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.

aging at least minimal standards of honesty and civility for advocates in arbitration. When the Code of Ethics was supplemented in 1974 by the "Code of Professional Responsibility for Arbitrators of Labor-Management Disputes,"[2] all provisions directed at the parties were removed. No reason was given except that "It has seemed advisable to eliminate admonitions to the parties . . . except as they appear incidentally in connection with matters primarily involving responsibilities of arbitrators."[3] Thus, since 1974 there has been no expression of the standards of conduct expected of the parties and their representatives. It seems a fair assumption that the subject has been included in the program for the 1985 Annual Meeting to raise the question whether standards for parties should be established, and if so, what they should be.

It is not difficult to conclude that this mini-system of justice called arbitration cannot survive unless the parties whose rights are to be adjudicated approach the process with respect, integrity, and candor.[4] The only questions are whether express rules need to be articulated, and, if so, what they should be and how they should be enforced.

Do We Need Rules?

If the need for rules is to be determined by the extent and degree of misconduct it would be difficult to make a case for rules. In nearly thirty-six years of participation in the process, I have observed very few departures from the highest ethical standards by advocates on the union side. Given the fact that most union advocates are not lawyers and that their standards of conduct therefore derive from their own moral instincts rather than from formal training, this conclusion is reassuring. Of the few instances of misbehavior I have observed, only one or two involved acts of the advocate. The remainder involved suspect conduct by parties or witnesses for which the representative may have had no responsibility.

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[2]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), 217–236.

[3]*Id.* at 217.

[4]There is no need to rekindle the old dispute whether arbitration is a judicial process or an extension of collective bargaining. See Garrett, *The Role of Lawyers in Arbitration*, in Arbitration and Public Policy, Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Spencer D. Pollard (Washington: BNA Books, 1961), 102–124. The needs are the same, however the process be characterized.

Nevertheless, I have concluded that it would be a worthwhile project for this Academy and the organizations which have previously collaborated with it to establish rules of professional responsibility for the parties and their representatives. Such rules serve functions beyond the mere elimination of observed abuses:

1. They serve as a reminder to all participants that the process is fragile and that its preservation demands their good behavior.
2. The knowledge that advocates as well as arbitrators are bound by a rigorous ethical code serves to foster respect for the process on the part of those whose rights are determined by it.
3. Rules give the honest advocate the basis for discouraging misconduct by parties and witnesses.
4. Rules serve as reminders and guides to the ethical and well-intentioned advocate confronted with difficult choices.
5. The project of devising appropriate rules should keep a large committee of the Academy busy for at least two years.

What Should the Rules Be?

Although it is not the purpose of this year's program to establish the rules, at least some starting points can be identified. Since the primary focus of the rules will be the conduct of the advocate in connection with the hearing itself, a useful starting point is Rule 3 of the Model Rules of Professional Conduct adopted by the House of Delegates of the American Bar Association in August, 1983. The rule is set out in full as an Addendum to this paper. While there is room to quarrel with details, the basic thrust of the rule cannot be seriously disputed.

Nor does it contain any surprises. Advocates are admonished not to maintain cases or assert defenses known to be without merit. They should strive to expedite and not delay the proceeding. The tribunal should be treated with candor. Facts and law should not be misstated nor should evidence, oral or documentary, be offered which is known to be false. The opposition is to be treated fairly. Its access to evidence should not be obstructed nor should evidence be altered, destroyed or falsified. The impartiality of the tribunal must be respected. Advocates should not seek to influence the tribunal in any improper way and should avoid ex parte communications. Disruptive conduct is to be avoided.

These are salutary principles and are as applicable to arbitration as they are to judicial proceedings. To them should be added at least two other subjects which have special application to labor arbitration.

The first of these is the responsibility of the advocate in arbitration to the underlying collective bargaining relationship of the parties.[5] A critical difference between arbitration and other forms of litigation is that the parties to arbitration are usually under a legal mandate to continue their relationship after the litigation terminates. They do not walk away from each other when they leave the hearing room. An advocate who behaves in ways destructive of the underlying relationship, who destroys the confidence of the parties in the process, or who needlessly damages the morale and relationships of employees and supervisors, does a grave disservice to the process. A victory achieved by means which sacrifice the confidence of employees, supervisors, union, and management representatives in the essential fairness of the process is purchased at too great a cost.

