calculated to prevent use or disclosure.

105. Compare Canon V with ABA-AAA Code, Canon V, supra note 6, at 316-17; Second Working Draft, Canon V, supra note 6, at 389; see also Academy Code, supra note 9, ¶ 2.G-1.6.
106. Compare Canon V.C with ABA-AAA Code, Canon V.C, supra note 6, at 317; Second Working Draft, supra note 6, at 389.
108. Compare Canon VI with ABA-AAA Code, Canon VI, supra note 6, at 317-
Here court-annexed arbitration practice is generally consistent with the Canon; the arbitrator cannot be deposed or called as a witness to testify concerning anything said or done in an arbitration proceeding in any subsequent trial or proceeding involving the issues in or parties to the arbitration. The arbitrator's notes are privileged and not subject to discovery.\textsuperscript{109} Arbitrators in court-annexed cases have immunity to the same extent as a trial judge with respect to their actions in the arbitration proceeding.\textsuperscript{110} Canon VI.D(2) rules for payment of an arbitrator by an arbitration institution, such as the AAA, are exempted from Canon VIII.B's primacy principles.\textsuperscript{111}

\textbf{G. Canon VII: Non-Neutral Arbitrators
Appointed by a Party}\textsuperscript{112}

Most arbitrations involve one arbitrator. However, federal and state statutes\textsuperscript{113} contemplate appointment of more than one arbitrator, e.g., a lawyer, a builder and an architect in a construction dispute.\textsuperscript{114}

If more than one arbitrator is to be appointed in a proceeding, the parties may agree to appoint persons who are non-neutral, i.e., who have

\begin{flushright}
18: Second Working Draft, Canons VI-VII, \textit{supra} note 6, at 389-91; \textit{see also id.}, Canon VI, Comment, \textit{supra} at 390; Academy Code, \textit{supra} note 9, \textbullet\textbullet\textbullet II.C, II.K, III.A; IBA Ethics, Arts. 6, 9, \textit{supra} note 9, at 589; SPIDR Standards, Responsibilities to the Parties § 3; Disclosure of Fees, \textit{supra} note 9, at 328-29.


111. \textit{See supra} notes 33-34 and accompanying text.

112. Canon VIII, establishing standards for primacy of law and choice of law, has been analyzed at \textit{supra} notes 22-45 and accompanying text.


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interests in the dispute that would otherwise preclude participation under Canon I-VI standards. Canon VII states principles for that situation; the North Carolina version tracks the ABA-AAA Code, except for refining the Canon's language.\(^\text{115}\)

V. CONCLUSIONS: WHERE DO WE GO FROM HERE?

The ABA-AAA Code is limited by its terms to commercial disputes. The Bar Association drafting committee considered it out of date in some respects for adoption verbatim as a general ethics code to cover all kinds of arbitrations in North Carolina. Nevertheless, the Code was a good foundation for drafting a general set of ethics rules for statewide application in North Carolina. The North Carolina Mediator Standards, adopted two years ago; the North Carolina Code of Judicial Conduct, adopted in 1973 but with many revisions since then;\(^\text{116}\) and the state's Revised Rules of Professional Conduct, adopted last year; have supplied useful ideas, as have other standards used across the country and worldwide, such as the International Bar Association Ethics Standards for International Arbitrators.

Most arbitrators, like other neutrals and those in other callings, want to play by the rules. The North Carolina Canons offer standards for that purpose, such as knowing what the technical disclosure rules are,\(^\text{117}\) so that problems can be avoided before they become an issue. For the few who transgress,\(^\text{118}\) the Canons offer benchmarks for enforcement.

The principal difficulty today is that there is not much enforcement potential apart from courts' authority in court-annexed arbitration cas-

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115. Compare Canon VII with ABA-AAA Code, Canon VII, supra note 6, at 318-20; Second Working Draft, Canon X & Comment, supra note 6, at 392-95; see also Alan Scott Rau, Integrity in Private Judging, 38 S. Tex. L. Rev. 485, 488-529 (1997) (party-appointed non-neutral arbitrator issues). A lawyer chosen as a partisan of a party in a multimember arbitral panel is not prohibited from later representing that party. Compare MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.12(d) with N.C. REVISED RULES OF PROFESSIONAL CONDUCT, Rule 1.12(d); see also Hazard & Hodes, supra note 12, § 1.12:501; Wolfram, supra note 12, § 8.10.3, at 468-69.

116. See supra note 8.

117. Compare Canon II with ABA-AAA Code, Canon II, supra note 6, at 313-15; Second Working Draft, Canon II, supra note 6, at 382-84; see also supra notes 71-82 and accompanying text.

