CHAPTER 11

PROFESSIONAL RESPONSIBILITIES OF ARBITRATORS

I. ARBITRATORS AS EXPERT WITNESSES

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The question before me today is whether, and if at all, to what extent, arbitrators should agree to serve as expert witnesses. The critical question that must be posed straight away is: expert on what? Once this question is answered and we examine a variety of questions of propriety, it will become apparent that there is little, if any, role that an arbitrator may properly play as an expert witness. This is not to say we have no expertise. Instead, my point is that the exercising of such expertise may be irrelevant and, more seriously, inappropriate.

The National Academy's Code of Professional Responsibility[1] directs itself to this question in only one, relatively narrow, context. Section 6(E) states: "The arbitrator's responsibility does not extend to the enforcement of an award." Subsection 2 notes: "In view of the professional and confidential nature of the arbitration relationship, an arbitrator should not voluntarily participate in legal enforcement proceedings."

Let me immediately acknowledge that our Code is clearly directed toward the enforcement of one's own award. Nevertheless, the theory behind these prohibitions is instructive; it is that arbitrators, having rendered their decisions, are *functus officio* and may not extend their involvement beyond that point. In part this entirely justifiable prohibition is grounded on the

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[1]Code of Professional Responsibility for Arbitrators of Labor-Management Disputes. This is a joint document originally approved in 1951 by a committee of the American Arbitration Association, the National Academy of Arbitrators, and the Federal Mediation and Conciliation Service. It was revised in 1974 by a joint steering committee of those same organizations, and has been adopted by several state PERBs as well as the National Mediation Board.

clear limits of an arbitrator's understood functions—the rendering of an award. The arbitrator is, after all, an outsider to the collective bargaining relationship and ought not to be assisting one side or the other in any collateral action, such as a section 301 enforcement proceeding, that may later attend the arbitration. The restriction is reflective of a certain unseemliness that would attend a judge's pursuing the decision as it winds its way through the legal system. It would be unheard of, for example, for a trial judge to appear as an advocate, a witness, or in any other capacity in support of the award at the appellate levels.

Beyond that, however, the Code fails to deal directly with service as an expert witness *per se*, except to the extent of certain requirements of disclosure in Part 2, to which we shall return later.

Our membership policy deals more directly with the issue before us: "The Academy deems it inconsistent with continued membership in the Academy for any member who has been admitted to membership . . . to undertake thereafter to serve partisan interests as advocate or consultant for labor or management in labor-management relations. . . ." I do not argue that by legislative intent "consultant" was contemplated by the drafters to include expert witnesses. My understanding is that no one discussed this issue. But this would not be the first time we took new variations into consideration under existing language. I have done that, and I think, with few exceptions, this is consulting. Moreover, the consulting aspect does not exhaust the potential problems.

The premise of my discussion today is that in many seemingly benign situations where an arbitrator may be called as "expert," there is, in fact, a serious conflict between the role as arbitrator and as a member of the Academy that needs to be recognized and avoided.

The problems inherent in the expert role are best illustrated with a series of hypotheticals. Take first the arbitrator who is solicited as an expert witness in a duty-of-fair-representation (DFR) matter. A grievant learns that the union has declined to process a grievance to arbitration because, in its view, the grievance is frivolous or at least not meritorious. The grievant sues the union in a DFR suit, and the union turns to the arbitrator as an expert on the contract. The union seeks the arbitrator's testimony that indeed the matter lacks merit and if it were

brought before the arbitrator, the company would probably prevail.

On the surface one might argue that the arbitrator should be readily available for such duty. After all, the arbitrator may be an expert on that particular contract and, if the test to be applied to the union is whether it was a reasonable judgment in terms of the merits, who better to ask than the one who would ultimately decide the merits? Moreover, from an institutional standpoint the arbitrator is participating in a defense of the process. The union has made a judgment that, at least in the abstract, unions ought to be making and, if this was done in good faith, it is the type of case and action one ought to support.

But this sword is double-edged. Fair representation suits are premised on a defense of the process, the assumption being that the union, the company, or both, have unfairly disadvantaged an employee. It would follow, therefore, that an arbitrator should just as readily champion the employee's cause in such case, for that too would constitute a defense of the process. However, I think we ought not be there at all.

Consider the earlier case—the arbitrator having been retained by the union. What if the issue involved a very sensitive contract provision that for all sorts of reasons neither party to the collective bargaining agreement wished to pursue in arbitration? Assume, for example, the union considered this a critical issue in upcoming bargaining and was fearful that receiving a negative arbitration award (which it fully believed it would receive) would jeopardize its bargaining posture. Assume, as well, that the company also wanted to steer clear of an arbitrator's comments or conclusions on this very sensitive matter for similar reasons. Is this a situation wherein the arbitrator should agree to be hired for the purpose of expounding on this issue?

Consider some other scenarios. What if the arbitrator is called by the union president with the following request: "Eva, we have dozens of cases here that we have to review for purposes of making 'go, no-go' decisions with respect to arbitration. We'd like you to spend a few days reviewing them with us and giving us your views on whether they're any good. After all, you've had extensive experience in the industry, and we would value your judgment." Should the arbitrator accept? Does it matter that there is no longer any affiliation with those parties or that industry? I think not. I can't imagine a better example of "serving partisan interests as a consultant," a role that is explicitly prohib-

ited by our membership policy. And, incidentally, what if the union wished to hire the arbitrator to expound on the merits of a particular contract provision at its national convention? One suspects we would agree such an appearance would be imprudent, to say the least. Does casting it in the context of a court setting make any difference? Again, my answer is no.

If one is troubled by these scenarios, and I certainly hope you are, let me suggest that the discomforting factor is the realization there may be a variety of interests in this and in many other apparently innocuous appearances by an arbitrator in an "expert" capacity. What is lacking as an essential ingredient in such appearances is joint approval of the parties. Does it matter if the expert is retained by the disenchanted grievant rather than the company or union? I don't think so. In either case the arbitrator is entering as the third person in a situation where admission is normally by invitation only.

Remember, I am not speaking of a lack of expertise. The arbitrator may be the permanent umpire for the parties and may well possess a good deal of expertise on how this kind of case might turn out. But that does not change the basic premise (if anything, it accentuates it) that an arbitrator's expertise is expected to be exercised upon joint request of the parties. No one has invested us with muse powers or status, and it is this uninvited venturing into the parties' otherwise private relationship that I find both troublesome and inappropriate.

The Code's requirement of disclosure in section 2(B)(2) states: "When an arbitrator is serving concurrently as an advocate for or representative of other companies or unions in labor relations matters, or has done so in recent years, he or she must disclose such activities before accepting appointment as an arbitrator."[2] If one concludes that service as an expert witness for a union in a DFR suit would reasonably require disclosure in the next joint appointment, the basic conflict is revealed.

