

APPENDIX D

ETHICS THEN AND NOW: A COMPARISON OF
ETHICAL PRACTICES

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At the founding meeting of the Academy on September 14, 1947, only two committees were established: the Membership Committee and the Ethics Committee, the latter chaired by Whit McCoy. The importance of this committee which was renamed the Ethics and Grievances Committee in 1965, and the Committee on Professional Responsibility and Grievances in 1975 can be gauged by the roster of individuals who have served successively as chairmen: Nate Feinsinger, Dave Cole, Gabe Alexander, Harry Platt, Ben Aaron, Pat Fisher, Syl Garrett, Abe Stockman, Russ Smith, Dick Mittenhal, Sandy Porter, Howard Cole, Bill Fallon, and currently, Arthur Stark. Of these individuals, over half or 8 served as President of the Academy and one, Bill Fallon, is currently our President-Elect. The importance we attach to Ethics and Professional Responsibility is further demonstrated by the references thereto in our Constitution, our statement of Purposes and Aims and our statement of Policy Relative to Membership with which I am sure you are all familiar.¹

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¹Article II, Section 1 of the Constitution provides:

Article II, Section 1—The Purposes for which the Academy is formed are: To establish and foster the highest standards of integrity, competence, honor, and character among those engaged in the arbitration of labor-management disputes on a professional basis; to secure the acceptance of and adherence to the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes prepared by the National Academy of Arbitrators, the American Arbitration Association and the Federal Mediation and Conciliation Service, or of any amendment or changes which may be hereafter made thereto; to promote the study and understanding of the arbitration of labor-management disputes; to encourage friendly association among the members of the profession; to cooperate with other organizations, institutions and learned societies interested in labor-management relations, and to do any and all things which shall be appropriate in the furtherance of these purposes. (As amended April 29, 1975.)

The Statement of Academy Purposes and Aims sets forth the principal purposes of the organization as follows:

to establish and foster high standards and competence among those engaged in the

My assignment this morning is to deal with the topic of "Ethics Then and Now" to which the Program Committee has attached the explanatory subtitle: "A Comparison of Ethical Practices." Compared to what, one might ask. How do the ethical practices of the profession of labor arbitration compare with those of the American Bar Association, the American Medical Association, or the ethical practices of Academia,² to name but a few examples? Although this might be a fruitful exercise in a study of comparative professional standards, it is not one which I propose to undertake. In fact, the ambiguity of the subtitle leads me to interpret my assignment according to the intent which I perceived in the original submission, "Ethics Then and Now," and which I have broadly interpreted as meaning what, if any, differences exist or have developed over time from the early days of the Ethics Committee to the present. In other words, I have viewed my task as a historical inquiry. In preparation I have read the Committee reports, all the references to the subject contained in the indices to our Annual Proceedings and, of course, the two Codes, together with the eleven interpretations thereof issued to date. Lest you think in alarm that I am about to

arbitration of labor-management disputes on a professional basis; to adopt canons of ethics to govern the conduct of arbitrators; to promote the study and understanding of the arbitration of labor-management disputes.

The Statement of Policy Relative to Membership reads in relevant part:

In considering applications for Membership, the Academy will apply the following standards: (1) The applicant should be of good moral character, as demonstrated by adherence to sound ethical standards in professional activities. (2) The applicant should have substantial and current experience as an impartial arbitrator of labor-management disputes, so as to reflect general acceptability by the parties. (3) As an alternative to (2), the applicant with limited but current experience in arbitration should have attained general recognition through scholarly publication or other activities as an impartial authority on labor-management relations.

Membership will not be conferred upon applicants who serve partisan interests as advocates or consultants for Labor or Management in labor-management relations or who are associated with or are members of a firm which performs such advocate or consultant work.

The Academy deems it inconsistent with continued membership in the Academy for any member who has been admitted to membership since the adoption of the foregoing restriction to undertake thereafter to serve partisan interests as advocate or consultant for Labor or Management in labor-management relations or to become associated with or to become a member of a firm which performs such advocate or consultant work.