118. Cf. AAA-ABA Code, Preamble, supra note 6, at 311; Second Working Draft, Preamble, supra note 6, at 379.
es,119 the enforcement authority of other regulatory agencies like the North Carolina State Bar for lawyers who serve as arbitrators,120 and a court's inherent authority to govern proceedings before it, including the contempt power in appropriate cases for recalcitrant arbitrators. It is beyond the scope of this chapter to recommend methodology or legislation for enforcement. However, an enforcement mechanism is a need, if these Canons are to be adopted and are to have real meaning. As this is written, North Carolina agencies are doing just that;121 by considering these Canons, or perhaps a variant of them, for adoption in matters before them.

In cases where the Canons apply and there is no court intervention, enforcement must be left to other agencies regulating the conduct of persons serving as arbitrators, like lawyers who serve as arbitrators,122 or arbitration institutions, such as the American Arbitration Association, where the institution is the arbitration administrator but the parties contract for the Canons instead of other ethics rules, like the ABA-AAA Code.123 Even as ethics rules have served as predicates for the possibility of setting aside arbitral awards,124 they can be considered in disciplinary proceedings for professionals by their licensing agencies. To be sure, in some instances this might mean disparate discipline for arbitrators on the same panel, for example, in a medical malpractice panel of three arbitrators where all three transgress, a lawyer-arbitrator might be publicly censured, a doctor-arbitrator privately censured, and a nurse-arbitrator might receive no discipline at all, for the same offense. As the hypothetical suggests, some arbitrators not subject to discipline within their business or profession might escape discipline altogether on that account if parties choose arbitrators who have no professional, business or arbitration institution affiliation. An example might be a retiree who agrees to

119. See N.C. Ct.-Ord. Arb. R. 3(a)-3(b), implying a supervising judge may remove bad apples from a list of approved arbitrators or refuse to certify them even if parties want them.

120. E.g., N.C. REVISED RULES OF PROFESSIONAL CONDUCT, Rule 1.12(a); see also supra notes 1, 12, 32, 60, 115. A lawyer's disbarment would mean that the lawyer would no longer be qualified to serve in court-annexed arbitration, since only attorneys admitted to the State Bar may qualify. N.C. Ct.-Ord. Arb. R. 2(a)-2(b).

121. See supra notes 1-2, 13 and accompanying text.

122. See supra notes 1, 12, 32, 60, 115, 120 and accompanying text.

123. For example, the arbitration institution might choose to remove the arbitrator from its lists for a transgression.

124. See Holtzman, supra note 6, at 374-77.
arbitrate and who has no active connection with any professional or business group and no affiliation with an arbitration institution. In that case the only recourse may be never to choose that person as arbitrator again, particularly if the arbitrator has immunity for his acts. It would seem, however, that the latter hypothetical case would be rare among the few arbitrators who violate ethics codes. A response to the disparate discipline issue where there is more than one arbitrator is that this is part of what the parties bargain for when they choose arbitrators from different callings for a multimember panel. If there were no arbitrator ethics rules, a lawyer would still be subject to discipline under lawyer ethics rules for conduct as an arbitrator, the doctor for physicians' ethics rules violations, etc.

Justice Brandeis once wrote in dissent that the states are laboratories for innovative change. The North Carolina Canons' principal innovations are: potentially broad application to all North Carolina-based arbitrations, including court-annexed proceedings, explicit choice of law rules, and generally stricter standards for disclosure than other rules would require. The Canons may be helpful in promoting standards for other jurisdictions' court-annexed arbitration programs, development of other voluntary codes, including the current American Bar Association-American Arbitration Association project on revision of ethics standards for arbitrators in commercial disputes, thereby helping to improve the quality of decisionmaking by arbitrators, whether they serve in court-annexed arbitrations, the commercial context, or other fora, as well as participants' perception of the arbitration process.

125. See supra note 118 and accompanying text.
127. The Canons will not apply to agreements to arbitrate unless parties incorporate them by reference. See supra notes 16, 19 and accompanying text.
128. The Second Working Draft, supra note 6, also has choice of law rules. See supra notes 26-31, 52, 54, 61, 71-82 and accompanying text.
129. See supra notes 71-82 and accompanying text.
130. Walker, Court-Ordered Arbitration Comes to North Carolina and the Nation, supra note 3, described state and federal programs in 1986. Undoubtedly the number of courts with this ADR option has grown. See Feerick, Toward, supra note 7, at 456.
131. See supra notes 6, 47 and accompanying text.
VI. APPENDIX: NORTH CAROLINA CANONS OF ETHICS FOR ARBITRATORS (FEB. 12, 1998)

The North Carolina Bar Association adopted this version of the Canons in April 1998.\textsuperscript{132} The Canons are under consideration for possible adoption by the Supreme Court of North Carolina for court-annexed arbitration.\textsuperscript{133} The Canons, if adopted by the Court, may vary from this text, in the Canons or in Comments following each Canon.\textsuperscript{134} If the Court or other North Carolina agencies adopt versions different from the February 12, 1998 draft reprinted below, the Bar Association may choose to amend its recommended version for arbitrations by agreement of the parties.\textsuperscript{135} Availability of revised ethics rules, like those for arbitrating commercial disputes,\textsuperscript{136} or newer legislation, such as the Revised Uniform Arbitration Act if adopted in North Carolina,\textsuperscript{137} may promote amendments for the Canons.