The problem stems from a serious concern for the appearance of bias from serving one party or the other in any capacity. One might suggest this is different from representation as a traditional advocate, and that is true. Yet, the unavoidable truth is that the arbitrator who appears for one party as an expert is

[2]It should be recalled that the Code serves not only the NAA, but also the AAA, FMCS, and other organizations. The membership requirements of the latter organizations do not proscribe advocacy or consultant work.

being paid by that party for those services. Should this fact be of interest to the other party? I think so. What of other services rendered by the arbitrator to the union, such as selling insurance to the union? Could a brother-in-law do all the union's printing work? These would be serious concerns from a propriety standpoint. The concerns are not lessened by the arbitrator's having been retained for arbitral expertise. To the contrary, I suggest they are heightened. These are not conflicts susceptible to resolution by mere disclosure. They are conflicts that ought to be avoided entirely.

Change the hypothetical. What if a grievant has sued both the company and union. The arbitrator is invited by both parties as an expert to testify on behalf of both of them. Here the conflict problem is apparently attenuated. At this point one turns squarely to the question of "expert on what," revealing questions of relevance and reliability that should confront a trial judge.

If an arbitrator is called to testify as to the probable outcome on the merits of the case, my reaction as a judge would be: "Thank you very much but I'll do the decisionmaking in this forum and you'll excuse me if I withhold my decision until after I've heard the case." If you don't think it strange for an arbitrator to testify on the merits of a case not yet heard, turn the situation around. Think of the arbitrator who is unwilling to testify as an expert but who is subpoenaed by a party to speculate as to the outcome of a case that has not yet been litigated. The arbitrator would, no doubt, be outraged at the prospect of having to respond. Moreover, the very act of the arbitrator's appearing to testify on probable outcomes may well invite the court to focus unnecessarily on the ultimate merits of the case, instead of the proper question of whether the union's judgment was reasonable and free of caprice or discrimination. By appearing to testify on the merits, we are inviting courts to do precisely what we say they should not do.

In terms of the landmark *Vaca* standards, what is required is not that the union be correct on whether the grievance was meritorious but that it make a reasoned judgment. There are many ways for the union to prove that, including making its own presentation to the court on whether it had sufficient facts, based on a reasonable investigation, to make a fair decision. In *Vaca v. Sipes*,[3] the court said, in relevant part, the following:

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[3]386 U.S. 171 (1967).

> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. . . . Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration, regardless of the provisions of the applicable bargaining agreement. . . . In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through the settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved. . . . It can well be doubted whether the parties to collective bargaining agreements would long continue to provide for detailed grievance and arbitration procedures of the kind encouraged by L.M.R.A. in section 203(d), . . . if their power to settle the majority of grievances short of the costlier and more time-consuming steps was limited by a rule permitting the grievant unilaterally to invoke arbitration. Nor do we see substantial danger to the interests of the individual employee if his statutory agent is given the contractual power honestly and in good faith to settle grievances short of arbitration. . . . Having concluded that the individual employee has no absolute right to have his grievance arbitrated under the collective bargaining agreement at issue, and that a breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious, we must conclude that the duty was not breached here.

The specter of arbitral speculation on the merits of an unlitigated case must be assessed in this context. Questions of good faith judgments and the circumstances surrounding the union's decision—beyond the question of whether the grievance was meritorious—are elements that are fully within the court's expertise. Inherent in the Supreme Court's decision is the clear notion that even meritorious grievances may be settled over the grievant's objections.

Other situations that may involve potential intervention of an arbitrator-as-expert raise a somewhat different question. Consider, for example, the case of an attorney accused of missing a filing deadline on an arbitration case. (Assume the grievant may retain a private attorney in lieu of the union's services, as is sometimes the case.) The company has declined to appear at the

hearing, citing timeliness objections, and the arbitrator appointed to the case has recessed the matter, telling the grievant to secure an injunction from a court. Rather than go to court, however, the grievant sues the attorney for malpractice. The arbitrator is called in as an expert for the purpose of informing the court that under this contract the filing was timely. Here the company and union are in no way directly connected to the case. This intervention is nevertheless troublesome. Aside from the continuing questions of relevance (judges may rightly inquire as to why they could not make the same inquiry and decision on contract language), one faces the same problems of the arbitrator as consultant, a shedding of the neutral role that ought not to be indulged, and an uninvited commentary on the contents of a private labor agreement.

The analogy, it may be argued, is to a doctor testifying on the prognosis of an injured patient. But that "expert" occupies a very different position than we do. There is no expectation of both the appearance and the fact of continued neutrality. A doctor doesn't have to consider the question of whether some other party would be disadvantaged by a medical opinion, possibly because the state of one's body is not dependent on the next set of negotiations.

I turn now to some other scenarios, real not hypothetical, that have been provided by Academy member James Oldham, Past President Ben Aaron, and President-elect Dave Feller. After concluding that all three colleagues, whom I not only admire but love, have ventured into the wilderness, I will summarily resign my membership.

Feller has testified as an expert in five different cases. They are highly illustrative for our purposes. When he testified as an expert on admission procedures in law schools (in the celebrated *Bakke* case) he was doing nothing that would concern us. I assume David *was* an expert on admissions procedures. Similarly, when he testified as an expert on supplemental unemployment benefits plans in the steel industry—their structure and applications in general—I find no conflict at all.

But Feller also testified as an expert witness in three cases relating directly to the labor/management relationship. In *Bucholtz v. Swift and Company*,[4] a number of employees brought suit against both the company and the union, claiming a breach

[4]102 F.2d 2219.

of the union's duty of fair representation in settling a vacation-pay claim. Feller was called by the company as an expert to testify that unions often press frivolous grievances and to testify on the contractual question of whether there was a reasonable possibility of success. Notwithstanding this expert testimony, the trial court concluded that the grievants would have succeeded in their pay claims and that the union had breached its duty of fair representation. (No one says experts have to be persuasive.) There is no conflict here. Both parties were on the same side of the issue; both were deeply involved in the case. Evidently the union had no problems with Feller's appearance; in fact, the union was a potential beneficiary of his testimony. But what if the union had objected? What if it didn't want an arbitrator's ruling on this issue for whatever reason? Should the arbitrator have been sensitive to that fact even though called by the company? I think so. One might seek to justify this as an arbitrator joining hands with the parties to defend the collectively bargained dispute-resolution procedure. I think the greater danger however, in addition to the consulting issues I spoke of earlier, is a certain tarnishing potential that I perceive in the company, union, and arbitrator joining hands to defend a grievance procedure that may well be attacked as collusive in the first place.