Because the foregoing restriction was not a condition for continued membership prior to April 20, 1976, it is the Academy's policy to exempt from the restriction members who were admitted prior thereto. However, the appearance of any Academy member in any partisan role before another Academy member serving as a neutral in a labor-relations arbitration or fact-finding proceeding shall, from and after April 21, 1977, be deemed inconsistent with continued membership.

²For a recent approach to ethical problems in professional education, see the Symposium: *Ethics in Academia: Power and Responsibility in Legal Education*, in J. Legal Educ., June 1984.

present you with a dissertation, let me reassure you that my findings and conclusions will be as brief as possible in order to leave time for discussion. And so to Genesis.

At the first annual meeting in January, 1948, the Committee on Ethics in Labor Arbitration concluded its report to the membership as follows:

In truth, the arbitration process is capable of infinite variety, and no code of ethics or standards of conduct should be drawn so narrowly as to inhibit the possibility of varying the process to fit the present and future needs and desires of the parties and of the public. Even if we were prepared to propose a code adapted to the prevailing thought of labor and management, we would have great difficulty in obtaining a definite and authoritative statement of that thought. . . .

In summary, we are agreed on certain basic canons of ethics for arbitrators embodying concepts of decency, integrity and fair play. These could be reduced forthwith to a code of ethics. We do not believe a code should be adopted until our thinking is clear on a number of other problems which may be of ethical content. On some of these problems agreement may be impossible, reflecting a lack of agreement on the part of labor, management, and the public as to the functions of the arbitration process and of arbitrators in labor disputes. . . . We are convinced that further study and reflection during the coming year is desirable and necessary before consideration of a specific and detailed code of ethics. This approach, we are certain, will strengthen public confidence in the seriousness and sincerity of the purposes of this organization.³

Note how tentative this report was. There was agreement only on *concepts* of decency, integrity, and fair play as the basic ingredients which could be reduced forthwith to a code of ethics leaving to the future the development of a more specific and detailed code.

A year later, at the Second Annual Meeting in January 1948, the Committee reported that following informal meetings in Philadelphia and Boston it had developed an agenda of three questions, simply stated as:

First, shall we adopt a Code of Ethics?

Second, how shall we go about it?

Third, what shall be its form, scope and content?

After reviewing the early history of arbitration with its stress on problem solving, mediation, and acceptability of the award to

³Appendix A, The Profession of Labor Arbitration, Selected Papers from the First Seven Annual Meetings, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1957), 136–137.

the parties, achieved, if necessary, through *ex parte* conferences, the Committee noted that a code of ethics in those pre-Wagner Act days would have been confined to these four principles:

1. The public interest in a labor dispute is paramount.
2. Time is of the essence.
3. The award must be just.
4. The award must be mutually acceptable to the parties.

As a result of more recent developments in the collective bargaining process, however, the Committee noted that the function of the arbitrator had changed in important respects, with distinctions to be drawn between grievance and interest arbitration.

With reference to grievance arbitration the Committee wrestled with the question of whether the arbitrator was in fact a judge, noting that the public judge was commissioned to administer *justice according to law*, whereas the arbitrator as a private judge had a responsibility, indeed an obligation, to ascertain and minister to the particular needs and desires of the parties who employed him. Therefore, given the variety of arbitration systems, it would not be improper in some instances for an arbitrator, unlike a judge, personally to consider substantial justice in a particular case or to formulate an award under which both parties could live. Moreover, tripartite arbitration raised more difficult ethical problems relating to neutrality and confidentiality should arbitration be modelled on the judicial process. More significant in the Committee's view was that interest arbitration was legislative rather than judicial in nature, characterized by the absence of any generally accepted objective standards for decision making. *No ethical implications, therefore, inhered in interest arbitration.*

In conclusion the Committee recommended that a further study of the arbitration process be made highlighting the need to keep it flexible, that standards of conduct be developed for advocates as well as arbitrators and that there be provision for exchanges of ideas on certain commonly discussed problems, eight of which it set forth, and most of which you will note have a distinctly contemporary ring:

