CHAPTER VIII

ETHICAL RESPONSIBILITIES OF THE ARBITRATOR

I. THE CASE FOR A CODE OF PROFESSIONAL RESPONSIBILITY FOR LABOR ARBITRATORS

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Our session today on the ethical responsibilities of the arbitrator is somewhat unusual. We have had a standing Committee on Ethics in existence since the Academy was founded. In 1950, this committee drafted our present Code of Ethics in conjunction with representatives of the American Arbitration Association and the Federal Mediation and Conciliation Service. From the reports of the Committee on Ethics over the years, it would appear that there is little grist for its mill. Should we therefore assume that the members of the Academy are living up to the Academy's purposes, as set forth in our Constitution, "to establish and foster the highest standards of integrity, competence, honor and character among those engaged in the arbitration of industrial disputes on a professional basis," and "to adopt and encourage the acceptance of and adherence to canons of ethics that govern the conduct of arbitrators"? Having received no complaints, should we not further assume that there are none of any substantial character? Why then do we continue our intensive soul-searching? Perhaps if we could put the Academy on the couch long enough, some skillful psychoanalyst could help dredge up from our collective unconscious the conflicts that lead us to this afternoon and this particular session. Please be assured that I will not attempt any Freudian or neo-Freudian interpretation. I am abysmally ignorant of my own unconscious, and it would be presumptuous of me even to think about the deep recesses of my fellow arbitrators' unconscious. But such probing, if it were possible, is indeed unnecessary. There are reasons for our concern we can identify. I begin by reviewing these reasons.

First, we are in a period of change characterized by great pres-

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sure to reorder our priorities to place foremost the task of strengthening our societal systems to help realize our most deeply cherished values and goals. These goals include the dignity and worth of each individual, a just and fair society, peace and order in a troubled nation and world, growth and stability in our economy, and emphasis on those elements of life our founding fathers may have envisaged as appropriate to the pursuit of happiness.

As a result of the winds of change violently circulating in this country for the past few years, attention has focused on the professions. The gap between our preachments and our practices has been mercilessly exposed. Fortas, Haynsworth, and cases involving conduct of state court judges have produced concern and anxiety on the part of the judiciary and have led to the adoption of codes of conduct by various federal and state judicial bodies. The American Bar Association has approved a set of rules having to do with conflict of interest of judges. It is now in the process of reconsidering the canons of judicial conduct adopted many years ago. It has recently approved a far-reaching and comprehensive Code of Professional Responsibility to take the place of its former Canons of Ethics. Many state bar associations have adopted this Code. Even the American Medical Association and constituent local medical societies have taken a fresh look at the problem of delivery of medical services, particularly to the low- and middle-income groups, and have relaxed their traditional opposition to group- and government-sponsored programs providing medical services. The teaching profession, particularly the faculties of universities, has for several years been engaged in intensive evaluation of its obligations, not only in the area of university governance, but in relation to its responsibilities to the consumers of its efforts. Many of the clergy have left their cloisters and are putting their religion to work where "the action is."

The second reason, directly related to the first, is that in the two decades since our Code of Ethics was adopted, the profession of labor arbitration has come of age. The growth has been tremendous. Labor arbitration has become an important system in industrial conflict resolution. Nevertheless, we are still troubled by whether we can claim for ourselves the status of a profession. William Loucks described a key distinguishing characteristic of a profession in his most insightful paper, "Arbitration—

A Profession," given at the Thirteenth Annual Meeting of the Academy:

> "It consists of a membership composed solely of those who are willing and anxious to follow an enlightened consensus on what activities and acts are permissible, demanded, or precluded to the practitioner—basically without fear of organized sanction against the individual. . . . The concern of the classic professions is to see that established emphases upon function, service, and codes of behavior are not chiseled away—our concern is to see that more and more emphasis is put upon performance of function, that more and more we build, through our individual behavior as arbitrators, those codes of right and wrong which keep our efforts focused on performance of function."

Human nature being what it is, it follows that an individual arbitrator will give more weight and attention to his professional obligation when there is an organized and persistent reminder and stimulus coming from the Academy.