As noted previously, the Canons were primarily adapted from the 1977 ABA-AAA Code of Ethics for Arbitrators in Commercial Disputes.\textsuperscript{138} The drafters also studied other state ethics rules,\textsuperscript{139} national\textsuperscript{140} and international\textsuperscript{141} codes of standards for neutrals and included language from them in the Canons where appropriate.

Omissions generalize the Canons from rules for commercial arbitration to principles to govern all arbitrations, whether court-administered (e.g., court-annexed arbitration) or by parties' consent, to change language in some cases, and for other purposes.\textsuperscript{142} Brackets — [] — indi-

\begin{itemize}
\item \textsuperscript{132} See supra notes 1-2 and accompanying text.
\item \textsuperscript{133} See supra note 17 and accompanying text.
\item \textsuperscript{134} For example, if the Court adopts Canon VIII and its Comment, the language of the Comment's lead paragraph, reflecting the draft nature of the Canons as presented to the Bar Association, undoubtedly will be amended.
\item \textsuperscript{135} Cf. supra notes 14-16, 18 and accompanying text.
\item \textsuperscript{136} See Holtzman, supra note 6.
\item \textsuperscript{137} See Hein, supra note 14.
\item \textsuperscript{138} See supra note 6 and accompanying text; abbreviated in Part V as Code.
\item \textsuperscript{139} See Code of Judicial Conduct, supra note 8; Mediator Standards, supra note 7; N.C. REVISED RULES OF PROFESSIONAL CONDUCT (1998), abbreviated in Part V as Rules; see also supra notes 7-9 and accompanying text.
\item \textsuperscript{140} Academy Code, supra note 9; SMA Ethics, supra note 9; SPIDR Standards, supra note 9; thus abbreviated, underlined, in Part V.
\item \textsuperscript{141} IBA Ethics, supra note 9, and thus abbreviated, underlined, in Part V.
\item \textsuperscript{142} See supra notes 47-49 and accompanying text.
\end{itemize}
cate omissions; *italics* indicate amendments. *Italics* also are used for some sources, as in the original text of the February 12, 1998 version.\textsuperscript{143}

Those who would wish to incorporate the Canons, or a version of them, in agreements to arbitrate should consider the text and *Comments* of the Canons carefully, as to whether they are appropriate for the transaction to be arbitrated and the law applicable to the agreement to arbitrate. Other jurisdictions considering adopting the Canons for court-annexed arbitration should determine whether the Canons reflect the law and practice of that jurisdiction.

**NORTH CAROLINA CANONS OF ETHICS FOR ARBITRATORS**

[I]. **AN ARBITRATOR SHALL UPHOLD THE INTEGRITY AND FAIRNESS OF THE ARBITRATION PROCESS.**

A. Fair and just processes for resolving disputes are indispensable in our society.\textsuperscript{[n]} Arbitration is an important method for deciding many types of disputes. \textsuperscript{[n]} For \textsuperscript{[n]} arbitration to be effective, there must be broad public confidence in and understanding of the integrity and fairness of the process. Therefore, an arbitrator has a responsibility not only to the parties but also to the courts, the public and the process of arbitration itself\textsuperscript{[n]} and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator \textsuperscript{[n]} has a responsibility to the public, \textsuperscript{[n]} parties whose rights will be decided, the courts, and \textsuperscript{[n]} other participants in the proceeding. These Canons shall be construed and applied to further these objectives.

B. It *may be* inconsistent with the integrity of the arbitration process for persons to solicit appointment for themselves. However, \textsuperscript{[n]} persons may indicate a general willingness to serve as \textsuperscript{[n]} arbitrators, *e.g.*, by listing themselves with institutions that sponsor arbitration, or with courts that have court-annexed arbitration programs. Arbitrators *may advertise, consistent with the law.*

C. Persons *may* accept appointment as arbitrators only if they believe that they can be available to conduct the arbitration promptly. *They shall exercise judgment whether their skills or expertise are sufficient to sup-

\textsuperscript{143} Sources in the *Comments* also do not publish dates of *e.g.*, legislation; refer to Parts I-IV for this information.
port demands of the arbitration and, if these skills or expertise are not sufficient, they shall decline to serve or withdraw from the arbitration, with the court's approval in court-administered arbitration, and notice to the parties.

D. After accepting appointment and while serving as an arbitrator, a person shall avoid entering into any financial, business, professional, family or social relationship, or acquiring any financial or personal interest [ ] likely to affect impartiality or which might reasonably create the appearance of partiality or bias. For one year after [ ] decision of a case, persons who have served as arbitrators shall avoid entering into any such relationship, or acquiring any such interest, in the circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest, unless all parties to the arbitration consent to any such relationship or acquiring any such interest. Lawyers shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as an arbitrator unless all parties to the arbitration consent after consultation.

