

THE DISPUTE BOARD FEDERATION CODE OF PROFESSIONAL CONDUCT FOR DISPUTE BOARD MEMBERS¹

Note: Canons I through VIII of this Code apply to all Board Members. Canon IX applies to all special party-appointed Board Members, except that Canon X exempts certain special party-appointed Board Members from compliance with certain provisions of Canons I–IX related to impartiality and independence, as specified in Canon X.

CANON I

A BOARD MEMBER SHOULD UPHOLD THE INTEGRITY AND FAIRNESS OF THE DISPUTE BOARD PROCESS

A. A Board Member has a responsibility not only to the parties but also to the Dispute Board process itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, a Board Member should recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding. This responsibility may include pro bono service as a Board Member where appropriate.

B. One should accept appointment as a Board Member only if fully satisfied:

- (1) That he or she can serve impartially;
- (2) That he or she can serve independently from the parties, potential witnesses, and the other Board Members;
- (3) That he or she is competent to serve; and
- (4) That he or she can be available to commence the Dispute Board Hearings in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the parties are reasonably entitled to expect.

C. After accepting appointment and while serving as a Board Member, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality. For a reasonable period of time after the completion of service as a Board Member, persons who have served as Board Members should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in their service on the Dispute Board by the anticipation or expectation of the relationship or interest. Existence of any of the matters or circumstances described in this paragraph C does not render it unethical for one to serve as a Board Member where the parties both have consented in writing to the Board Member's appointment and continued services following full disclosure of the relevant facts in accordance with Canon II.

¹ © 2011 The Dispute Board Federation.

D. Board Members should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamour, and fear of criticism or self-interest. They should avoid conduct and statements that give the appearance of partiality toward or against any party.

E. When a Board Member's authority is derived from the agreement of the parties, a Board Member should neither exceed that authority nor do less than is required to exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the Dispute Board Hearings or refers to rules to be followed, it is the obligation of the Board Member to comply with such procedures or rules. A Board Member has no ethical obligation to comply with any agreement, procedures or rules that are unlawful or that, in the Board Member's judgment, would be inconsistent with this Code.

F. A Board Member should conduct the Hearing and the entire process so as to advance the fair and efficient resolution of the matters submitted for decision or recommendation. A Board Member should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the Dispute Board process.

G. The ethical obligations of a Board Member begin upon acceptance of the Dispute Board Member Agreement and continue throughout all stages of the proceeding until the Board Member's termination. In addition, as set forth in this Code, certain ethical obligations begin as soon as a person is requested to serve as a Board Member and certain ethical obligations continue after the termination of the Dispute Board.

H. Once a Board Member has accepted a position as Board Member he or she should not withdraw or abandon the position unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue. When a Board Member is to be compensated for his or her services, the Board Member may withdraw if the parties fail or refuse to provide for payment of the compensation as agreed.

I. A Board Member who withdraws prior to the completion of the terms as set forth in the Dispute Board Member Agreement, whether upon the Board Member's initiative or upon the request of the parties, should take reasonable steps to protect the interests of the parties in the proceedings, including return of evidentiary materials and protection of confidentiality.

Note to Canon I: A prospective Board Member is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved. Board Members may also have special experience or expertise in the areas of business, commerce, or technology, which are involved in the proceedings. Board Members do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the proceedings, but a Board Member may not have prejudged any of the specific factual or legal determinations to be addressed during the Hearings.

During a Dispute Board Hearing, the Board Members may engage in discourse with the parties or their representatives, draw out arguments or contentions, comment on the evidence, and otherwise control or direct the proceedings. These activities are integral parts of Dispute Board Hearings. Paragraph D of Canon I is not intended to preclude or limit either full discussion of the issues during the course of the Hearing or the Board Member's management of the proceeding.