Feller also served in a DFR case where the union had engaged in a lengthy strike and had agreed, as a part of the settlement, to eliminate a section in the prior agreement that would have required successor employers to accept and abide by the terms of the labor contract. In that case Feller testified (one may assume it was for the union) on the questions of (1) whether a union is required to disclose each and every term of a proposed settlement at a ratification meeting, and (2) whether, even if the omitted provision had been in effect, the purchaser would have been obliged to employ the grievants. The union lost. (0 for 2, Dave.) In that case it is not immediately apparent that the company did, or would, object. But that is, at the very least, a question that must be asked. Without regard to the merits of that issue, isn't that perilously close to consulting? Disclosure would be a bare minimal requirement of the Code. But in terms of the Academy's membership policy, it is absolutely essential for us to determine whether this amounts to consultant status for the reasons stated earlier. I think it does, and if so, it is prohibited by our membership policy.[5]

[5]I distinguish between arbitrators who participate in training and education sessions for one party or the other and those who serve as an expert witness, at least for purposes of

Feller also testified as a witness for Pan Am against dissident pilots who, contrary to their union's position, claimed the right to flight engineer positions after compulsory retirement as pilots. Unquestionably, Feller is an expert on those provisions. Without regard to the relevance of his testimony (we'll turn again to that in a moment), it is not clear that one who serves in a neutral capacity as between these parties in their original arbitration should later be serving as expert to one side or the other. It is easy to see how the neutral's position would be thereby devitalized.

In his paper Feller notes that his various examples serve "to illustrate the range of issues in which an arbitrator, or an expert in labor relations generally, can be called upon to testify as an expert." But there is a profound distinction between the arbitrator and the general labor relations expert. The latter may well become involved in a variety of expert musings. The former, as a labor relations neutral, has to be distinguished, set apart, and reserved for those situations in which expertise is exercised in a neutral capacity.[6]

In *Banks v. Bethlehem Steel*,[7] arbitrators Oldham and Aaron were hired as competing experts in a fair representation case. The grievant claimed that, had the case gone to arbitration, he would have prevailed. Aaron was retained by the grievant to testify, as he did, that the union used poor judgment in accepting a relatively small cash settlement rather than pursuing the matter to arbitration. Oldham was hired by the company and the union jointly to testify that the chances of the grievant prevailing

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the membership policy. I still believe the Code may require disclosure of such involvement, but working as an educator, while clearly a consultant role, is not done in the "partisan interests" context. I believe that distinction is inherent in the membership policy.

[6]Feller points out that, following a finding by a court of a breach of the duty of fair representation, the issue of whether there was, in fact, a breach of the labor agreement becomes (1) directly relevant, and (2) more likely to be resolved by a jury. *See* Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 133 LRRM 2793 (1990). There the Supreme Court held, *inter alia*, that to recover money damages in an action for breach of the duty of fair representation (DFR), an employee must prove both that the employer's actions breached the labor agreement and that the union violated its DFR. He argues that the arbitrator's expertise is clearly greater on the issue of contract breaches than a jury's and therefore sees arbitral intervention as a reasonable necessity.

I agree that the result—resolution of this issue by jury—is wrong. I applaud Feller's efforts to secure legislation that would set the matter on the proper course: In the event of a breach of the DFR arising from the failure to arbitrate, for example, the matter should be sent back to complete the contemplated procedure. But I do not find that the current legal situation, however misguided, justifies arbitral intervention in a strictly advocacy role, and in that respect David and I part company.

[7]870 F.2d 1438 (9th Cir. 1989).

were considerably more problematical than Aaron had assumed—some of the evidence the grievant would have relied on would probably have been inadmissible according to the collective bargaining agreement.

The functions of these two arbitrators were somewhat different. Aaron reviewed the file in the case, considered the grievant's long period of service, a clean disciplinary record, and the extenuating circumstances and concluded that "a labor arbitrator more likely than not would have ruled against Bethlehem Steel if the grievance over the discharge of the grievant had been submitted to arbitration."[8] Ultimately the union lost. The Court found the union had violated its duty of fair representation by failing to arbitrate the grievance. (The company settled on the courthouse steps.)

I am troubled by the presence of a neutral arbitrator, albeit a stranger to the particular relationship, testifying as an advocate for the grievant in this context. Aaron did it out of a profound sense of moral outrage. But I think the mantle of hired champion is simply not one we may properly assume in these circumstances.

First, I think Aaron's testimony is irrelevant. As indicated above, whether a grievant is likely to prevail in the judgment of an arbitrator is not the critical question as to whether a breach of the duty of fair representation occurred, although I acknowledge the relevance of such inquiry on the issue of damages.

But, even granting the possible relevance of that issue, and the distressing propensity of judges to mix all the issues, I still cannot accept the arbitrator-as-advocate role. What's wrong with the arbitrator as hired gun? The answer is suggested by the question, of course. However we characterize the arbitrator's role—legal or quasi-legal, judicial or quasi-judicial—it is certain the arbitrator is not, and may not be, an advocate. Yet, here the arbitrator becomes an advocate, a rent-a-judge available for decision both after and before the trial.

Recall, if you will, the long and rather heated discussions this Academy has had on the question of publishing awards and the timing of seeking the parties' approval—before or after the issuance. There were widespread feelings on the question. We concluded (wrongly in my judgment) that arbitrators could

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[8]Affidavit of Benjamin Aaron in Banks v. Bethlehem Steel Corp., Case No. C85-692C (D.C. W.D. Wash.) at 4.

solicit parties' approval prior to releasing the award. But on one point we were unanimous; the decision, while written by the arbitrator, is the parties' property, and only the parties may control whether and to what extent it is released. One might expect parties to be nonplussed when an arbitrator renders opinions on their contract and on their labor relationship when they themselves have not asked for those opinions. It is this aspect—answering questions that have not been asked (by both contracting parties)—that is ultimately so troublesome. It is antithetical to the notion of discretion and careful handling of our entrusted responsibilities.

As I indicated, there was another arbitrator involved in that case. Oldham was brought in at the behest of both the company and the union to rebut Aaron by testifying that certain hearsay elements of the evidence would not have been admissable. The grievant's prospects, therefore, would not have been as rosy as Aaron had assumed. While I think arbitrators' involvement in any capacity in these cases is troublesome, I think his appearance comes closer to satisfying some of my concerns.

First, Oldham was invited in jointly by the parties. Second, he was testifying on a procedural aspect of the collective bargaining agreement, of which the court may well have been unaware. I am less troubled by the neutral appearing in the context of the hearing administrator and testifying as to its normal procedures than as a prognosticator of probable results. Indeed, as the 9th Circuit Court of Appeals has noted, in all cases where that court found a breach of the duty of fair representation based on arbitrary conduct, "it is clear that the union failed to perform a procedural or ministerial act, that the act in question did not require the exercise of judgment and that there was no rational or proper basis for the union's conduct."[9]

I do not suggest, therefore, that there is no role for the arbitrator as expert witness. My response instead is that this is a matter, like most endeavors in our professional existence, that at

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[9]Peterson v. Kennedy, 771 F.2d 1244, 1254, 120 LRRM 2520 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122, 122 LRRM 80 (1986). *See also* Gregg v. Chauffeurs, Teamsters Union Local 150, 699 F.2d 1015 (9th Cir. 1983); Tenorio v. NLRB, 680 F.2d 598, 110 LRRM 2939 (9th Cir. 1982). In *Tenorio*, the court found that the union's failure to investigate "was so grossly inadequate as to transcend poor judgment." *Supra*, at 601. In the *Banks* case (*supra*, note 7) that same court observed that, in reaching its conclusion in *Tenorio*, "we emphasized that we were not second-guessing the union's assessment of the grievance merits. . . . Rather, our holding was based upon the ground that the duty of fair representation requires that, before assessing the merits of a grievance, a union must have an ample basis upon which to make such an assessment." 680 F.2d at 602.

least requires knowledge and consent of both parties.[10] If appear we must, our expertise should be left to questions of procedure only and, if possible, given the real potential of a challenge to our overall stance of professional neutrality, we ought to just say no.