Second is the question of the advocate's obligation to avoid participation in a breach of the duty of fair representation by the union.[6] The principal lines of inquiry should be:

1. What is the obligation of the union advocate to the union members other than the grievant who may be adversely affected by a decision favorable to the grievant?
2. What is the obligation of the union advocate who knows that the union's prosecution of the grievance is perfunctory?
3. What is the obligation of the employer advocate who learns that the union's prosecution of the grievance is perfunctory?

How Shall the Rules Be Enforced?

It is my conviction that the overwhelming number of persons who act as advocates in arbitration will welcome a guide to their professional responsibilities and will comply with it without the threat of coercive enforcement. After all, arbitration works, not

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[5]Seward, *The Quality of Adversary Presentation in Arbitration: A Critical View,* in Arbitration of Subcontracting and Wage Incentive Disputes, Proceedings of the 32nd Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1979), 14–30.

[6]See Aaron, *The Role of the Arbitrator in Ensuring a Fair Hearing,* in Arbitration 1982: Conduct of the Hearing, Proceedings of the 35th Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1982), 30–49.

because awards are judicially enforceable, but because the parties need the system more than they need a correct result in each case. This same need for the system will impel most participants to behave ethically once the standards are established.

Where violations occur, the response of the arbitrator must be tailored to the specific situations. In some instances, the arbitrator may be able to eliminate the problem by the manner in which he conducts the hearing, as by ensuring participation by the nongrieving employee whose rights may be adversely affected.[7] In other cases the arbitrator will be forced to decide whether he can continue to serve.

In these cases, the arbitrator must balance the general desirability (and national policy) of resolving disputes by arbitration against his ability to function in face of whatever corruption of the process has occurred.[8] If he determines that, notwithstanding the misconduct of the advocate, he is able to determine the truth of the matter and to render a fair and meaningful decision, he should probably continue. No irremediable harm will occur. If the party disappointed by the award is also the party victimized by the improper conduct, the courts are open to it. If the party that perpetrated the wrong is the loser, it has not benefited from its wrongdoing.

If, on the other hand, the arbitrator believes he cannot perform his function in light of the misconduct, he has no choice but to withdraw. Perhaps he should issue a statement outlining the reasons for his refusal to proceed. The parties can then pursue their judicial or administrative remedies.

Conclusion

Because a large number of advocates in arbitration, on both sides, are not lawyers or subject to any other professional discipline, it is highly desirable that standards of conduct be established and promulgated. This Academy can perform an important and lasting service by assuming leadership in the preparation of appropriate rules. I urge you to do so.

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[7] *Id.*

[8] *Id. See also Finality and Fairness in Grievance Arbitration: Whether Allegations of Unfair Representation Justify Termination of Arbitration,* B.Y.U. L. Rev. (1978: 132).

Addendum

Rule 3 of the Model Rules of Professional Conduct of the American Bar Association[9]

Rule 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Rule 3.2 Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

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[9]Excerpted from the Model Rules of Professional Conduct, copyright by the American Bar Association. All rights reserved. Reprinted with permission.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Rule 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person except as permitted by law; or

(c) engage in conduct intended to disrupt a tribunal.

Rule 3.6 Trial Publicity

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Notwithstanding paragraphs (a) and (b)(1–5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;
(2) the information contained in a public record;
(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;
(4) the scheduling or result of any step in litigation;
(5) a request for assistance in obtaining evidence and information necessary thereto;
(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
(7) in a criminal case:
(i) the identity, residence, occupation and family status of the accused;
(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
(iii) the fact, time and place of arrest; and
(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

Rule 3.7 Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
(1) the testimony relates to an uncontested issue;
(2) the testimony relates to the nature and value of legal services rendered in the case; or
(3) disqualification of the lawyer would work substantial hardship on the client.
(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:
(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining,

counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

Rule 3.9 Advocate in Nonadjudicative Proceedings

A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.