Third, a substantial number of arbitrators are not members of this Academy. Over the years, but less so in recent years, rumors of serious misconduct have circulated. These have included charging very high fees which have no relationship to the amount of time spent, rigged awards, and, I believe, an isolated case or two of an arbitrator who indicated he would throw the case one way or the other for a side payment. Almost without exception these rumors involved nonmembers of the Academy. Our concern indeed was and is not about our members, most of whom, except for the founders, have been carefully screened in advance and were admitted only after careful investigation, but for all arbitrators outside of the Academy. I should add, parenthetically, that we may suffer here from a parochial bias. Indeed, at this point there is little hard evidence that demonstrates that the ethical conduct of arbitrators outside of the Academy falls below the standard of conduct of members of the Academy. The concern, nevertheless, remains and provides some of the impetus for our inquiry.

Fourth, there have been constant and recurring complaints having to do with both the expense and the delay involved in the arbitration process. I am informed that the FMCS receives an average of three letters a week from parties complaining about delay—both in setting hearing dates and in the issuance of awards. Complaints on fees are somewhat fewer, averaging two

or three a month. But these statistics are but the tip of an iceberg. We must remember that most parties, for a variety of reasons, are reluctant to make complaints. Inherent in the problems of delay and expense are standards of conduct, to some extent touched on in our present Code of Ethics, which need further inquiry and elaboration.

Within the limitations of time, I do not believe I can make a fruitful contribution by discussing isolated problems involving specific questions of ethical conduct. Instead, I should like to focus on what I believe should be the immediate role of the Academy in this area. The Code was superbly drafted. It was an exceptional document considering the difficulty then confronting the draftsmen in formulating rules of conduct for the widely varied collection of individuals engaged in labor arbitration; there was also proper concern about moving too fast in a field where flexibility is a prime consideration. The developments of the past 20 years make clear that we need to take a fresh look at the Code. The time has come for a complete restatement of the Code of Ethics. We should commence immediately to draft a Code of Professional Responsibility for Labor Arbitrators. I will not presume to do more than to indicate the bare outline of such a code and some of the subjects which I believe need special attention and consideration in any revision.

You will note that I use the term "Code of Professional Responsibility." This is a title borrowed from the American Bar Association's recent revision of its Canons of Ethics. Canons are like commandments. They are basically negative in tone and commitment. The time is past for simply a string of "thou shalt nots." We should accentuate the affirmative obligations growing out of membership in a profession. In particular, we should articulate the positive obligations of arbitrators to achieve the high objectives of the arbitration process—that of an impartial, competent, expeditious, and relatively inexpensive method of dispute resolution.

Much of the content of the present Code of Ethics belongs in a new Code. I would hope that what is retained will be restated in affirmative form. It should be made clear to all arbitrators that it is not enough to avoid engaging in improper conduct but that it is the responsibility of each individual arbitrator to do everything in his power to achieve the objectives of the arbitra-

tion process. Beyond the tone of the Code, there is need, as I see it, for more content indicating in more specific terms what arbitrators should do to fulfill their responsibility as professionals. I intend to do so only in summary fashion and to relate this content to the four objectives I have previously mentioned: impartiality, competency, expedition, and reasonableness of cost. I shall take these up in turn.

I. Impartiality

In general we assume that impartiality is achieved when the arbitrator has been accepted by the parties. But acceptability is no guarantee of impartiality. In the case of the permanent arbitrator, or one who has regularly served the parties over a period of years, impartiality may be assumed by his acceptability. But in the case of ad hoc arbitration, in many cases one or both parties may have had no prior experience with the arbitrator selected. As is true in the judicial field, appearance of impartiality may be just as important as impartiality itself, and this brings us to the conflict-of-interest area which is the subject of Herbert Sherman's paper. I will not trespass on his topic except to say that there is an affirmative duty on the part of an arbitrator to remove himself from any case in which he believes his impartiality is compromised or when there are circumstances which may lead to doubt as to his impartiality. There is need for amplification of conflict-of-interest situations. I should note in passing that the report of the Special Committee on Standards of Judicial Conduct appointed by the American Bar Association took about eight pages, double-spaced, to set forth the standards that should apply. While part of the report is not directly relevant to the labor arbitrator, the bulk of it will provide a frame of reference for the draftsmen of a new Code of Professional Responsibility.