If all this sounds like a particularly protective, highly sensitive reaction to the arbitral status and stature, I plead guilty. It is this admittedly pristine posture that I wish to recognize and preserve and that, in rather clear terms, is both endorsed and required by this Academy's membership policy. It is these very distinctions, including our appropriate prohibitions against advertising, that set us apart from other practitioners. These distinctions must be preserved and protected in the interest of the integrity and vitality of the labor arbitration process.

II. Disclosure and Recusement—When to Tell and When to Leave

Walter J. Gershenfeld*

Disclosure and recusement have been peripheral topics at a number of Annual Meeting presentations since the early days of the Academy. It took approximately a quarter century before these topics became a major focus of an address at an Academy meeting. In 1971, based on survey and other research data, Herbert Sherman covered disclosure in a variety of situations, emphasizing both the need for disclosure and the difficulties posed by the general nature of the obligation. Nevertheless, he succeeded in providing guidance as to what might be expected from arbitrators in given situations. He found judges generally bound by stricter canons than arbitrators. Judges are often required to withdraw from a case while an arbitrator's obligation may, at least initially, be limited to disclosure.

Most of another quarter century has now gone by. What is there that needs saying about disclosure and recusement? After all, isn't it simply a matter of following the Code of Professional

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[10]We apply this test to almost everything else we do as arbitrators. Should the arbitrator accept a ride to the airport from one party after a hearing? Not without checking with the other party. Should the arbitrator have a drink at the bar with one of the parties after the hearing or later that evening? Surely not without checking with the other party and probably not at all.

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Responsibility for Arbitrators of Labor-Management Disputes by disclosure or recusement as needed? As will be seen, some aspects of disclosure and recusement have raised concerns in recent years and require a fresh look. Most important, I will emphasize Code sections that raise questions about the need for adjustments in the Code itself.

The key section of the Code is 2.B, which requires arbitrators to disclose "any current or past managerial, representational, or consultative relationship with any company or union involved in a proceeding" for which the arbitrator is being considered or has been designated to serve. Section 2.B. also requires disclosure of "any pertinent pecuniary interest" or "any close personal relationship" between either party and the arbitrator. The arbitrator is enjoined to withdraw if "the arbitrator believes or perceives that there is a clear conflict of interest." In other Code sections, we are required to advise parties of the basis for our charges as well as any conditions that might unduly delay hearing the case or preparing the opinion. Although these latter two items raise questions of disclosure and recusement, I will limit this presentation to the issues covered directly under section 2.B. of the Code.

There is a duty to tell the parties anything about yourself that you have reason to believe they should know in connection with a given case. There is an obligation to recuse yourself when a conflict of interest appears to be present. A third related concept, that of abstention, has recently been introduced by Reginald Alleyne.[1] He points out that there are certain types of cases (for example, when an arbitrator is asked to decide matters involving a fee charged by another arbitrator) that should be rejected or abstained from by arbitrators. Other terms used to describe an arbitrator leaving a case include resign, excuse, or otherwise withdraw from a case.

I will begin by noting differences among the related concepts mentioned above and then move forward with an analysis of disclosure and recusement in certain prehearing and hearing situations. Whenever possible, I will be normative, not only by indicating the requirements of the Code but also by identifying those areas where either flexibility or a stronger position than that taken by the Code is desirable.

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[1]Alleyne, *The Law and Arbitration*, The Chronicle, National Academy of Arbitrators, (February 1991).

The concept of disclosure is well understood. Disclosure should generally be in writing prior to the scheduled hearing so the parties can consider the information at their leisure and make an informed judgment as to whether it precludes an arbitrator's participation in a case. The arbitrator may not realize some information is pertinent until the hearing or may not discover anything to report until someone or something at the hearing makes a disclosure necessary. The arbitrator's general responsibility is to disclose appropriate information as soon as the need to do so becomes known.

The broad term for withdrawing from a case is recusement. The term applies whether or not the action is taken on someone else's request or the arbitrator's own motion. Latin dictionaries list the meaning of the verb "recuso" as "refuse" or "chafe at." A later use of the root term introduces a religious application. The American Heritage Dictionary defines "recusant" as follows:

1. A Roman Catholic who refused to attend the services of the Church of England between the reigns of Henry VIII and George II.
2. A dissenter, nonconformist.[2]

I suppose these definitions make anyone, including an arbitrator who elects to play golf or tennis rather than attend services, a recusant. In any event the definitions are strong, emphasizing the individual electing an independent course of action that may not be popular with all concerned.

Some of my colleagues have suggested when recusement has been raised that they find the term awkward and prefer to use the simpler "excuse." The problem is that there is a definitional nicety about "excuse" which makes it less functional than "recuse" for this purpose. When someone seeks to be excused, the ball is in the court of the person whose concurrence is being sought. Recusement is in the hands of the person taking the action. I am aware in practice that people will say, "Excuse me," without really seeking approval for an action, but the mixed context in which "excuse" is used makes it less desirable for exactness than "recuse."

Abstention, resignation, and withdrawal are other categories involving when to come and when to go. Abstention, although a noteworthy idea, does not fit the principal areas to be high-

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[2]American Heritage Dictionary, 1036 (2d College Edition) (Boston: Houghton Mifflin, 1985).

lighted here. Abstention is based on something in the situation that you find repugnant as an arbitrator. Disclosure and recusement involve some aspect of yourself and/or your relationship to the parties in a case that may require nonparticipation.

As a practical matter, withdrawal and resignation are synonymous with recusement. They will be so used here, and this paper will concentrate on the twin towers of disclosure and recusement in prehearing and hearing situations.

Prehearing Issues

Prior Employment, Consultative or Advocacy Relationship With One of the Parties

The facile answer is that the nature of these relationships is sufficiently powerful that there is a substantial obligation to disclose and, depending upon the length of time involved and the time period which has passed since the relationship, to recuse oneself.

Although the quick answer should stand as the norm, there are qualitative variations, which I can illustrate from personal experience. Some years ago I worked in the national office of a union, and later in the industrial relations department of a company. These parties were not in a collective bargaining relationship with each other. On occasion I have since been selected by that union and company to hear cases. I have disclosed in the union case, where my previous role was relatively modest and remote in time, and withdrawn in the company case, since I held an executive position there.