- (a) How does one get to be "an arbitrator" in the first place? How does he become known as such? How is he selected for a particular case? Does he solicit business? Is he solicited by one party or another? Is he asked to make commitments in advance? Is he re-
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- engaged by the same parties? Why? Why not? Does he “compete” with other arbitrators for business?
- (b) The “professional arbitrator” versus the arbitrator with a steady job other than arbitration. Is one more or less inclined to be “ethical” than the other?
 - (c) Can a person “ethically” be an arbitrator although he represents or consults with the same or other unions or employers in other matters?
 - (d) Problems involved in *ex parte* communications.
 - (e) Fraternizing, entertainment, and the like.
 - (f) The conduct of hearings. Is there a “right” and a “wrong” way, in terms of ethical conduct? Is it “unethical” to attempt to mediate? To help out the weaker side, particularly if it has no attorney and the other side has? To disregard the “rules of evidence”? To attempt to “reform” the parties? To compromise? To “duck” issues?
 - (g) The award. Should the arbitrator make the decision which both sides want, even though he thinks it is a “wrong” decision? Should the award be accompanied in every case by an opinion? Should it be published? At all? Or only with the consent of the parties?
 - (h) When is a fee “too large” or “too small”? Under what circumstances should an arbitrator serve without a fee? Can a fee properly be charged for “waiting time” when the arbitration is called off because the parties have settled and the arbitrator has forfeited some other income-producing assignments?⁴

As a result of this report and the joint efforts of the Academy, the AAA, and FMCS, a Code of Ethics and Procedural Standards for Labor-Management Arbitration was developed and adopted in 1951.⁵ This Code included standards of conduct for the parties as well as the arbitrator. It applied both to grievance and interest arbitration and to the single arbitrator as well as tripartite boards. Although giving lip service to the concept of the arbitrator as a servant of the parties, its emphasis was on arbitration as a judicial rather than a problem-solving process, with a concurrent downgrading of attempts at mediation without the consent of both parties (a far cry from the Med-Arb process so prevalent today, especially in interest arbitration).

Two years later, in 1953, the Ethics Committee reported that the bare publication of a set of precepts would not be sufficient to answer all the problems, the existence of which had given rise to the effort to develop the Code. Consequently, the Board of

⁴*Id.* at 149–150.

⁵*Appendix B, supra* note 3 at 151–163.

Governors, at the Committee's request, empowered it to interpret the Code upon assumed or predicated facts and to consider any modifications which might be advisable. The first such opinion—on fees—was attached to this report.⁶

Looking back at this 1951 Code, Charles Killingsworth, assessing "Arbitration Then and Now," commented in 1972 that the controversy over the nature of the arbitration process, whether it was one of mediation or of adjudication, had threatened to split the Academy apart and to thwart its efforts to develop a Code of Ethics.⁷ In my opinion this was a just assessment explaining the rather ambiguous language concerning the proper function of the arbitrator that I have noted above.

In the years between 1951 and 1972 criticisms of the Code and of arbitrators and the arbitration process began to surface both at Academy meetings and in books, articles, and speeches by practitioners as well as by members. Rolf Valtin, speaking in 1960 as a relatively new member, raised the question of whether the Code had ever been enforced and expressed his concern that the Academy seemed to function more like a social club than a professional organization.⁸ That same year Allan Dash in his Presidential Address criticized the high fees, costs, delays, and

⁶Appendix C, *supra* note 3 at 164-167. Ethics Opinion No. 2, issued on February 15, 1955, dealt with disclosure of relationships with the parties. It is published on pp. 167-169, note 3 *supra*.

⁷*Twenty-Five Years of Labor Arbitration—and the Future*, in *Labor Arbitration at the Quarter-Century Mark*, Proceedings of the 25th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1973), 15-17. The controversy alluded to by Professor Killingsworth had its origin in what has been cryptically referred to as the "Taylor-Braden" debate. At the Second Annual Meeting of the Academy, George Taylor, one of the pre-eminent arbitrators of his time, gave a provocative address which is now regarded as the classic exposition of the function of the arbitrator as one of mediation and problem solving (See Taylor, *Effectuating the Labor Contract through Arbitration* in *The Profession of Labor Arbitration*, *supra* note 3 at 20-41). In this address, Taylor was opposing the point of view espoused by J. Noble Braden, then the Executive Vice-President of the American Arbitration Association, who was a strong advocate of the proposition that the sole function of the arbitrator was judicial in nature (See his articles, *Problems in Labor Arbitration* in 13 *Monthly Lab. Rev.*, 143 (1948); and *The Function of the Arbitrator in Labor-Management Disputes* in 4 *Arb.J.* 35 (1949).