E. Arbitrators shall conduct themselves in a way that is fair, in word and action, to all parties and must not be swayed by outside pressure, [] public clamor, [] fear of criticism or [] self-interest. If an arbitrator determines that he or she cannot serve impartially, that arbitrator shall decline appointment or withdraw from serving and shall notify the parties, and the court in court-administered arbitrations.

F. When an arbitrator's authority is derived from the parties' agreement, [] the arbitrator shall not exceed that authority nor do less than [] required to exercise that authority completely. Where the parties' agreement [] sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, [] the arbitrator must [] comply with such procedures or rules.

G. An arbitrator shall make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.

H. [] An arbitrator's ethical obligations begin upon acceptance of [] appointment and continue throughout all stages of the proceeding. In addition, wherever specifically set forth in these Canons, certain ethical obligations begin as soon as a person is asked to serve as an arbitrator and [] continues for one year after the decision in the case has been given to the parties.
I. An experienced arbitrator should participate in development of new practitioners in the field and should engage in efforts to educate the public about the value and use of arbitration procedures. An arbitrator should provide pro bono services, as appropriate.

Comment

References to "commercial" have been deleted. Excess verbiage has been deleted. The catchline has been changed from "should" to "shall" to underscore the mandatory nature of the principle; "should" has been omitted in Canon I.A in the penultimate sentence, and the language amended, to underscore this. "Should" in the last sentence has been changed to "shall." "Should" has been changed to "shall" or "must" in other parts of the Canon.

Other additions in Canon I.A follow the Preamble to the Standards. The addition in Canon I.B gives examples of circumstances in which persons may offer services as arbitrators. It is consistent with N.C. Ct-Ord. Arb. R. 2(a). Unlike the Code, Canon I.B. says it "may be" inconsistent with the integrity of the arbitration process to solicit appointment as an arbitrator. This is because of the difficulty, e.g., in drawing a line between advertisement permitted by law and solicitation that is condemned in some professional standards, e.g., those for lawyers. Arbitrators should be mindful of fairness, neutrality, disclosure and conflict of interest principles stated in these Canons. The last sentence in Canon I.B makes it clear that the Canons should not be read to forbid arbitrator advertising where, e.g., commercial free speech principles under the Constitution allow it. The addition in Canon I.C is taken from Standards I.B-I.C and covers situations of court-appointed arbitrators under, e.g., the Uniform Arbitration Act, N.C. Gen. Stat. § 1-567.4, or in court-annexed arbitrations; these arbitrators are subject to court order appointing them, and the court is the final arbiter of these issues. The thrust of Canon I.C is consistent with Rule 1.1, although the latter deals with competence of a lawyer, and the Canon governs competence to serve as an arbitrator. Canon I.D states a one-year rule instead of the "reasonable time" principle of the Code. The one-year principle has been substituted to coincide with the time in the Federal Arbitration Act, 9 U.S.C. §§ 9-11, during which a party can move to set aside an award. The Uniform Act, G.S. §§ 1-567.34 - 1-567.14, requires set-aside applications to be made within 90 days of an award. Fed. R. Civ. P. 60(b) and N.C.R. Civ. P. 60(b) limit certain judgment set-aside motions to one year. One year has been chosen
as the time when nearly all conflict issues would arise and be resolved. The addition to Canon I.D, penultimate sentence, follows the consent rule in Rule 1.12(a), and the new last sentence states a special rule for lawyer arbitrators, taken from id. Standards may be different for others who serve as arbitrators; for them Canon VIII.B would apply. (It might be appropriate to delete the last sentence governing lawyer conduct, since this ties in to the new Rules which might change, and let lawyers be governed by the Rules as a separate document.) Additions in Canon II.E follow Standard II.C, with additions to cover court-annexed arbitration or arbitrations where a court has appointed an arbitrator under, e.g., the Uniform Act, N.C. Gen. Stat. § 1-567.4. “Asked” replaces “requested” in Canon I.H. The phrase “continues for one year” has been added to coincide with the one-year rule for Canon I.D.

Canon I.I has been adapted from SPIDR Standards, Support of the Profession; unlike standards applicable to arbitrators in proceedings, Canon I.I is hortatory, not mandatory. The Rules do not include the equivalent of ABA, Model Rules of Professional Conduct, Rule 6.1, which says a lawyer should aspire to provide 50 hours of public service a year. See Alice Neece Moseley et al., An Overview of the Revised North Carolina Rules of Professional Conduct: An Examination of the Interests Promoted and Subordinated, 32 Wake Forest L. Rev. 939, 990-91 (1997). Since these Canons would apply to all arbitrators, including non-lawyers, and Canon I.I states aspirations to provide continuing education, there is no inconsistency with the Rules. Canon I.I is consistent with North Carolina attorneys’ obligations to take 12 hours of continuing legal education a year. Other lawyers teach this CLE, and these lawyers have the same role as Canon I.I would contemplate for experienced arbitrators.

The Canon’s language has been tightened.