John Caraway reports a Wisconsin case in which the court held:

> Past employment with a party is only evidence of possible partiality; once the other party has ascertained the time, nature, and duration of the past employment it may well conclude that the arbitrator is able to decide the dispute impartially. Disclosure is necessary, however, in order to afford the other party the opportunity to make the relevant inquiries and decide for itself after investigation whether the arbitrator selected is impartial and disinterested.[3]

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[3]Caraway, *The Duty to Disclose*, The Chronicle, National Academy of Arbitrators, February 1990, citing Richo Structures v. Parkside Villages, Inc., 82 Wis.2d 547, 263 N.W.2d 204 (1978).

In this case, the court disqualified a neutral for nondisclosure of an earlier part-time employment relationship. Thus, prior relationships of an employment, advocacy, or consultative nature generally require disclosure. Of course, the passage of time may appear to make the matter moot. Nevertheless, even if you believe that the parties will find your disclosure unnecessary or humorous, it is better to err on the side of disclosure unless you are certain that the disclosure is indeed far-fetched.

Financial Holdings

The Code could not be sharper on the subject. Section 2.B.1.a. of the Code states:

> The duty to disclose includes . . . current stock or bond ownership (other than mutual fund shares or appropriate trust arrangements) or any other pertinent form of managerial, financial or immediate family interest in the company or union involved.

No one should have trouble with the basic thrust of financial disclosure, nor should anyone expect anything other than recusement when a financial holding is substantial. "Substantial" is a difficult judgmental term, but a measure of this type will likely come into play in the future. The Code raises some operational problems with regard to financial disclosure, particularly since no exceptions are made for *de minimis* situations.

There is an appropriate practice to follow when financial or other relationships preclude hearing cases involving a particular company or union: you should prerecuse yourself. The cognizant authorities in the organization involved and/or the appointing agency should be made aware of your intention not to hear cases involving that organization.

Financial disclosure presents various Code problems. Recently I spoke to an attorney for one of the largest companies in the United States. It is a company whose stock has historically been owned by many people seeking the magic of security, income, and growth. The attorney has been involved in hundreds of arbitration cases with many arbitrators. I asked him how often arbitrators had disclosed stock ownership in the company. His reply was, "Never." He went on to add that this did not disturb him even though some of the arbitrators may have owned stock in the company. There was virtually no likelihood that any one person other than a multimillionaire could own

even a significant fraction of one-tenth of 1 percent of the stock. He did not expect disclosure nor did he receive it.

I have spoken with a number of arbitrators who have made disclosures of stock holdings and been told, "So what? Everyone on both sides of the table owns stock in the company." The union may have begun buying stock in order to obtain the company's financial report, and later an employee stock ownership program (ESOP) may have been adopted. Nevertheless, the arbitrator should reveal all holdings to conform to the Code.

While the Code does refer to bonds, it also lists the parties as companies and unions. Assuming this is broad enough to cover public sector employers and unions, it is possible that an arbitrator could purchase state or municipal bonds. That arbitrator could then be selected for cases in which the municipality or state government is involved. My suspicion is that while a few arbitrators have dutifully disclosed such holdings, the majority have considered the relationship too distant to be meaningful. One state official to whom I posed the question of disclosure in this type of situation was bemused by my suggesting the disclosure of state bond holdings, let alone recusement.

Going further, should an arbitrator who handles federal cases disclose the ownership of federal savings or treasury bonds? There undoubtedly are some arbitrators who hear federal sector cases and own federal bonds or notes. My guess is that disclosure has not occurred to them as a necessity and, yet, the Code is clear in its requirement. The response that the Code does not contemplate disclosure in such situations is lame.

One key to the problem is size, that is, the size of the entity involved. When we are dealing with the federal or state governments, large cities, and conglomerates, a holding of 100 shares or $1,000 in bonds is likely to be perceived as immaterial to impartiality. Still, converting various holdings to definitional *de minimis* designations is difficult. A holding of $10,000 of stock in a medium-sized company should certainly be disclosed. The same holding in a small company might be a basis for recusement. An arbitrator appointed to an umpireship should always disclose holdings in the company involved and might well consider divestiture.

The most useful advice regarding financial disclosure is to err on the side of caution. However, as long as there are financial holdings that do not necessitate disclosure (federal bonds are clearly the best example), the Code does not square with reality,

and we may need some better guidelines as to when to tell, when to sell, and when to ring a bell.

The flip side of financial holdings is debt. I particularly have in mind the taxpayer status of the arbitrator. Size again plays a role. No one would question the arbitrator as taxpayer not recusing when handling a federal, state, or large city case. However, what should happen when the arbitrator receives a small community, interest arbitration case in the arbitrator's home town? My informal survey finds that arbitrators increasingly are recusing themselves in such circumstances, and I applaud the development.

Prior Student Relationship With a Party

A common situation involves students presenting cases before arbitrators who have earlier been their professors. My observation indicates that most arbitrators tend to disclose such relationships early in their careers. Typically, they find over time that the parties do not consider this to be a problem. Disclosure takes place less often in subsequent cases. One variant occurs when an arbitrator attends a hearing and finds a former student playing a key role in the case without the arbitrator's knowing it in advance. The disclosure at the hearing rarely makes waves, and I believe most arbitrators handle the situation with an informal disclosure, that is, they say something that makes it clear the individual has studied with the professor at some time in the past.

While I am not uncomfortable with the informal handling of the professor-student situation, I stress that close working relationships between a professor and a student warrant disclosure under all circumstances. I am thinking of such examples as an advocate who has worked as a graduate assistant for a professor, or who has jointly authored journal articles with the arbitrator. Disclosure here is mandatory, but even a close professor-student working relationship does not warrant recusement. Obviously there may be unusual circumstances to the contrary, but I am positing the general rule.

Close Social Relationships With Parties

The Code permits great flexibility in this regard. Section 2.B.3.a. states:

> Arbitrators establish personal relationships with many company and union representatives, with fellow arbitrators, and with fellow mem-

> bers of various professional associations. There should be no attempt to be secretive about such friendships or acquaintances but disclosure is not necessary unless some feature of a particular relationship might reasonably appear to impair impartiality.

I suspect that the clause reflects the situation as it existed in the early days of modern arbitration (postwar Labor Board). Many arbitrators and advocates had worked together closely at that agency. It was a world in which they knew each other well and "everyone" knew of the relationship. I do not believe these prior relationships (which often continued actively on a social level) were the source of much disclosure and/or recusement. At the same time I am certain the Code was followed and no secret was made of these relationships.

Today the situation is different. If a close personal friendship exists, it should be disclosed. I hasten to add that seeing colleagues at professional meetings and conferences and occasionally having a meal with them in such circumstances does not, in my judgment, require disclosure. The problem arises when the people involved enjoy each other's company to the point where there is a regular social relationship. While some arbitrators may take umbrage at my suggestion that an informal friendly relationship with one party could possibly compromise the arbitrator in a case involving the other party, the hard reality is that the world is far more suspicious today than in the past. The pain of defending oneself against the slings and arrows of a losing party who has discovered posthearing that you enjoy a friendship with the opposition's advocate makes disclosure a stronger imperative than the Code contemplates.