CANON II

A BOARD MEMBER SHOULD DISCLOSE ANY INTEREST OR

**RELATIONSHIP LIKELY TO AFFECT IMPARTIALITY OR
WHICH MIGHT CREATE AN APPEARANCE OF PARTIALITY**

A. Persons who are requested to serve as Board Members should, before accepting, disclose:

- (1) Any known direct or indirect financial or personal interest in the outcome of the proceedings;
- (2) Any known existing or past financial, business, professional or personal relationships, which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective Board Members should disclose any such relationships, which they personally have with any party or its representatives, with any co-Board Member, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts;
- (3) The nature and extent of any prior knowledge they may have of the project or potential disputes that may arise before the Dispute Board; and
- (4) Any other matters, relationships, or interests, which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating disclosure in the area of the Dispute Board.

B. Persons who are requested to accept appointment as Board Members should make a reasonable effort to inform themselves of any interests or relationships described in paragraph A.

C. The obligation to disclose interests or relationships described in paragraph A is a continuing duty, which requires a person who accepts appointment as a Board Member to disclose, as soon as practicable, at any stage of the proceedings, any such interests or relationships which may arise, or which are recalled or discovered.

D. Any doubt as to whether or not disclosure is to be made should be resolved in favour of disclosure.

E. Disclosure should be made to all parties unless other procedures for disclosure are provided in the Board Members agreement, applicable rules or practices of an institution, or by law. Where more than one Board Member has been appointed, each should inform the others of all matters disclosed.

F. When parties, with knowledge of a person's interests and relationships, nevertheless desire that person to serve as a Board Member, that person may properly serve.

G. If a Board Member is requested by all parties to withdraw, the Board Member must do so. If a Board Member is requested to withdraw by less than all of the parties because of alleged partiality, the Board Member should withdraw unless either of the following circumstances exists:

- (1) An agreement of the parties, or Dispute Board rules agreed to by the parties, or applicable law establishes procedures for determining challenges to Board Members, in which case those procedures should be followed; or
- (2) In the absence of applicable procedures, if the Board Member, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can nevertheless act impartially and fairly.

H. If compliance by a prospective Board Member with any provision of this Code would require disclosure of confidential or privileged information, the prospective Board Member should either:

- (1) Secure the consent to the disclosure from the person who furnished the information or the holder of the privilege; or
- (2) Withdraw.

CANON III

A BOARD MEMBER SHOULD AVOID IMPROPRIETY OR THE APPEARANCE OF IMPROPRIETY IN COMMUNICATING WITH PARTIES

A. If an agreement of the parties or applicable Dispute Board rules establishes the manner or content of communications between the Board Member and the parties, the Board Member should follow those procedures notwithstanding any contrary provision of paragraphs B and C.

B. A Board Member or prospective Board Member should not discuss a proceeding with any party in the absence of any other party, except in any of the following circumstances:

- (1) When the appointment of a prospective Board Member is being considered, the prospective Board Member:
 - (a) May ask about the identities of the parties, representatives, or potential witnesses and the general nature of the project; and
 - (b) May respond to inquiries from a party designed to determine his or her suitability and availability for the appointment. In any such dialogue, the prospective Board Member may receive information from a party disclosing the general nature of the project but should not permit them to discuss anything further.
- (2) For a Dispute Board in which the two party-appointed Board Members are expected to suggest and/or appoint the Chair Board Member, each party-appointed Board Member may consult with the party, who appointed the Board Member concerning the choice of the Chair Board Member,
- (3) If the Dispute Board is one involving party-appointed Board Members who are paid by the parties appointing them, then each party-appointed Board Member may consult with the party who appointed that Board Member concerning arrangements for any compensation to be paid to the party-appointed Board Member. Submission of routine written requests for payment of compensation and expenses in accordance with such arrangements and written communications pertaining solely to such requests need not be sent to the other party,
- (4) If the Dispute Board is one involving non-neutral party-appointed Board Members, each party-appointed Board Member may consult with the party who appointed the Board Member concerning the status of the Board Member (i.e., neutral or non-neutral), as contemplated by paragraph C of Canon IX,
- (5) Discussions may be had with a party concerning such logistical matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the Board Member should promptly inform each other party of the discussion

and should not make any final determination concerning the matter discussed before giving each absent party an opportunity to express the party's views; or

- (6) If a party fails to be present at a hearing after having been given due notice, or if all parties expressly consent, the Board Member may discuss the case with any party who is present.