[II. AN ARBITRATOR SHALL DISCLOSE ANY INTEREST OR RELATIONSHIP LIKELY TO AFFECT IMPARTIALITY OR WHICH MIGHT CREATE AN APPEARANCE OF PARTIALITY OR BIAS.

A. Persons [] asked to serve as arbitrators shall, before accepting, disclose:

(1) any direct or indirect financial or personal interest in the out-
come of the arbitration;

(2) any existing or past financial, business, professional, family or social relationships which are likely to affect impartiality or which might reasonably create an appearance of partiality or bias. Persons asked to serve as arbitrators shall disclose any such relationships which they personally have with any party or its lawyer, or with any individual whom they have been told will be a witness. They shall also disclose any such relationships involving their spouses or minor children residing in the household or their current employers, partners or business associates; and

(3) any information required by a court in the case of court-administered arbitrations.

B. Persons [] asked to accept appointment as arbitrators shall make a reasonable effort to inform themselves of any interests or relationships described in [] Canon II.A.

C. The obligation to disclose interests or relationships described in [] Canon II.A is a continuing duty which requires a person accepting appointment as an arbitrator to disclose, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.

D. Disclosure shall be made to all parties unless other disclosure procedures [] are provided in the rules or practices of an institution or court [] administering the arbitration. Where more than one arbitrator has been appointed, [] the other[] arbitrators shall be informed of [] interests and relationships which have been disclosed.

E. [] If an arbitrator is asked by all parties to withdraw, the arbitrator shall do so[], provided however, if a court is administering the arbitration, the arbitrator shall inform the court of the request and shall comply with court orders. [] If an arbitrator is asked to withdraw by less than all of the parties because of alleged partiality or bias, the arbitrator shall withdraw unless [] any of [] these circumstances exists:

(1) If [] the parties’ agreement, or arbitration rules to which the parties have agreed [], establish[] procedures for determining challenges to arbitrators, [] those procedures shall be followed; []

(2) If the arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can nevertheless act and decide the case impartially and fairly, and that withdrawal would cause unfair delay or expense to another party or would be contrary to the interest of justice; or

(3) The court administering the arbitration decides otherwise.
F. The parties may waive disqualification of an arbitrator upon full disclosure of any basis for disqualification, and upon approval of the court in court-administered arbitrations.

Comment

Excess verbiage has been deleted. "Asked" has been substituted for "requested." "Shall" has been substituted for "should" throughout the Canon; see Comment for Canon I.

Canon II.A’s provisions have been stated clearly in the conjunctive ("and"). Canon II.A(2) has been amended to follow Code of Judicial Conduct, Canon 3(C)(2) as to spouses and minor children. Canon II.A(3) has been added for court-annexed arbitration or arbitration administered by a court under, e.g., the Uniform Act, N.C. Gen. Stat. § 1-567.4. Although Canon VIII.B generally provides that these Canons state principles paramount to institutional (e.g., the Code) ethics standards, Canon VIII.B states an exception for Canon II.D’s disclosure principles. Canon II.E has been modified to account for situations where a court administers arbitration, e.g., court-annexed arbitration, but also where a court appoints an arbitrator, e.g., pursuant to the Uniform Act. Canon II.F has been added; it is taken from N.C. Ct.-Ord. Arb. R. 2(e); however, court approval is required only if a court has appointed an arbitrator in a court-annexed arbitration or pursuant to, e.g., the Uniform Act.

Canon II generally follows Code of Judicial Conduct, Canon 3(C), although Canon II does not specify degrees of kinship as the Code of Judicial Conduct does. If this specificity is considered appropriate, it can be inserted. See also Academy Code, ¶¶ 2.B, 3.A; IBA Ethics, Arts. 1, 3-4; SPIEDR Standards, Responsibilities to the Parties § 4.

[] III. AN ARBITRATOR, IN COMMUNICATING WITH [] PARTIES, SHALL AVOID IMPROPRIETY OR THE APPEARANCE OF IMPROPRIETY.

A. If the parties’ agreement [] or [] arbitration rules referred to in that agreement[] establish[] the manner or content of communications between the arbitrator and the parties, the arbitrator shall follow those procedures notwithstanding any contrary provision in Canons III.B and III.C. []

B. Unless otherwise provided in applicable arbitration rules or in the parties’ agreement, [] arbitrators shall not discuss a case with any party in the absence of other parties, [] except in [] these circumstances:
(1) Discussions may be had with a party concerning such matters as setting the time and place of hearings or making other arrangements for conducting proceedings. The arbitrator shall promptly inform other parties of the discussion and shall not make any final determination concerning the matter discussed before giving each absent party an opportunity to express its views.

(2) If all parties request or consent to it, such discussion may take place.

C. Unless otherwise provided in applicable arbitration rules or in the parties' agreement, whenever an arbitrator communicates in writing with one party, the arbitrator shall send a copy of the communication to other parties at the same time. Whenever the arbitrator receives a written communication concerning the case from a party which has not already been sent to other parties, the arbitrator shall send that communication to other parties.