I call attention to one special problem. If you are fortunate enough to have a continuing relationship with parties, you may well have properly disclosed a friendly relationship with an advocate. While the parties fully understand the situation, new grievants and supervisors may be puzzled about the apparently genial relationship between the parties and the arbitrator. This requires going beyond disclosure by circumspect behavior at the hearing on the part of both the arbitrator and the parties when all involved know each other well.

The Ubiquitous Training Program Problem

Many of us are called upon to participate in training programs involving the parties. When these programs are sponsored by

universities or neutral organizations, such as the American Arbitration Association or the Federal Mediation and Conciliation Service, and a broad range of parties are present, there is little problem in terms of disclosure or recusement requirements.

The situation changes when you are asked to address or train a group connected with a union or a company. Regardless of the unimpeachable credentials of the sponsoring organization or the emphasis on explaining arbitral procedures rather than "how to beat the other side," such a training assignment requires a minimum of disclosure in future selections. Even when the other side has rejected an opportunity to participate in the training program and has indicated a willingness to continue using you as an arbitrator, arbitrators are becoming sufficiently uncomfortable so that, if the training assignment is accepted, prerecusement in such situations is becoming a norm. In fact, arbitrators are hesitating to accept such assignments, particularly where they anticipate hearing cases involving the parties.

The role of arbitrators in training programs is very much in flux. I suspect that some years ago many arbitrators, if called upon to hold a mock arbitration program for management or union law firm personnel, would have considered it a fairly routine assignment. I was asked to do so recently and turned the invitation down. I was obviously not the first choice since I was asked why arbitrators were hesitating to accept this relatively easy, well-paid assignment. I sensed my emphasis on the Code was not well received.

Case-Related Rulings and Their Impact

Prehearing or Hearing Rulings

Prehearing rulings may be made by telephone or mail, and they relate to a variety of procedural or substantive matters. The parties may have difficulty selecting a date or agreeing on a site. There may be disagreement as to whether the hearing should be bifurcated for arbitrability. There may be a question as to which party is required to take action to compel or halt a hearing. Ruling on any of these topics may well incense the losing party. It is not uncommon for that party to take the view that the arbitrator has prejudiced neutrality and should withdraw from the case. Similar situations may occur following rulings at a hearing.

The standard is clear. Rulings made in the course of a case, no matter how much they may anger one party, are generally not a proper basis for recusement. The request for recusement could be a plot to delay the arbitration, or it could be a search for what is perceived as a more favorable forum. What if you are convinced the request is honest and based on a deep-seated belief that your ruling has caused an advocate to lose confidence in your ability to hold a fair hearing? The answer is that recusement is improper in all but the most unusual circumstances. The process is not served when an arbitrator elects to walk away from a case before or during a hearing because one party has indicated a lack of confidence after an adverse preliminary ruling. One possible exception may be if an arbitrator has effectively communicated a decision in a case without a request from the parties.

Generally, a request for recusement by both sides must be honored. For example, suppose an arbitrator has indicated aversion to the product made by the company at the start of a hearing. I know of one such case where the arbitrator was asked to resign by both parties.

A more difficult situation occurs when the request for recusement comes from both parties, but (1) you suspect the parties are seeking a jointly desired outcome, or (2) the parties make it clear that they wish you to uphold a discharge. The right of the parties to select their arbitrator may clash with the importance of avoiding collusive behavior in arbitration.

In case (1) noted above, the arbitrator's suspicion is not an acceptable basis for denial of the mutual request to recuse yourself. You have no way of knowing all the factors that went into the request, nor are the parties bound to disclose their reasons. In case (2), Advisory Opinion No. 6 spells out that you cannot continue to function as an arbitrator without the informed consent of the grievant in that type of situation. Barring that unlikely contingency, you must recuse yourself whether or not the parties ask you to do so.

Surprise at a Hearing

In section 2.B.4. the Code requires disclosure when a relationship involving the parties is not discovered until all concerned have arrived at the hearing. The situation involving former students has already been discussed. In these days of

mergers and consolidations, it is likely a financial interest may be present that is not initially recognized by the arbitrator because the name of the company gave no clue it was now part of an organization in which the arbitrator has a financial interest. These situations should be treated the same as if the arbitrator possessed the requisite knowledge prior to the arbitration. Disclosure should be the norm when that would have been the case if the information had been available earlier.

Another type of surprise occurs when someone appears at a hearing whom you know in another context. For example, one party may serve on a community board or participate in a sports-for-kids program with you, and you did not realize the person would be involved in the upcoming case. In one situation with which I am familiar, the arbitrator learned at a hearing that one of the parties had played tennis on the next indoor court over the past couple of years. Although they had never been introduced, they had said hello and exchanged pleasantries during that time. Do any of these situations require disclosure or recusement?

If we are to maintain the neutral image of arbitration, it is better to err on the side of disclosure and to let the parties judge whether the relationship warrants additional action. As to recusement, section 2.B.5. of the Code indicates that if an arbitrator believes or perceives that a conflict of interest is present, the arbitrator should withdraw regardless of the expressed desires of the parties. This point warrants emphasis. The parties may be satisfied that it is appropriate for you to continue in your arbitral office. However, you find that the disclosed relationship is sufficiently troubling to you that you wish to recuse yourself after further thought. The decision would be perfectly consistent with the Code. While it is better to make a recusement decision early, the alternative of continuing after you decide that you do not belong in the case is not a satisfactory one.

New Arbitrator-Advocate Relationships

There is a growing phenomenon of labor arbitrators and advocates functioning in other forms of arbitration. Most notably, this has been true of commercial cases, but labor arbitrators increasingly are appearing in securities, lemon-law, pupil-assignment, and other types of cases. While labor arbitrators have always had some activity in nonlabor areas, research data

and subjective observation indicate growth in these areas, reflecting the leveling off of demand for labor arbitration and the increase in arbitrator supply.

How does this development relate to disclosure and recusement? The answer is that people who know each other as labor arbitrators and advocates are meeting in new circumstances, sometimes even while the old relationship is actively ongoing. To illustrate, a labor arbitrator may be working on a case that has had one hearing and is scheduled for an additional hearing. The arbitrator is named to chair a three-member, commercial arbitration panel that will deal with a multimillion dollar claim requiring a number of hearings. One of the arbitrators assigned to the case is also an advocate in the labor case being heard by our arbitrator.

Disclosure is obvious and easy. The harder question is whether the labor arbitrator should recuse from the commercial case if the labor case is to be untainted. Both the labor arbitrator and the advocate sitting on the commercial case may well be circumspect and even agree overtly that the labor case will never come into their discussions while together on the commercial case. Nevertheless, the prospect of their being together in both formal and informal settings over a substantial period of time is sufficient to give me pause.

This type of new arbitrator-party relationship was not contemplated as such by the Code. Certainly, however, the general qualifications of the arbitrator, including honesty and impartiality, apply. Therefore, labor arbitrators running into this and analogous situations will have to weigh their behavior carefully and decide whether disclosure is sufficient or whether recusement may be necessary. My expectation is that this is a subject we will have to address formally in the near future.

