

## Arbitrability of Motions to Disqualify

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### Motions to Disqualify a Party's Attorney in Arbitration

- Trap for the unwary: Such motions can be a trap for the unwary, given applicable law.
- Applicable law: Numerous jurisdictions hold that, as a matter of public policy, the disqualification of counsel in arbitration is a matter for the courts, not arbitrators, since it involves attorney conduct. *See, e.g., Northwestern Nat'l Ins. Co. v. Insko, Ltd.*, 2011 U.S. Dist. LEXIS 113626 (S.D.N.Y. October 3, 2011); *but see, Canaan Venture Partners L.P. v. Salzman*, 1996 Conn. Super. LEXIS 245 (Conn. Super. Ct. Jan. 22, 1996); *SOC-SMG, Inc. v. Day & Zimmermann, Inc.*, 2010 Del. Ch. LEXIS 195 (Del. Ch. Sept. 15, 2010).

### Parties' Right to Pick Their Counsel

- Rule 24 of the AAA's Commercial Arbitration Rules: "Any party may be represented by counsel or other authorized representative...."
- Canon IV.C of the Code of Ethics for Arbitrators in Commercial Disputes: "The arbitrator should not deny any party the opportunity to be represented by counsel or by any other person chosen by the party."
- Impact of Rule: On a motion to disqualify counsel, the attorney conflict of interest rules would likely override Rule 24 and Canon VI.C.

### How Should Arbitrators Handle Such Motions

- Advising counsel of the issue: Because of the possible risk of vacatur in some jurisdictions if an arbitrator decides this issue, the Muscular Arbitrator, depending on the jurisdiction, may want to alert the parties to the existence of this issue and accord them time to consider the issue and take a position on it.
- Whether arbitrators may decide this issue with the informed consent of the parties: Many arbitrators believe that, even in jurisdictions with the restrictive rule, they may hear the motion, if the parties give informed consent.
- Muscularity: The Muscular Arbitrator should hear the motion if the parties give informed consent, rather than subject the case to the delays and expense of ancillary litigation.