coexist, there is need for a higher set of values for those who speak out for the disputants.

II.

GEORGE H. COHEN*

Without doubt, I am in an unenviable position today. It reduces to this: over a twenty-five-year career, on countless occasions I have had the good fortune to be invited to address distinguished professional groups whose interests have spanned the entire spectrum of labor-management relations. The assigned task in each instance was at once simple yet profound—assess and evaluate from a union lawyer's perspective some emerging and potentially critically important legal issue. The unstated premise was that the speaker would provide some brilliant insights into a virgin territory, thereby assuring that the audience would marvel at the demonstration of his intellectual prowess and, as well, his mastery of what we love to call the practical realities of industrial relations. On each such occasion my management counterpart on the panel has sat poised with pen in hand, hoping against hope, that I would utter some pearl of wisdom—however minuscule—so that he, in turn, could author a memorandum to all his corporate clients immediately upon return to the office. That memorandum, carefully couched in language analogous to an F.B.I. "All Points Bulletin," would alert those corporations that union labor lawyers throughout the land were about to launch a diabolical scheme to persuade some unsuspecting judge, NLRB member, or arbitrator that working men and women were entitled to some hitherto unrecognized right.

But, alas, the subject at hand—as I shall now demonstrate—simply does *not* lend itself to any such exciting treatment.

My initial surge of enthusiasm in response to the Academy's invitation to address its plenary session was tempered considerably upon receiving the Chair's follow-up letter describing the subject matter of this particular session—what was expected of Cohen and Zazas was the disclosure of our own private laundry list of the "sharp practices" that advocates unleash upon each other in arbitration. Apparently, it was contemplated that my list

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would "break the ice," that it would be the catalyst for audience participation, that upon hearing of the depth of unethical conduct to which my colleagues and I had sunk, each of you in the audience would rush to the microphone and share with us your favorite version of "Listen to this one"!

The Chair's letter did not fool me for a second. I understood immediately that I had been handpicked by the Academy as group leader of a "Dirty Tricks" session. Why me? What to do?

I had no choice other than to turn to the issue at hand:

Is There Any Reason for the Academy to Promulgate Rules Spelling Out the Professional Responsibility of the Advocate?

Quite frankly, that burning issue had never before even occurred to me. From personal experiences—as well as on the basis of discussions with fellow union lawyers—I was versed in labor's serious ongoing concerns about certain of the real problems with arbitration: (1) delays, delays, delays; (2) employer unwillingness to turn over to the grievant's representative, in advance of the hearing, even the most relevant materials (such as the grievant's personnel files); and (3) the actual conduct of the hearing itself. But unethical or immoral conduct by our management counterparts—that simply did not appear on my agenda.

To fill this evident gap in my knowledge I resorted first to the past. It was particularly instructive to learn that since at least as early as 1950 the "Professional Responsibility of Advocates" has been the subject of the continuing attention of the Academy and, as well, of the American Arbitration Association and of the Federal Mediation and Conciliation Service. In fact, one of the three parts of the *Code of Ethics and Procedural Standards for Labor-Management Arbitration* adopted by representatives of all three groups in 1951, including the Academy's delegation led by Nathan Feinsinger, was devoted to the "Conduct and Behavior of the Parties."[1] That subject is dealt with in eleven numbered paragraphs spanning three and one-half pages of the report of the Academy's 1951 annual meeting.

To begin with, I was struck by the fact that the stated principles concerning such subjects as Arbitrator Selection,

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[1]In The Profession of Labor Arbitration, Selected Papers From the First Seven Annual Meetings, National Academy of Arbitrators, 1948–1954, ed. Jean T. McKelvey (Washington: BNA Books, 1957), 159–163.

Arbitrators' Executive Session, Privacy of Arbitration, and Arbitrators' Compensation seemed so self-evident, so noncontroversial as to raise the question why they were included in the Code in the first place. In my judgment, their inclusion can only be justified under the "Lowest Common Denominator of Human Behavior" principle. For example, does the Academy need a paragraph 11 to advise parties to an arbitration proceeding that if they can't agree on how much to compensate the arbitrator, then common sense—and, yes, ethics as well—dictates that the parties should not discuss the arbitrator's fee *in* his presence! Likewise, does the Academy need a paragraph 5 to admonish the parties that "they are under a duty not to subject the arbitrator to improper pressures or influences . . . [and they] should neither give nor offer favors of any kind to the Arbitrator"?

Second, I had an intuitive feeling that the Code drafters had set about to achieve the impossible dream. For as it has been recognized since Biblical times: Ye who attempt to legislate a code of ethics or morality on any group—let alone one whose constituents include lawyers and nonlawyers alike—face a formidable task and, most assuredly, ye who do so without the benefit of meaningful enforcement power are in real trouble. In somewhat more modern terminology the 1951 Report, which accompanied the Code of Ethics, anticipated that precise practical problem:

> [T]he formulation of canons of ethics or standards of conduct for persons who appear before arbitrators is extremely difficult because there are no requirements for practice before arbitrators as before courts, . . . [and] no sanctions paralleling contempt of court or disbarment. . . . "[2]

Third, I was considerably distressed by the way in which the Code dealt with the hearing—the one aspect of the arbitral process that has uniformly occupied a position of preeminent importance to the parties. Section 6 ("The Hearing") began prayerfully enough: "Parties should be fair and courteous in their examination of witnesses and in their presentation of facts." Further, "Acrimonius, bitter or ill-mannered conduct is harmful to the cause of good arbitration." Sounds like Marquis of Queensberry Rules. Amen. So far so good. But interspersed