Summary

Disclosure and recusement continue to be important Code requirements in a variety of circumstances if a fair and proper hearing is to take place. If any erring is to be done, it should be on the side of disclosure and recusement, whichever is applicable. One notable exception occurs when an arbitrator is asked to engage in recusement simply because one party does not like a ruling made in the course of the hearing. This type of request, whether sincere or tactical, should generally not be honored.

Some of the situations requiring disclosure raise questions about the application of the Code as written. One involves financial holdings by an arbitrator. *De facto*, it appears neither the parties nor arbitrators expect disclosure of small holdings in large private organizations in *ad hoc* cases. Government bonds, particularly of large entities such as federal or state governments or large cities, are apparently covered by the Code but are often ignored as disclosure items in practice. The time has come for us to address necessary Code changes involving stock and bond holdings.

We have a healthy heritage from past arbitrators and advocates who know and respect each other, who conform to the Code by making no secret of their friendship, and who may believe that no one should challenge an arbitrator's impartiality simply because of friendship with an advocate. The world today tends to be more suspicious in many ways than in the past, and arbitrators are well advised to make friendship disclosures routine so that all people at a hearing, especially those from the shop floor, are not puzzled by what is happening in an arbitration that affects them.

Other situations that in the past were not unusual, such as training one set of parties in the arbitration process, now raise questions of prerecusement if an arbitrator accepts a training assignment with that party. Cases close to home in the public sector (particularly in small communities) are more often becoming a basis for recusement. New types of relationships among the parties are also emerging as arbitrators and advocates find themselves coming together in such milieus as commercial arbitration while still meeting in labor arbitration settings.

No one ever said that questions of ethics were easy or resolvable for all time by given pronouncements. Disclosure and recusement require regular review if we are to keep up with new circumstances and changes in the perception of existing situations.

III. Arbitral Neutrality and Accounts Receivable

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I confess I originally confronted this assigned topic with some diffidence because I had a hard time believing this distinguished

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and high-minded group would worry too much about its neutrality being compromised by an account receivable. Not that you are lacking in sensitivity. Rather, I felt most of you would not expect any sophisticated advocate to harbor dark suspicions that you would flip over an unpaid bill.

To my surprise, as I have looked into it further, I've found people do take the question seriously—more accurately, they do believe that this is the kind of issue we need to address. There is a perception out there—and we deal here at least as much with perceptions as with realities—that labor arbitrators have become lax about observing some of the proprieties of the Code of Professional Responsibility. We ignore such perceptions at our peril.

The perceivers are not merely the umbrella shakers and chronic doomsayers. For example, the signers of the Report of the Special Committee on Professionalism, which was submitted to the Academy at its 40th Annual Meeting,[1] announced that they perceived a declining sensitivity to what Abe Stockman once labeled the "necessary proprieties" of our occupation. In presenting the Committee's report to the membership, Dick Mittenthal noted that the Committee had heard complaints about arbitrators' misconduct from the appointing agencies as well as the parties. For another example, Frank Zotto, an American Arbitration Association Vice President and a thoughtful observer of our scene, reports that the issue of arbitrators' failing to disclose potential conflicts of interest or other circumstances that might cause parties to question their impartiality is one that "surfaces all the time." Frank believes arbitrators may have become lax about disclosure because in many instances they and the parties' representatives know each other so well and for so long that the need for disclosure is minimized.

We need to be punctilious in our observation of the Code's requirements. Toward that end I ask you to consider the provisions of Part 2.B.1 and 2.B.3 (marginal paragraphs 27 and 35) of the Code. Part 2.B.1 states, in pertinent part, the following:

> Before accepting an appointment, an arbitrator must disclose directly or through the administrative agency involved, any current

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[1]Seward, *Report of the Special Committee on Professionalism*, in Arbitration 1987: The Academy at Forty, Proceedings of the 40th Annual Meeting, National Academy of Arbitrators, ed. Gladys W. Gruenberg (Washington: BNA Books, 1988), Appendix B, 221.

> or past managerial, representational, or consultative relationship with any company or union involved in a proceeding in which he or she is being considered for appointment or has been tentatively designated to serve. *Disclosure must also be made of any pertinent pecuniary interest* [emphasis added].

Part 2.B.3 broadens the area of disclosure to include any "other circumstance, in addition to those specifically mentioned earlier in this section, which might reasonably raise a question as to the arbitrator's impartiality."

These provisions describe the arbitrator's responsibility before accepting appointment. The notion clearly is that disclosure in advance of acceptance of appointment will give the parties an opportunity either to waive any objection to the potentially disqualifying circumstance or to object to the arbitrator's appointment.

In some accounts-receivable situations advance disclosure will not be possible as a practical matter because the case will be in process and the arbitrator will have already performed some services when the dispute over the interim bill arises. Even then, however, the arbitrator is obliged to disclose the potentially disqualifying circumstance, in this case the existence of an outstanding account receivable. Part 2.B.4 (marginal paragraph 37) of the Code states the following:

> 4. If the circumstances requiring disclosure are not known to the arbitrator prior to acceptance of appointment, disclosure must be made when such circumstances become known to the arbitrator.

In my view this means the existence of an account receivable owed by one of the parties to a pending arbitration should be disclosed by the arbitrator prior to the next scheduled hearing.

Disclosure may satisfy an arbitrator's obligations under the Code, but it does not erase the fact that one party owes the arbitrator money while the other does not. By disclosing this fact the arbitrator may avoid the suspicion that the Code presumes may attach to undisclosed "pecuniary interests." Unless the bill is paid, however, those who perceive the arbitrator's neutrality to be compromised by an outstanding account receivable will continue to be suspicious. The question, then, is what, if anything, the arbitrator needs to do or can do to cope with these suspicions.

Accounts receivable come in all shapes and sizes. I propose to discuss three species of the genus. The first is not technically an account receivable but an account expectable. I refer to the fees

to be paid under arbitration systems promulgated by nonunion employers. I include these because, like accounts receivable, they are cases in which either only one party pays the arbitrator or one party's capacity and willingness to pay is questionable. The second species is an account receivable for a case still in process, typically an interest arbitration, a bifurcated case, or other proceeding involving successive hearings for which an interim bill has been submitted and not paid by one of the parties. The third species, probably the most common of the three, is in the bad debt category, that is, an account receivable in a completed case, which one party has not paid because it either refuses or is unable to pay. For shorthand purposes I will generally refer to these different categories or situations as (1) employer promulgated, (2) interim billing, and (3) bad debt situations.

Employer-Promulgated Systems

Employer-promulgated arbitration systems raise a number of troublesome questions of basic fairness and due process, which are beyond the scope of our present discussion. These employer-promulgated systems are currently under study by the Academy's Committee on Alternative Dispute Resolution, chaired by Mike Beck. It is a two-year study to be completed in the spring of 1992 and will doubtless prove a source of considerable agonizing over the Academy's role in relation to these systems, which are not tripartite, in the sense that they do not contain the usual labor-management-neutral triad.