II. Competency

We come next to the matter of competency. Here the emphasis should be put upon performance of function. There are obligations related to competency, of course, which may be regarded as institutional or as belonging to the Academy, and obligations and responsibilities which can be identified as individual. The Academy has been aware of the keen need for training of arbi-

trators and also for the encouragement of all efforts to mark out an educational route which can be preparatory to entering the profession of arbitration. As an Academy we have not accomplished a great deal in either of these respects, but there has been some progress. Far more economics departments, departments of industrial relations, and law schools are including courses in arbitration, and the literature in the field has grown substantially, the best part of it being the annual proceedings of the Academy.

There are a number of areas in which the individual arbitrator has primary responsibility. The first I mention is more negative than positive. Clearly, no arbitrator should undertake an arbitration beyond his competence. One illustration should suffice and that is the review of a wage incentive. I need not tell this group that an arbitration involving a wage incentive cannot be properly handled by a novice or one who has never previously been involved in the establishment of incentive rates. The least that an arbitrator who first encounters a case of this character should do is to make clear to the parties his lack of experience. If, notwithstanding this disclosure, the parties wish him to proceed, he should raise with the parties the advisability of providing consultation with an industrial engineer, certainly in his early ventures in the field. Other problems of this character likewise require an arbitrator without adequate experience to proceed with care and caution. Clearly, an arbitration involving a determination of contract terms, particularly of wages, should not be undertaken by an arbitrator devoid of requisite economic background and of knowledge of established criteria for wage determination.

On the positive side, the Code should make clear that individual arbitrators should do everything in their power to help train beginners in the field by taking on assistants where their caseload warrants it, and by advising and counseling them. In addition, arbitrators should be available for instruction and training of the representatives of the parties. It is axiomatic to say that the success of the arbitration process depends not only on the arbitrator but on the labor and management representatives that appear before him. The AAA has been active for many years in arranging training sessions for the parties, and it should be accepted as an obligation of the individual arbitrator that he

be generous with his time when he is asked to participate in this type of training.

Finally, the individual arbitrator has an obligation to keep himself abreast of developments in the field. Among lawyers the continuing education of the bar has received tremendous impetus in recent years, and arbitrators should not assume that they can simply get by with the experience of arbitrating cases. They should expand their horizons to include the benefit of research and education wherever that is made available to them.

The American Bar Association Code of Professional Responsibility, Ethical Considerations, Rules 6-1, 6-2, and 6-5, relate to competency and are relevant to this discussion. They read:

> "EC 6-1. Because of his vital role in the legal process, a lawyer should act with competence and proper care in representing clients. He should strive to become and remain proficient in his practice and should accept employment only in matters which he is or intends to become competent to handle.
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> "EC 6-2. A lawyer is aided in attaining and maintaining competence by keeping abreast of current legal literature and developments, participating in continuing legal education programs, concentrating in particular areas of the law, and by utilizing other available means. He has the additional ethical obligation to assist in improving the legal profession, and he may do so by participating in bar activities intended to advance the quality and standards of members of the profession. Of particular importance is the careful training of his younger associates and the giving of sound guidance to all lawyers who consult him. In short, a lawyer should strive at all levels to aid the legal profession in advancing the highest possible standards of integrity and competence and to meet those standards himself.
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> "EC 6-5. A lawyer should have pride in his professional endeavors. His obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty."

III. Expedition

We come next to the matter of expedition. I need not tell this group that delay presents one of the most serious problems in the arbitration process. Delay is behind a good deal of the discontent that exists with the process and forms the basis for the bulk of complaints. It is a truism that delay in the process is the responsibility not only of the arbitrator but of the parties. Arbi-

trators can do little or nothing about delays which occur prior to the time they are approached. But there are two types of delay which follow the appointment of the arbitrator. First, delay in scheduling, and second, delay in issuing the award after the case has been submitted by the parties. As to the first type of delay, the parties who agree to a long delay are at least put on notice by the arbitrator. Parties may be reluctant to change once their choice is made. Accordingly, there may be an affirmative duty on the part of the arbitrator, in the interest of expedition, to make clear to the parties that they are free to name another arbitrator to hear the case. When it comes to delays following the submission of the case, the responsibility is entirely on the arbitrator. Most complaints about arbitrators relate to the long time taken to issue awards. More than any other factor, a delayed award discredits the arbitration process and the arbitration profession. It defeats one of the most cherished objectives of arbitration—an expeditious resolution of the dispute. The new Code should place an affirmative obligation on the part of the arbitrator to decline appointment when he has a backlog of aged cases that have not been reduced to awards.

