

## 2 . 10 Practice Guidelines for DRB Members

The Fundamental Canons of Ethics established by the DRBF [1.6 and 3.2] set forth the key elements of the behaviors to which all Board members must subscribe in order for the DRB process to function effectively. Because a key element in the success of the DRB process is the contracting parties' trust in each Board member's impartiality, this chapter provides practice guidelines to assist both the parties and DRB members in complying with the letter and the intent of the Canons of Ethics.

### Canon 1

#### 2.10.1 **Board members shall disclose any interest or relationship that could possibly be viewed as affecting impartiality or that might create an appearance of partiality or bias. This obligation to disclose is a continuing obligation throughout the life of the DRB.**

The disclosure of interests or relationships between a Board member and a party involved in the contract that may create an appearance of partiality or bias is necessary to protect the credibility of the DRB. Board members must be perceived by both parties as impartial and independent individuals who are able to prepare reports and make recommendations that are not influenced by any member's relationship with other parties to the dispute.

The provisions of this Canon apply to all parties involved in the project.

Board members:

1. Must not have any financial interest in any party directly or indirectly involved in the project, or a financial interest in the contract or the project, except for payment for service on the DRB. "Financial interest" includes, for example, the beneficial ownership of shares in a party, whether held personally or by family members, other relatives, friends, or in legal arrangements such as trusts, partnerships, other companies or the like. The intention is that a member must not profit, however indirectly, from the results of DRB service except by payment established under the DRB arrangements.
2. Must disclose, in writing to both parties prior to appointment to the DRB, all current and previous employment by, or financial ties to, any party directly or indirectly involved in the project, including consultancy services on other projects. All previous and current service as a Board member, mediator, or arbitrator pursuant to other contracts involving one or more of the parties (or a constituent part of any of the parties) also must be disclosed. Full disclosure in advance of appointment will ensure that each party can assess and become satisfied that such contact will not affect the independence and impartiality of the member's service.

- The term "party directly involved in the project" includes the owner and contractor and all joint-venture partners individually.
- The term "party indirectly involved in the project" includes the construction manager, subcontractors of any tier, suppliers, designers, architects, engineers and other professional service firms, consultants to the project, et al.

3. Must disclose, in writing to both parties prior to appointment, any and all professional or personal relationships with any director, officer, or employee of any party directly or indirectly involved in the project, and any and all prior involvement in the project to which the contract relates. Persons with the depth of experience desired for DRB service often will have had some previous professional contact with one or more of the parties. Disclosure of relationships is to ensure that all parties are made aware of any non-financial relationships that might be perceived as affecting impartiality or independence. Examples would include a family relationship, whether by birth or marriage; employment of a relative; a close working relationship in a professional society; common membership on a board of directors of another company or organization; or classmates at a university.
4. Must not, while serving on a DRB, have an employment relationship in any capacity, including either as full- or part-time employee, as a consultant, expert witness, mediator or arbitrator, by parties involved in the contract, pursuant to the following guidelines:
  - a. Any such employment relationship with one of the parties directly involved in the contract is strictly prohibited.
  - b. Obtain written consent of both parties directly involved before agreeing to any such relationship with one of the parties indirectly involved in the contract.
  - c. Obtain written consent of both parties directly involved before serving as a Board member on another project involving one of those parties.
5. Must not, while serving on a DRB, engage in discussions or make any agreement regarding future employment relationships, either as a direct employee, as a consultant, or otherwise, pursuant to the following guidelines:
  - a. Any such discussions with one of the parties directly involved in the contract are strictly prohibited.
  - b. Obtain written consent of both parties directly involved before engaging in such discussions with one of the parties indirectly involved in the contract.
  - c. Obtain written consent of both parties directly involved before agreeing to serve as a Board member, mediator or arbitrator on another project involving one of those parties.
6. Disclose to the parties and to fellow Board members, in writing, any fact or circumstance that might be such as to cause either party to reasonably question their continued impartiality.

As with each aspect of disclosure, the standard of conduct must be such that a member not only must remain independent and impartial, but also always be perceived to be such. Disclosures must include any approach that could be perceived by either party to the contract as an attempt to influence the member's independence or impartiality. Any request to a Board member to resign from the DRB must be disclosed to the other party.