Comment

"Shall" has been substituted for "should" throughout Canon III; see Comment to Canon I. Code III.B(2), stating "If a party fails to be present at a hearing after having been given due notice, the arbitrator may discuss the case with any party present," has been omitted as redundant with Canon IV.F. Revisions have also tightened the text; the last phrase clarifies "to do so." See also Code of Judicial Conduct, Canon 2, for which Canon III is a rough parallel in some respects; Academy Code, ¶ 2.D; IBA Ethics, Art. 5.

IV. AN ARBITRATOR SHALL CONDUCT PROCEEDINGS FAIRLY AND DILIGENTLY.

A. An arbitrator shall conduct proceedings in an evenhanded manner and treat all parties with equality and fairness at all stages of the proceedings.

B. An arbitrator shall perform duties diligently and conclude the case as promptly as circumstances reasonably permit.

C. An arbitrator shall be patient, dignified and courteous to parties, their lawyers, witnesses, and all others with whom the arbitrator deals in that capacity and shall encourage similar conduct by all participants in the proceedings. This does not preclude an arbitrator's imposing sanctions if permitted by law or by the parties' agreement.
D. Unless otherwise agreed by the parties or provided in arbitration rules to which the parties have agreed, [] an arbitrator shall accord to all parties the right to appear in person and to be heard after due notice of the time and place of hearing.

E. An arbitrator shall not deny a party the opportunity to be represented by counsel.

F. If a party fails to appear after due notice, an arbitrator may proceed with the arbitration when authorized to do so by the parties or by law. [] An arbitrator may do so only after receiving assurance that notice has been given to the absent party.

G. When an arbitrator determines that more information than has been presented by the parties is required to decide a case, it is not improper for the arbitrator to ask questions, call witnesses, and request documents or other evidence.

H. It is not improper for an arbitrator to suggest to the parties that they discuss [] settling [] the case. [] An arbitrator may not be present or otherwise participate in [] settlement discussions unless asked to do so by all parties. An arbitrator may not [] pressure [] a party to settle.

I. Nothing in these Canons is intended to prevent a person from acting as a mediator, [] conciliator or other neutral in [] a dispute in which he or she has been appointed as an arbitrator, if asked to do so by all parties or where authorized or required to do so by applicable law[] or rules.

J. Where there is more than one arbitrator, the arbitrators shall afford each other [] full opportunity to participate in all aspects of the proceedings.

K. In court-annexed arbitrations where one or more of the parties is proceeding without counsel, at the hearing the arbitrator shall discuss the nature of the arbitration process with all parties and counsel present, including the arbitrator's role, time allotted for each party's case, order of proceedings, and the right to trial de novo (if applicable) if a party not in default is dissatisfied with the arbitrator's award, unless parties waive these explanations.

Comment

Language has been tightened, and excess verbiage has been deleted. "Shall" or "may" has been substituted for "should" throughout Canon IV; see Comment to Canon I.

Canon IV.C has been amended to follow Code of Judicial Conduct,
Canon 3(A)(3). The final sentence recognizes that arbitrators may be empowered to impose sanctions in, e.g., court-annexed arbitration or by the parties' agreement, in addition to the arbitrator's ethical obligation to encourage proper conduct. Canon IV.H is consistent with Standard IV.B. Canon IV.I has been modified to take into account procedures other than mediation or conciliation, e.g., early neutral evaluation, etc. Canon IV.K has been added; it only applies to court-annexed arbitration. Where there has been an agreement to arbitrate governed by, e.g., the Uniform Act, but parties have not appointed an arbitrator pursuant to the Act and the court does so under, e.g., N.C. Gen. Stat. § 1-567.4, there is no reason to require that arbitrator to explain the nature of arbitration. Many court-annexed arbitrations involve small claims where parties may appear without counsel; fairness and efficiency suggest that an explanation at the beginning of the hearing, unless waived, will expedite the proceeding. Parties in court-annexed arbitration may agree to binding arbitration with no trial de novo; if this is the case, there is no need to explain a right to trial de novo. Canon IV.K was suggested by Standard IV.A.


[] V. AN ARBITRATOR SHALL MAKE DECISIONS IN A JUST, INDEPENDENT AND DELIBERATE MANNER.

A. An arbitrator shall, after careful deliberation, decide all issues submitted for determination. An arbitrator may decide no other issues.

B. An arbitrator shall decide all issues justly, exercising independent judgment, and shall not permit outside pressure to affect the decision.