IV. Expense

Finally, we come to the matter of expense. This subject has also been extensively considered in the past. We all agree that excessive fees should be avoided. But when are fees excessive? While we cannot say very much specifically about what fees should be without running the risk of being charged with price-fixing, we can say more than our present Code states. The present Code simply states that fees "should be reasonable and consistent with the nature of the case and the circumstances of the parties." We should be able to relate the factors to be taken into consideration in the fixing of fees with greater particularity. Time taken by itself cannot and should not be the sole criterion. The parties should not be expected to pay for the education of the arbitrator. If a young and inexperienced arbitrator takes a week or 10 days to write an award on a relatively simple case, he should charge not on the basis of the time spent, but what would be a fair fee considering the nature of the issue involved. On the other hand, the undertaking of an arbitration involving the determination of contract terms, fixing rates of pay, rules, and working conditions for a substantial number of employees

carries with it responsibility warranting compensating at a higher level than that of the ordinary grievance arbitration.

Then there is the problem of parties with limited financial resources—the small company or small union. An important characteristic of a profession is its willingness to place service first and to provide that service to all who need it on a basis on which they can afford to pay. Some years ago, our president, Jean McKelvey, suggested a device which would serve two purposes, providing entry into the field of young arbitrators and a low-cost arbitration service. That device was the sponsoring of arbitration clinics in some of our larger cities, perhaps with the help of the appointing agencies, to provide arbitration at modest fees for clients unable to afford customary fees and to enable young arbitrators to gain experience. I am not suggesting that any specific proposal of this character be incorporated in the Code, but I do think the Code should make clear the obligation of the profession to provide services on a low-cost basis for parties whose financial circumstances warrant this treatment.

Miscellaneous Comments

There are a number of miscellaneous matters that should be considered.

Part III of the present Code relates to the conduct and behavior of the parties. I am not certain in my own mind that a Code of Professional Responsibility should include material of this character. If a decision is made to cover the parties as well as the arbitrators, then it would seem to me that the parties should be drawn into the drafting process. If we expect the parties to be guided by our Code, I am sure it would be generally agreed that they should have a voice in its formation.

Some additional developments during the past two decades should be reflected in the new Code of Professional Responsibility. They arise out of one of the central considerations of the Landrum-Griffin Act—the recognition of the need to protect individual employee's rights. What is the responsibility of the arbitrator to protect the rights of an affected individual employee caught between the claims of the company and the union or possibly victimized by collusion of the parties? What should be said about the informed or rigged award? Along with these

problems are the due process problems set forth with deep insight by Willard Wirtz in his paper at the Eleventh Annual Meeting of the Academy in 1958.

Finally, should the Code of Professional Responsibility extend to the other roles played by neutrals? One of the significant changes that has taken place in recent years, primarily because of the growth of public employee bargaining, is the increasing involvement of arbitrators in mediation and fact-finding. I would suppose that most members of the Academy have served in a neutral role other than arbitrator. Consideration should be given to including provisions in the Code relating to these special neutral roles after weighing the differences in practices and procedures of such neutrals and arbitrators.

Conclusion

Each period through which we live seems troubled and beset with difficulties. Today we are overwhelmed with problems that seem insoluble. I will not recite the litany all too familiar to you. The ethics of our profession seem inconsequential by comparison with the major crises that confront the nation, the states, and the cities, but the fact remains that we are the mainspring of an important system of dispute resolution and that the improvement of this system and the functioning of those who profess to arbitrate is one of the primary goals of this Academy. To this end I have attempted to suggest in bare-bone fashion some of the principal factors that should be taken into consideration in the drafting of the new Code. But I am fully aware that the generalities of my remarks mask a morass of difficult and delicate problems which will confront the draftsmen. We have not heretofore avoided challenge, and I trust you will agree that the time has come for a Code of Professional Responsibility for Labor Arbitrators.

II. ARBITRATOR'S DUTY OF DISCLOSURE—A SEQUEL

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The choice of the title for this paper is explained by the fact that it is a sequel to my prior article on the labor arbitrator's duty of disclosure, which was published last year in the

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