## Canon 2

### 2.10.2 **Conduct of Board members shall be above reproach. Even the appearance of a conflict of interest shall be avoided. There shall be no ex parte communication with the parties except as provided for in the DRB's Operating Procedures.**

Board members must avoid giving any appearance of impropriety in communications with the parties and to abstain from any ex parte communications. Board members are appointed to undertake a serious task: to render reports on issues that may have important consequences for either or both parties. It is proper that these members behave in a serious and professional manner in all dealings with the parties. Accordingly, Board members must refrain from private conduct that might give rise to doubts regarding capability to discharge the task of serving on a DRB.

When in surroundings where a member is likely to be known by others in addition to the parties, a Board member must behave with discretion and in a manner befitting a person to whom the parties have committed in confidence matters of importance.

Examples of impropriety include:

- Private meetings or other private communications with one of the contracting parties.
- Giving advice on construction means or methods or contract administration.
- Making derogatory comments on the contract, the project, or the actions or inactions of the parties.
- Criticism of the design or constructability of the project.
- Criticism or disparagement of any party or other Board member.
- Prejudging or commenting on the merits of a potential issue.
- Offering legal advice or opinion.
- Discussion of future employment or other business opportunity.
- Acceptance of or giving gifts, including travel, entertainment, or meals, even during recognised holidays which feature exchanging of gifts.

Board members must be sensitive to the possibility that even the most innocent of comments can be perceived by a party as an indication of bias.

Comments at a DRB meeting such as, "I have known the contractor's project manager for years, and he knows what he is talking about," do not instill trust and confidence in the process from the perspective of the owner's representatives.

## Canon 3

### 2.10.3 **Board members shall not use information acquired during DRB activities for personal advantage, or divulge any confidential information to others unless approved by the parties.**

A Board member's position of trust must be unassailable. The DRB process provides a private and confidential means for parties to settle their contractual disputes. The parties' positions, arguments, and the DRB's findings and reports are usually not available to the general public except as may be

provided by the parties or by law (e.g. Freedom of Information Acts). This information should not be divulged except as required by law. Board members must respect this confidentiality and treat the contract and any other details of the project disclosed to the DRB, as well as all activities as Board members (which are clearly not public knowledge), as confidential among the parties and the members.

Except for reporting statistical data for the DRBF Database and listing the project on their resume, a Board member must make no disclosures, oral or written, regarding any matter disclosed during his/her activities on the DRB without the prior written permission of the parties. Information gained by a Board member during the DRB process must not be used, or passed on to others, with intent that the information be used for such person's personal advantage or gain.

## Canon 4

### 2.10.4 **Board members shall conduct meetings and hearings in an expeditious, diligent, orderly, and impartial manner.**

The parties expect DRB proceedings will be conducted in an expeditious, diligent and impartial manner. During meetings and hearings members defer to the authority of the Chair on all procedural matters.

When appropriate during the hearing, ask questions where further explanation, information and clarification are necessary. The DRB must ensure that each party is permitted a reasonable opportunity for fully presenting its case and in responding to the opposing party's case. The goal of the hearing is to provide a forum for a full, impartial and complete discussion of the dispute.

A time period may be stipulated in the contract in which the DRB is to render its report. While extensions to the stipulated period may be necessary in certain cases, the DRB should attempt to adhere to the stated time periods in all but the most complicated disputes and referrals.

## Canon 5

### 2.10.5 **The DRB shall impartially consider all disputes referred to it. Reports shall be based solely on the provisions of the contract documents and the facts of the dispute.**

The paramount purpose of the DRB process is impartial consideration of all disputes referred to the DRB. This requires that members act without favor to either party to the dispute. DRB reports must set forth the facts, and the DRB's findings and recommendations must be based on those facts, the provisions of the contract documents and prevailing law.

Members must make every effort to achieve unanimity of opinion with the other members regarding disputes referred to the DRB.

Criticizing a party's actions, personnel or procedures has no place in a DRB report, and will only lead to feelings that the DRB is biased against the recipient of such criticism. Rejection of the report is a likely end result. Keep the report professional, objective and impersonal.