To some extent this was a sham debate since Taylor's thesis emerged from his experience as an Impartial Chairman in the clothing, textiles and full-fashioned hosiery industries in which both sides had a mutual concern for survival against their nonunion counterparts. Braden, on the other hand, was almost entirely preoccupied as an administrator with *ad hoc* arbitration and was concerned with the survival of the American Arbitration Association as a designating agency! Notwithstanding these differences in experience which gave rise to the controversy, the debate over the proper functions of the arbitrator was indeed a major preoccupation of Academy members in those early years.

⁸Valtin, *What I Expect of the Academy*, in *Challenges to Arbitration*, Proceedings of the 13th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1960), 13-20 at 19.

the legalism creeping into the practice of arbitration,⁹ all of which were being noted in various journal articles—one of which you may recall, was wryly entitled: “Arbitration—a Chamber of Horrors.” Bill Loucks, in a panel discussion on the question: “Is Arbitration a Profession?,” queried what the Ethics Committee had done, to which he answered “Nothing” and went on to complain that its inaction in enforcing a code of ethics was “intolerable for a professional organization.”¹⁰

Even more serious allegations of misconduct were lodged by Judge Paul Hays (formerly Arbitrator Hays) who issued a scathing indictment of the arbitration profession in the Storrs Lectures on Jurisprudence which he delivered at the Yale Law School in 1964 and which were subsequently published in 1966 under the title: *Labor Arbitration: A Dissenting View*. After citing Harry Shulman and Archibald Cox as outstanding professionals, he went on to comment:

“But surely arbitration cannot properly claim the right to be judged by the standards established by its best exemplars. What of the ‘many’ whose work is characterized by ‘incompetence, maneuvering, and even downright chicanery?’ What of the ‘rascals in arbitration’ who have ‘in some fashion . . . to be made to conform to some ethical standards or be thrown out?’ What of the arbitrators who indulge in ‘ambulance chasing’ and ‘fee padding?’ What of the arbitrators whose ‘interest’ is in ‘how to perpetuate themselves’ or of the arbitrator who in deciding a case asks himself, ‘How secure (am I) in (my) position?’ ‘What is the importance of the relevant arbitration duties to (my) career?’”¹¹ (It is perhaps interesting to note that it was at the outset of this decade that Justice Douglas in the Trilogy cases had placed halos on our heads in language which the late Peter Seitz characterized as “the judicial canonization of arbitrators”).

In response to these criticisms the Academy scheduled a session on “Ethical Responsibilities of the Arbitrator” at its Twenty-Fourth Annual Meeting held in Los Angeles in 1971. Speaking on “The Case for a Code of Professional Responsibility for Labor Arbitrators,” Alec Elson noted that despite the existence

⁹*The Academy and Public Opinion*, in *Challenges to Arbitration*, *supra*, 1–12.

¹⁰*Id.* 20–31 at 30.

¹¹Hays, *Labor Arbitration: A Dissenting View* (New Haven: Yale Univ. Press, 1966), 52.

of the Code, there was still need for "intensive soul-searching" in this area. He proceeded to identify four reasons for concern:

1. As a result of what he termed "the winds of change violently circulating in this country," the conduct and practice of all the major professions had come under scrutiny. As examples he noted the judiciary, the medical profession, college faculty, and the clergy—all of which were responding through their professional associations to the challenge of reordering their priorities to a new emphasis on social justice and order. In particular, he noted the development by the American Bar Association of a comprehensive Code of Professional Responsibility to replace its former Canons of Ethics.