C. Unless otherwise provided in this Canon, in applicable Dispute Board rules or in an agreement of the parties, whenever a Board Member communicates in writing with one party, the Board Member should at the same time send a copy of the communication to every other party, and whenever the Board Member receives any written communication concerning the case from one party which has not already been sent to every other party, the Board Member should send or cause it to be sent to the other parties.

CANON IV

A BOARD MEMBER SHOULD CONDUCT THE PROCEEDINGS FAIRLY AND DILIGENTLY

A. A Board Member should conduct the Hearings in an even-handed manner. The Board Member should be patient and courteous to the parties, their representatives, and the witnesses and should encourage similar conduct by all participants.

B. The Board Member should afford to all parties the right to be heard and due notice of the time and place of any hearing. The Board Member should allow each party a fair opportunity to present its evidence and arguments.

C. Unless the Dispute Board as a whole makes a procedural determination as to who shall make presentations before it, the Board Member should not deny any party the opportunity to be represented by any other person chosen by the party.

D. If a party fails to appear after due notice, the Board Member should proceed with the Hearing after receiving assurance that appropriate notice has been given to the absent party.

E. As Dispute Boards are inquisitorial by nature, when the Board Member determines that more information, than has been presented by the parties, is required to decide the claim, it is not improper for the Board Member to ask questions, call witnesses, and request documents or other evidence, including expert testimony.

F. It is not improper for a Board Member to suggest to the parties that they discuss the possibility of settlement prior to any Hearing or the use of mediation, or other dispute resolution processes, as the Board Member deems best.

G. Co-Board Members should afford each other full opportunity to participate in all aspects of the proceedings.

Note to paragraph G:

Paragraph G of Canon IV is not intended to preclude one Board Member from acting in limited circumstances where authorized by the agreement of the parties, applicable rules or law, nor does it preclude a majority of the Board Members from proceeding with any aspect of the Hearing if a Board Member is unable or unwilling to participate and such action is authorized by the agreement of the parties in the Dispute Board Members Agreement or applicable rules or law.

CANON V

A BOARD MEMBER SHOULD MAKE DECISIONS IN A JUST, INDEPENDENT AND DELIBERATE MANNER

- A.** The Board Member should, after careful deliberation, decide all issues submitted for determination. A Board Member should decide no other issues.
- B.** A Board Member should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.
- C.** A Board Member should not delegate the duty to decide to any other person.
- D.** In the event that all parties agree upon a settlement of issues in a claim and request the Board Members to embody that agreement in a Decision, the Board Members may do so, but are not required to do so unless satisfied with the propriety of the terms of settlement. Whenever a Board Member embodies a settlement by the parties in a Decision, the Board Members should state that the Decision is based on an agreement of the parties.

CANON VI

A BOARD MEMBER SHOULD BE FAITHFUL TO THE RELATIONSHIP OF TRUST AND CONFIDENTIALITY INHERENT IN THE POSITION

- A.** A Board Member is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the Dispute Board process to gain personal advantage or advantage for others, or to affect adversely the interest of another.
- B.** The Board Member should keep confidential all matters relating to the Dispute Board proceedings and decision or recommendation. A Board Member may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision or recommendation if the Board Member informs the parties and other Members of the use of such assistance and such persons agree to be bound by the provisions of this Canon.
- C.** It is not proper at any time for a Board Member to inform anyone of any decision or recommendation in advance of the time it is given to all parties. In a proceeding in which there is more than one Board Member, it is not proper at any time for a Board Member to inform anyone about the substance of the deliberations of the Board Members. After a decision or recommendation has been made, it is not proper for a Board Member to assist in proceedings to enforce or challenge the award.
- D.** Unless the parties so request, a Board Member should not appoint nor allow themselves to be appointed to a separate office related to the subject matter of any claim, such as an arbitrator.

CANON VII

A BOARD MEMBER SHOULD ADHERE TO STANDARDS OF INTEGRITY AND FAIRNESS WHEN MAKING ARRANGEMENTS FOR COMPENSATION AND

REIMBURSEMENT OF EXPENSES

A. Board Members who are to be compensated for their services or reimbursed for their expenses shall adhere to standards of integrity and fairness in making arrangements for such payments.