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[2]*Id.* at 147.

between those two pleas for decorum, there appears the following declaration. I share it with you because of all the formulations of what a due process hearing consists of, this deserves a place in history as one of the great *understatements*: "Concealment [by the parties] of necessary facts . . . is not conducive to a good or sound determination of the differences between the parties."[3]

Given the thrust of my preceding remarks, I was not surprised to learn that in 1974, after revisiting this same subject, the Joint Steering Committee composed of representatives of the Academy, AAA, and FMCS opted to delete the section governing the conduct of the parties. It did so predicated upon one of the shortest explanatory comments provided by any committee—surely any committee whose membership included, as did that one, the tandem of giants—Messrs. Garrett and Seward. They wrote: "It has seemed advisable to eliminate admonitions to the parties [Part III of the 1951 Code) except as they appear incidentally in connection with matters primarily involving responsibilities of arbitrators."[4]

While we do not have the benefit of all the profound thinking upon which that 24-word conclusion was based, I would expect that the considerations at work were much the same as those I have just aired summarily—with two additions:

I am confident that the 1974 decision of the Joint Steering Committee was prompted, in part, by the experiences of Messrs. Garrett and Seward—and their fellow Academy members, as well—during the 25-year post-Code period when the arbitration of labor-management disputes increasingly became a fact of life. Insofar as the Code of Conduct for the Unethical Behavior of Parties is concerned, the Committee undoubtedly subscribed to the Will Rogers school of homespun philosophy: If it ain't broke, don't fix it. Finally, I am likewise confident that the Committee recognized that perhaps a more effective alternative existed *if* it were *lawyers* whose conduct had to be policed. An attorney's conduct is subject to scrutiny by the bar associations of the states in which he or she is admitted. Various forms of discipline can be imposed from suspension to disbarment.

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[3]*Id.* at 161.

[4]*Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*, in Arbitration—1975, Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), at 217.

I must say that I would be more willing to rely upon that disciplinary process if there were reason to believe that the "punishment would fit the crime." One reported case illustrates the problem. In the matter of *Joel I. Keiler,*[5] the lawyer in question selected a colleague in his law firm to serve as the "impartial" dispute resolver and armed him with a bogus identity and a bogus business address. Not one word about these shenanigans was disclosed to the union. On appeal from a recommendation of the District of Columbia Disciplinary Board, the D.C. Court of Appeals held that the lawyer's conduct was indeed "prejudicial to the administration of justice," thereby violating the Disciplinary Rules of the Code of Professional Responsibility of the District of Columbia. The lawyer's defense before the court was intriguing: he argued that the company had the better case on the merits and would have prevailed even if the arbitration proceeding had been *bona fide,* thus excusing his actions. My friends, the implications of that argument are scary. After 20 years of arbitrating cases, I know full well that the company *always* has the better case on the merits—at least so I'm always told in our settlement discussions. Thus, the notion that my adversary's capacity to engage in unethical practices will be determined by some sliding scale—the better his case, the more readily we should excuse his aberrant behavior—is not appealing!

Before leaving that case, we should note that the Disciplinary Board's recommendation was only a slap on the wrist—a 30-day suspension from the practice of law. I leave it to your imagination to conjure up the depths to which a lawyer's misconduct would have to sink to justify some more *realistic* discipline. And bear in mind Mr. Keiler's ability to appear before you distinguished arbitrators in his "new" capacity as a nonlawyer was *not* interrupted even for *one minute.*

In any event, my final point is that precious few subjects are worthy of repeated examination by this distinguished body. In the 10-year period from 1974 to date, I have not become aware of any change in circumstances that would suggest that the Academy should attempt to *re*codify in 1985 what it *de*codified in 1974.

George Zazas is quick to point out in his paper that, based upon his extensive experience, unions have steadfastly adhered

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[5]380 A.2d 119 (D.C. 1977).

to the highest ethical standards in connection with arbitration proceedings. I'm a bit troubled, however, by George's suggestion that this conclusion may be attributable to the almost total absence of lawyer advocates representing unions in arbitration. But why quibble in public? On behalf of all the International Union staff representatives and local union grievance committeemen, I graciously accept George's accolade. On behalf of my fellow union lawyers, let me say this: I'd like to read George's paper two or three times more, searching for more *favorable* inferences!

In summary, I believe that the subject at hand presents a nonissue. Of course, I stand ready to be corrected. Indeed, one purpose of this panel is to provide an informal, open forum so that audience participation can provide additional insights, i.e., your own "tale of horribles" about the conduct of those who do combat before you.

If, as a result of this educational process, a grass roots consensus emerges to recreate a Code of Conduct for Arbitral Advocates, then please act swiftly and don't mince your words as was your wont in 1951. Most importantly, don't allow your valuable resources to be deflected away from the vital tasks that would otherwise be occupying the Academy's time.

One final note—if you ever invite me to address the Academy again, please let it be on a subject of some substantive significance!

III. THE CASE FOR ESTABLISHMENT OF FORMAL STANDARDS

GEORGE J. ZAZAS*

In 1951, when the National Academy of Arbitrators, the American Arbitration Association, and representatives of the Federal Mediation and Conciliation Service approved the "Code of Ethics and Procedural Standards for Labor-Management Arbitration," they saw fit to include a Part III entitled "Conduct and Behavior of Parties."[1] These gentle admonitions to the parties and their representatives served the purpose of encour-

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[1]In The Profession of Labor Arbitration, Selected Papers From the First Seven Annual Meetings, National Academy of Arbitrators, 1948–1954, ed. Jean T. McKelvey (Washington: BNA Books, 1957), 159–163.