2. In the two decades since the Academy's adoption of its Code of Ethics, the profession of labor arbitration had come of age with the practice of arbitration showing tremendous growth. Despite these developments, however, it was still uncertain whether arbitrators could truly claim the status of a profession.

3. In recent years there had been rumors of serious misconduct on the part of arbitrators, involving mainly nonmembers of the Academy. Although based on isolated instances these rumors nevertheless provided some impetus for a new inquiry into ethical practices.

4. Constant and recurring complaints about the costs and delays incurred in the arbitration process raised valid questions as to whether current standards of conduct and practice were in need of further study and elaboration.

All of these developments, Elson argued, prompted a need for the Academy to take a fresh look at the Code of Ethics and, like the American Bar Association, to develop a Code of Professional Responsibility articulating "the positive obligations of arbitrators to achieve the high objectives of the arbitration process—that of an impartial, competent, and relatively inexpensive method of dispute resolution."

Elson then turned to an elaboration of each of these four objectives of impartiality, competency, expedition, and costs. Under impartiality he noted the need for an adumbration of conflict of interest situations. Competency required that the arbitrator keep abreast of new substantive and procedural developments in the field through programs of continuing education. Arbitrators also had a professional responsibility to train new arbitrators—an obligation which the Academy itself had done little to support. Expedition might be encouraged were the new

Code to place an affirmative duty on the part of the arbitrator to decline new appointments when he had a backlog of well-aged cases awaiting decision. Finally, he advocated that the Code make clear the responsibility of the profession to provide services on a low-cost basis to those unable to pay the normal fees, perhaps through the sponsoring of arbitration clinics in some of our major cities with the collaboration of the designating agencies.

In conclusion Elson stated:

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. . . . 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.¹²

As a result of Elson's eloquent and stimulating challenge the same three groups that had endorsed and promulgated the 1951 Code of Ethics undertook a major revision of the Code in 1972. Their efforts culminated in the publication on November 30, 1974 of the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes—our current "Blue Book." The reasons for revision were noted briefly in the Foreword. These included the advisability of combining ethical considerations and procedural standards under the caption: Professional Responsibility; the advisability of eliminating admonitions to the parties; the need to consider the substantial growth of third-party participation in the public sector; the growing significance of interest arbitration; and the emergence of new and more diversified problems in private sector grievance arbitration. In comparing this new Code with the old one I note what appear to me to be the significant differences, changes, or innovations in the new Code as follows:

1. It applies to any procedures in which the neutral is empowered to make decisions *or* recommendations.

¹²Alex Elson, *The Case for a Code of Professional Responsibility for Labor Arbitrators in Arbitration and the Public Interest*, Proceedings of the 24th Annual Meeting, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1971), 194–203. Following Elson's major talk, Herbert L. Sherman, Jr. provided a sequel in a report of a study he had made on the *Arbitrator's Duty of Disclosure*, published in this same volume at 203–233. Contemporary practitioners will find this survey extremely helpful since it provides concrete guidance with respect to the need or lack of need of disclosure in some twenty specific situations which arbitrators still encounter in their practice.

2. It applies to *statutory* as well as voluntary procedures in which impartial third parties are called upon to function, such as advisory arbitration, impasse resolution panels, statutory arbitration, fact-finding, and other special procedures.

3. It stresses the importance of technical competence on the part of the arbitrator as well as the need for an arbitrator to keep current with the principles, practices, and developments in his or her field of arbitration practice.

4. It states the obligation of experienced arbitrators to cooperate in the training of new arbitrators.

5. It covers new areas such as mediation by an arbitrator and med-arb; independent research and reliance on other arbitration awards; the use of assistants; consent awards; the avoidance of delay; and detailed prescriptions on fees.

6. It sets forth standards of prehearing, hearing, and posthearing conduct.

In short, as the Code itself recognizes, there can be no attempt to draw rigid lines between ethics and good practice.

So far as enforcement procedures are concerned the only reference to charges of professional misconduct is contained in the Preamble.