B. Certain practices relating to payments are generally recognized as tending to preserve the integrity and fairness of the Dispute Board process. These practices include:

- (1) Before the Board Member finally signs the Dispute Board Member Agreement, the basis of payment, including any cancellation fee, compensation in the event of withdrawal and compensation for study and preparation time, and all other charges, should be established. All parties should be informed in writing of the terms established.
- (2) In proceedings conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, communication related to compensation should be made through the institution. In proceedings where no institution has been engaged by the parties to administer the arbitration, any communication with Board Members concerning payments should be in the presence of all parties; and
- (3) In the absence of any fee agreement to the contrary, Board Members should not, absent extraordinary circumstances, request increases in the basis of their compensation during the course of a proceeding.

CANON VIII

A BOARD MEMBER MAY ENGAGE IN ADVERTISING OR PROMOTION OF DISPUTE BOARD SERVICES, WHICH IS TRUTHFUL AND ACCURATE

A. Advertising or promotion of an individual's willingness or availability to serve as a Dispute Board Member must be accurate and unlikely to mislead. Any statements about the quality of the Board Member's work or the success of the Board Member's practice must be truthful.

B. Advertising and promotion must not imply any willingness to accept an appointment otherwise than in accordance with this Code.

Note to Canon VIII:

This Canon does not preclude a Board Member from printing, publishing, or disseminating advertisements conforming to these standards in any electronic or print medium, from making personal presentations to prospective users of Dispute Board services conforming to such standards or from responding to inquiries concerning the Board Member's availability, qualifications, experience, or fee arrangements.

CANON IX

BOARD MEMBERS APPOINTED BY ONE PARTY HAVE A DUTY TO DETERMINE AND DISCLOSE THEIR STATUS AND TO COMPLY WITH THIS CODE, EXCEPT AS EXEMPTED BY CANON X

A. In Dispute Boards in which there are three Board Members, it is customary for each party, acting alone, to nominate one Board Member. The third Board Member is then appointed by

agreement either of the parties or of the two Board Members, or failing such agreement, by an independent institution or individual. In all such tripartite agreements to which this Code applies, all three Board Members are presumed to be neutral and are expected to observe the same standards.

B. Notwithstanding this presumption, occasionally there are certain types of tripartite Dispute Boards in which it is expected by all parties that the two Board Members appointed by the parties may be predisposed toward the party appointing them. Those Board Members, referred to in this Code as ‘Canon X Board Members,’ are not to be held to the standards of neutrality and independence applicable to other Board Members. Canon X describes the special ethical obligations of party-appointed Board Members who are not expected to meet the standard of neutrality.

C. Under this Code a party-appointed Board Member has an obligation to ascertain, as early as possible but not later than the first meeting of the Board Members and parties, whether the parties have agreed that the party-appointed Board Members will serve as neutrals or whether they shall be subject to Canon X, and to provide a timely report of their conclusions to the parties and other Board Members:

- (1) Party-appointed Board Members should review the agreement of the parties, the applicable rules and any applicable law bearing upon Board Member neutrality. In reviewing the agreement of the parties, party-appointed Board Members should consult any relevant express terms of the written Dispute Board Member Agreement. It may also be appropriate for them to inquire into agreements that have not been expressly set forth, but which may be implied from an established course of dealings of the parties or well-recognized custom and usage in their trade or profession;
- (2) Where party-appointed Board Members conclude that the parties intended for the party-appointed Board Members not to serve as neutrals, they should so inform the parties and the other Board Members. The Board Members may then act as provided in Canon X unless or until a different determination of their status is made by the parties, any administering institution or the Dispute Board; and
- (3) Until party-appointed Board Members conclude that the party-appointed Board Members were not intended by the parties to serve as neutrals, or if the party-appointed Board Members are unable to form a reasonable belief of their status from the foregoing sources and no decision in this regard has yet been made by the parties, any administering institution, or the Dispute Board, they should observe all of the obligations of neutral Board Members set forth in this Code.

D. Party-appointed Board Members not governed by Canon X shall observe all of the obligations of Canons I through VIII unless otherwise required by agreement of the parties, any applicable rules, or applicable law.