C. An arbitrator shall not delegate the duty to decide to any other person, unless the parties agree to such delegation.

D. [] If all parties agree to settle issues in dispute and ask an arbitrator to embody that agreement in an award, an arbitrator may do so[ but is not required to do so unless satisfied with the propriety of the settlement [] terms []]. Whenever an arbitrator embodies the parties' [] settlement [] in an award, the arbitrator shall state in the award that it is based on the parties' [] agreement [].
Comment

Revisions tighten the text and omit excess verbiage. "Shall" has been substituted for "should" throughout Canon V; see Comment to Canon I. The new material in Canon V.C makes it clear that parties can agree that an arbitrator may delegate decisionmaking in whole or in part, e.g., to conciliators as now provided in the North Carolina International Commercial Arbitration and Conciliation Act. See also Academy Code, ¶ 2.G-2.I, 6.

VI. AN ARBITRATOR SHALL BE FAITHFUL TO THE RELATIONSHIP OF TRUST AND CONFIDENTIALITY INHERENT IN THAT OFFICE

A. An arbitrator is in a relationship of trust to the parties and shall not at any time use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others[] or to affect adversely the interest of another.

B. Unless the parties agree otherwise, [] or the law or applicable rules require, an arbitrator shall keep confidential all matters relating to the arbitration proceedings and decision.

C. It is not proper at any time for an arbitrator to inform anyone of the decision before it is given to all parties. Where there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone concerning the arbitrators' deliberations[]. After an arbitration award has been made, it is not proper for an arbitrator to assist in post-arbitral proceedings, except as required by law, or as agreed by the parties.

D. In many types of arbitrations it is customary [] for [] arbitrators to serve without pay. [] In some types of cases it is customary for arbitrators to receive compensation for [] services and reimbursement for [] expenses. Where [] such payments are to be made, all persons [] asked to serve, or who serve [] as arbitrators, shall be governed by the same high standards of integrity and fairness as apply to their other activities in the case. Accordingly, such persons shall scrupulously avoid bargaining with parties over the amount of payments, or engaging in [] communications concerning payments, which would create an appearance of coercion or other impropriety. Absent [] provisions in the parties' agreement [], in rules to which the [] parties have agreed, or in applicable law, certain practices relating to payments are generally recognized as [] preferable [] to preserve the integrity and fairness of the arbitration process. These
practices include: []

(1) It is preferable that before the arbitrator finally accepts appointment, the basis of payment be established and that all parties be informed [] in writing.

(2) In cases conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, [] payments shall be arranged by the institution to avoid the necessity for arbitrators' communicating directly with [] parties concerning the subject.

(3) [] Where no institution is available to assist in making arrangements for payments, it is preferable that any discussions with arbitrators concerning payments [ ] take place in the presence of all parties.

(4) In cases where arbitration is court-administered, court rules, orders and practices shall be followed.

Comment

Excess verbiage has been deleted, and language has been tightened. "Shall" replaces "should" throughout Canon VI, except in Canon VI.D(3), where "should" has been omitted. Canon VI.C has been modified to allow parties to agree to use the arbitrator in other neutral roles, e.g., as a post-award mediator. Although Canon VIII.B generally provides that these Canons state principles paramount to institutional (e.g., the Code) ethics standards, Canon VIII.B states an exception for Canon VI.D(2)'s payment principles. Canon VI.D(4) has been added to take into account, e.g., court-annexed arbitration. See also Academy Code, ¶¶ II.C, II.K, III.A; IBA Ethics, Arts. 6, 9; SPIDR Standards, Responsibilities to the Parties § 3, Disclosure of Fees.

[] VII. ETHICAL CONSIDERATIONS RELATING TO ARBITRATORS APPOINTED BY ONE PARTY.

A. Obligations under Canon I. Non-neutral party-appointed arbitrators shall observe [ ] Canon I obligations [] to uphold the integrity and fairness of the arbitration process, subject [] to these [] provisions:

(1) Non-neutral arbitrators may be predisposed to the party [] appointing them but in all other respects are obligated to act in good faith and with integrity and fairness. For example, non-neutral arbitrators shall not engage in delaying tactics or harassment of a party or witness and shall not knowingly make untrue or misleading statements to [] other arbitrators.
(2) [] Provisions of Canon I.D relating to relationships and interests do not apply [] to non-neutral arbitrators.

B. Obligations under Canon II. Non-neutral party-appointed arbitrators shall disclose to all parties, and to [] other arbitrators, [] interests and relationships which Canon II requires to be disclosed. Disclosure [] required by Canon II is for the benefit [] of the party [] appointing the non-neutral arbitrator and [] for the benefit of [] other parties and arbitrators so that they may know of [] bias which may exist or appear to exist. [] This obligation is subject to these provisions:

(1) Disclosure by non-neutral arbitrators must be sufficient to describe 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.

(2) Non-neutral arbitrators are not obliged to withdraw if asked to do so by a party who did not appoint them, notwithstanding []

Canon II.E.

C. Obligations under Canon III. Non-neutral party-appointed arbitrators shall observe Canon III's [] obligations [] concerning communications with [] parties, subject [] to these [] provisions:

(1) In an arbitration in which [] two party-appointed arbitrators are expected to appoint the third arbitrator, non-neutral arbitrators may consult with the party who appointed them concerning [] acceptability of persons under consideration for appointment as the third arbitrator.