On the matter of interpretation it is noteworthy that in the 33 years since the original Code was adopted only 11 opinions have been issued by the Committee. These deal with four main categories: Advertising, Full Disclosure, Excessive Delays, and Publication of Awards. Because all of us have ethical problems affecting our own practice, I suspect that we have dealt with them on a less formal basis, either by asking the advice of fellow members or relying on our own interpretation of the Code. Since "time is of the essence" as the first Committee put it (in reference to rendering timely awards), I suspect further that most of us cannot wait for an answer from the Committee. There must still be a number of questions of general interest to the profession, however, which some of us might like to have clarified or perhaps changed. One that occurs to me is the use of assistants to draft opinions—ghost writers, if you will—without the knowledge of the parties. Another concerns the ways in which advertising is subtly practiced by some among us. Still a third, which is of recent interest and controversy, is that of the Code interpretations governing the publication of awards. And a fourth is that of arbitral immunity.

I approached this topic at the outset with the impression that “Ethics Then” was no different from “Ethics Now.” So far as the emphasis on the personal traits of the good arbitrator is concerned—character, integrity, objectivity, and honesty—there has been no change.

What has changed, however, is recognition of our responsibility for keeping up with new substantive and legal developments in the field, for training new arbitrators and for familiarizing ourselves with new problems of due process, particularly in the area of fair representation to which Willard Wirtz and Robben Fleming alerted us many years ago.¹³

In conclusion I would like to remind you of Dave Miller’s commentary on the proposed revisions of the Code in 1974, just before his untimely death. He noted that when the original Code was drafted there were only about 200 members, widely experienced in practice and in the ethical precepts of a newly developing profession, who “did not require great guidance either in practice or in ethical principles.” With the Academy’s burgeoning membership (almost 500 at the time he was writing) and with the vastly increased number of nonmember arbitrators engaged in either the public or private sectors in various roles under expedited systems, statutory appointments, or membership on panels, he argued that the time had come to make “a broader statement of ethical guides and good practice than we may require. In simple terms, it means the inclusion in our codes of more guides and more explanation than some of us believe are necessary for our own personal guidance.”¹⁴

In my opinion the Code adopted in 1974 met Dave Miller’s expectations concerning the elevation of the standards of arbitration practice. A decade later the need for continued scrutiny and possible further revisions of the Code is a question with which every new generation of arbitrators must grapple.

¹³See Wirtz, *Due Process of Arbitration in The Arbitrator and the Parties*, Proceedings of the 11th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1958), 1–36; and Fleming, *Due Process and Fair Procedure in Labor Arbitration in Arbitration and Public Policy*, Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Spencer D. Pollard (Washington: BNA Books, 1961), 69–91.

¹⁴Miller, *Presidential Reflections in Arbitration—1975*, Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1975), 4–6.

Epilogue or Prologue to Discussion

To stimulate discussion on some current problems of ethical practice I have collected a few recent anecdotes that have come to my attention.

1. Fees

a. A 45-minute hearing resulted in a consent award. It was typed by the arbitrator's secretary the next day. The arbitrator sent a bill for one day of hearing and one day of study. Was this an excessive charge?

b. The arbitration hearing lasted 4 hours, and was then adjourned to a later date. In the meantime the arbitrator sent an interim bill for two days of work: one day for the hearing and another day for dictating a memo to the file. Was this excessive?

2. Delays

One of my colleagues (not an Academy member) procrastinated two years in deciding a discharge case. The parties, their patience exhausted, finally selected another arbitrator who held a hearing. The decisions of the first and the second arbitrator arrived in the mail on the same day. As you might (or might not) imagine, one denied the grievance; the other sustained it. Which was the valid award? Should a third arbitrator now be selected?

3. Advertising

a. Triple A Programs recently have been featuring a tripartite form of panel presentations. If the neutral is an Academy member, the letters NAA appear beside his or her name. If not, only the arbitrator's name is given. Is the Triple A violating the Code of Responsibility which it has endorsed?

b. An arbitrator was seen distributing his business card (unsolicited) to advocates at an educational conference. Later he left the cards (surreptitiously) on the registration desk. Assuming he was an Academy member, was this a Code violation?