CANON X

EXEMPTIONS FOR BOARD MEMBERS APPOINTED BY ONE PARTY WHO ARE NOT SUBJECT TO RULES OF NEUTRALITY

Canon X Board Members are expected to observe all of the ethical obligations prescribed by this Code except those from which Canon X specifically excuses them.

A. Obligations under Canon I

Canon X Board Members should observe all of the obligations of Canon I subject only to the following provisions:

- (1) Canon X Board Members may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness. For example, Canon X Board Members should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statements to the other Board Members; and
- (2) The provisions of subparagraphs B(1), B(2), and paragraphs C and D of Canon I, insofar as they relate to partiality, relationships, and interests are not applicable to Canon X Board Members.

B. Obligations under Canon II

- (1) Canon X Board Members should disclose to all parties, and to the other Board Members all interests and relationships which Canon II requires be disclosed. Disclosure as required by Canon II is for the benefit not only of the party who appointed the Board Member, but also for the benefit of the other parties and Board Members so that they may know of any partiality which may exist or appear to exist; and
- (2) Canon X Board Members are not obliged to withdraw under paragraph G of Canon II if requested to do so only by the party who did not appoint them.

C. Obligations under Canon III

Canon X Board Members should observe all of the obligations of Canon III subject only to the following provisions:

- (1) Like neutral party-appointed Board Members, Canon X Board Members may consult with the party who appointed them to the extent permitted in paragraph B of Canon III;
- (2) Canon X Board Members shall, at the earliest practicable time, disclose to the other Board Members and to the parties whether or not they intend to communicate with their appointing parties. If they have disclosed the intention to engage in such communications, they may thereafter communicate with their appointing parties concerning any other aspect of the case, except as provided in paragraph (3);
- (3) If such communication occurred prior to the time they were appointed as Board Members, or prior to the first hearing or other meeting of the parties with the Board Members, the Canon X Board Member should, at or before the first hearing or meeting of the Board Members with the parties, disclose the fact that such communication has taken place. In complying with the provisions of this subparagraph, it is sufficient that there be disclosure of the fact that such communication has occurred without disclosing the content of the communication. A single timely disclosure of the Canon X Board Member's intention to participate in such communications in the future is sufficient;
- (4) Canon X Board Members may not at any time during the arbitration:
 - (a) Disclose any deliberations by the Board Members on any matter or issue submitted to them for decision or recommendation,

- (b) Communicate with the parties that appointed them concerning any matter or issue taken under consideration by the panel after the record is closed or such matter or issue has been submitted for decision or recommendation; or
 - (c) Disclose any final decision or interim decision in advance of the time that it is disclosed to all parties.
- (5) Unless otherwise agreed by the Board Members and the parties, a Canon X Board Member may not communicate orally with the neutral Board Member concerning any matter or issue arising or expected to arise in the arbitration in the absence of the other Canon X Board Member. If a Canon X Board Member communicates in writing with the neutral Board Member, he or she shall simultaneously provide a copy of the written communication to the other Canon X Board Member;
- (6) When Canon X Board Members communicate orally with the parties that appointed them concerning any matter on which communication is permitted under this Code, they are not obligated to disclose the contents of such oral communications to any other party or Board Member; and
- (7) When Canon X Board Members communicate in writing with the party who appointed them concerning any matter on which communication is permitted under this Code, they are not required to send copies of any such written communication to any other party or Board Member.

D. Obligations under Canon IV

Canon X Board Members should observe all of the obligations of Canon IV.

E. Obligations under Canon V

Canon X Board Members should observe all of the obligations of Canon V, except that they may be predisposed toward deciding in favour of the party who appointed them.

F. Obligations under Canon VI

Canon X Board Members should observe all of the obligations of Canon VI.

G. Obligations under Canon VII

Canon X Board Members should observe all of the obligations of Canon VII.

H. Obligations under Canon VIII

Canon X Board Members should observe all of the obligations of Canon VIII.

I. Obligations under Canon IX

Note: The provisions of paragraph D of Canon IX are inapplicable to Canon X Board Members, except insofar as the obligations are also set forth in this Canon.