(2) Non-neutral arbitrators may communicate with the party who appointed them concerning any other aspect of the case, provided they first inform the other arbitrators and the parties that they intend to do so. If such communication occurred before [] the person was appointed as arbitrator, or before the first hearing or other meeting of [] parties with the arbitrators, the non-neutral arbitrator shall, at the first hearing or meeting, disclose [] that such communication has taken place. In complying with Canon VII.C(2) [], it is sufficient that there be disclosure [] that such communication has occurred without disclosing the content of the communication. It is also sufficient to disclose at any time the intention to follow the procedure of having such communications in the future, and there is no requirement thereafter that there be disclosure before each separate occasion when such a communication occurs.

(3) When non-neutral arbitrators communicate in writing with a party that appointed them concerning any matter as to which communication is permitted under these Canons, they are not required to
send copies of [] such writing to [] other parties or arbitrators.

D. Obligations under Canon IV. Non-neutral party-appointed arbitrators shall observe [] Canon IV's obligations to conduct [] proceedings fairly and diligently.

E. Obligations under Canon V. Non-neutral party-appointed arbitrators shall observe [] Canon V's obligations [] concerning making decisions, [] but [] such arbitrators may be predisposed toward deciding in favor of the party who appointed them.

F. Obligations under Canon VI. Non-neutral party-appointed arbitrators shall observe [] Canon VI's obligations [] to be faithful to the relationship of trust inherent in the office of arbitrator, [] but [] such arbitrators are not subject to [] Canon VI.D's provisions [] with respect to [] payments by the party appointing them.

Comment

"Shall" or "must" has been substituted for "should" in Canon VII; see Comment to Canon I. Excess verbiage has been deleted; sentences have been tightened; Canons VII.E and VII.F have been rewritten to convey the same sense as the Code. Nothing in Rule 1.12(d) conflicts with Canon VII.

VIII. Canons are subject to laws and professional responsibility principles; choice of law

A. These Canons are subject to applicable constitutional, statutory, decisional or administrative rules, State or federal, and when these conflict with these Canons, the Canon provision shall be deemed superseded if it is not possible to give effect to the rule and these Canons.

B. These Canons and other ethics or similar rules which may apply to an arbitrator in any other capacity, e.g., as a professional, shall be read in pari materia, giving effect to these Canons and the ethics rules if possible. If an arbitrator is subject to other arbitrator ethics rules, e.g., the ABA-AAA Code of Ethics for Arbitrators in Commercial Disputes, and these Canons, these Canons shall govern if there is a conflict of standards; provided however, that the principle of primacy in Canon VIII.B shall not apply to disclosure principles in Canon II.D and payment princi-
ples in Canon VI.D(2).

C. These Canons apply to arbitrations in North Carolina, or adminis-
tered by a court in North Carolina, to arbitrations where the parties
choose North Carolina law exclusive of conflict of laws principles in the
contract or other agreement, or where it is determined that North Carolina
law exclusive of conflict of laws principles applies, regardless of where
the arbitration is conducted.

Comment

Canon VIII is not part of the Code and may not be necessary. How-
ever, given the possibility of conflicting rules of court, professional re-
sponsibility rules, legislation or constitutional principles, statement of the
obvious in Canon VIII.A-B seems appropriate. Canon VIII.B provides
that if an arbitrator is subject to professional or other ethics rules because
of that arbitrator's status as, e.g., a lawyer, these Canons and the profes-
sional ethics rules must be read in pari materia, giving effect to both if
possible. If these Canons are not promulgated as rules by a government
agency, Canon VIII.A says ethics or other rules of government agencies
(e.g., courts) override in a conflict. The second sentence of Canon VIII.B
may be controversial if a government agency does not promulgate these
Canons because these principles if not government-sanctioned may con-
figure with other suggested norms, e.g., the Code. In the latter case parties
may wish to stipulate what ethics rules apply in an agreement to arbitrate
or other document. See IBA Ethics, Introductory Note. If these Canons
are promulgated by a government agency, then these standards promul-
gated by a government agency will trump rules in, e.g., the Code, under
Canon VIII.A principles. Parties should not be allowed to stipulate out of
Canons standards unless an authoritative agency, e.g., a court, allows it.
In this case Canon VIII.B would not allow use of Canon I.F to stipulate
to different ethics rules. There are two exceptions to Canon VIII.B's
trumping principle: Canons II.D and VI.D(2), dealing with disclosure of
conflicts of interest and payment by institutions administering arbitrations.

Rule 8.5 suggested Canon VIII.C, which is intended to cover court-
annexed arbitrations, arbitrations where a court appoints an arbitrator
pursuant to, e.g., the Uniform Act, N.C. Gen. Stat. § 1-567.4, and arbitra-
tions where parties have chosen North Carolina law or where North Caro-
lina law, exclusive of conflict of laws principles, applies. This means that
parties and the arbitrator cannot step across a State line and escape these
principles.