Although the broader philosophical issues raised by the employer-promulgated systems are beyond the ken of our inquiry, the provisions of such systems dealing with the payment of the arbitrator's fees and expenses are of interest here. Those provisions raise relevant questions about the possible impact of unpaid arbitration fees on perceptions of arbitrators' neutrality. In some of these systems the entire cost of the arbitration is paid by the employer. In others the costs are split 50-50, but the employee's ability to pay in the absence of a favorable award is subject to question. In still others the employer may, under various conditions, be required to pay all the costs if it loses or refuses to abide by the award.

A number of our members have written or commented upon this subject.[2] Their concerns about the uneven pay arrangements in these systems mirror some of the concerns that have arisen in the interim billing and bad debt situations. According to Chuck Rehmus, if the employer pays the full cost, may not an arbitrator who regularly serves in such an arbitration system "appear to have a conflict of interest in terms of not repeatedly ruling against the employer who pays the bills"?[3] If the costs are split 50-50, there may also be a conflict of interest, Rehmus observes, in cases where "the arbitrator's ability to receive pay from one of the parties is dependent upon whether that party receives a favorable award."

The first and most obvious thing about these problems is that they are inherent in employer-promulgated systems and are not by-products of an action taken or not taken by an arbitrator. The nonunion employer clearly believes its self-interest requires employee grievances to be put before a neutral. Where it has agreed to pay the entire cost of the arbitration, the employer has presumably concluded it is in its self-interest to pay whatever it costs, regardless of the outcome, to obtain a neutral to referee disputes with individual employees. It has, in short, willingly undertaken to pay the cost of being ruled against. It may not take too kindly to being ruled against repeatedly, but I suggest it will be more eager than a union employer to receive at least some adverse rulings as proof that its system is not management-dominated.

Any party is apt to balk eventually at retaining an arbitrator whom it feels rules against it too often in cases it deems meritorious. One view is that paying 100 percent of the cost does not significantly affect an employer's posture in this matter. If appearances suggest the neutrality of the arbitrator is compromised by the pay arrangement, I believe the realities do not support such a view.

Insofar as the grieving employee is concerned, however, concerns about the neutrality of any system of dispute resolution that is entirely paid for by the employer will not be easily dis-

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[2]*See, for example,* Rehmus, *Unrepresented Grievants: An Arbitral Dilemma,* The Chronicle (May 1989), 1; Walt, *Employer-Promulgated Arbitration Systems: Raising Questions,* The Chronicle (October 1989), 2; and Walt, Rentfro, and Das, *Employer-Promulgated Arbitration,* in Arbitration 1990: New Perspectives on Old Issues, Proceedings of the 43rd Annual Meeting, National Academy of Arbitrators, ed. Gladys W. Gruenberg (Washington: BNA Books, 1991), 189–203.

[3]Rehmus, *Letter to the Editor,* AAA STUDY TIME (July 1985), 5–6.

pelled by rational argument. The employees will likely remain skeptical until they are shown in practice that the system is truly neutral. In any event, the arbitrator can do nothing to change the appearances except to refuse to serve in such cases. That decision is apt to hinge not so much upon who pays but upon how arbitrators feel about accepting these arbitration cases—whether participation would tend to (1) lend respectability to nonunion employment arrangements, (2) provide due process for unrepresented employees, (3) advance the frontiers of arbitration, or (4) undermine neutral standing for service to management and labor in a collective bargaining relationship that includes arbitration. These and other considerations are likely to and should be given more weight than concerns about the pay arrangement.

The problems associated with the situation of the impecunious employee are more delicate. Chances are that most employee grievants, whether impecunious or not, will have recourse to grievance and arbitration procedures very rarely and will have no real interest in maintaining the viability of an employer-promulgated system by paying the costs attendant upon its operation. In the most obvious case the disenchanted employees whose discharges are upheld in arbitration may balk at paying for the cost of certifying the propriety of their demise. If the employees are impecunious as well, they may not only be disinclined but unable to pay. Commentators worry that the neutrality or objectivity of the arbitrator in such cases may be perceived as compromised by the fact that payment of the employee half of the cost of arbitration depends upon receipt of a monetary award.

None of the solutions to this problem seem altogether satisfactory. One that appears to be gaining popularity requires payment of money in escrow to cover the projected costs or a part of them, such as the estimated fee for hearing or deciding the case. I know a number of arbitrators, whose integrity I highly regard, who have engaged in this escrow practice or a variant of it. However, as will become apparent, I have some doubts about this approach.

I understand some regions of the American Arbitration Association have been willing to participate in setting up escrow arrangements at the arbitrator's (not the agency's) initiative. It may be that the regular application of escrow arrangements by

an administrative agency will lend an appearance of regularity, which will make them more palatable to the parties.

A second solution to the impecunious employee problem is not to worry about payment in advance, but to look to the employer for payment of the entire cost, when and if the employee refuses or is unable to pay after the award is issued. The theory is that each participant in an arbitration proceeding is jointly and severally liable for the arbitrator's fee, that is, each is individually bound to pay the whole amount. The legal rationale has, of course, evolved in arbitrations between parties to a collective bargaining agreement. Whether the same principle applies in the absence of a contract between the parties to the arbitration is a question I have not researched, but I note that at least one commentator, Sol Yarowsky, believes that it does.

Reliance on the joint-and-several-liability doctrine avoids the potential mercenary stigma of the escrow arrangement, but at the cost of having to hassle the employer to pay both portions of the bill and recover the proper portion from the employee. Assuming the grievant is still an employee, the employer is obviously in a better position than the arbitrator to recover from a recalcitrant employee.

Another approach to the impecunious employee is accepted by a little noted section of the Code of Professional Responsibility, Part 2.K.1(b)(6) (marginal paragraph 96), which provides:

> When it is known to the arbitrator that one or both of the parties cannot afford normal charges, it is consistent with professional responsibility to charge lesser amounts to both parties or to one of the parties if the other party is made aware of the difference and agrees.

I wonder how often that approach has been tried.

What effect do these solutions to the impecunious employee problem have upon others' perceptions of the arbitrator's neutrality? Without impugning the integrity of anyone, I feel escrow arrangements convey or imply a lack of trust and a concern about monetary guarantees on the arbitrator's part, which taint the relationship from the outset. The unease attending pay-in-advance practices is simply a part of the general aura of disquietude which hovers around the fringes of employer-promulgated arbitration systems.

In my judgment, the employer, although better able than the employee to put up the fee in advance, will be given pause by an arbitrator's insistence on an escrow arrangement. However, it is

the employees who are likely to be most disturbed by being asked to put up or shut up. Will they not ask themselves the question: If the arbitrator doesn't trust us to pay or is so focused on the fee as to insist upon payment in advance, can we trust the arbitrator? Suppose, for example, that company counsel inundates the arbitrator with judicial and arbitral precedents, which the arbitrator cannot properly evaluate without devoting more time to research than is contemplated by the fee the parties have paid into escrow. Will the arbitrator take the extra time needed to evaluate the precedents cited?

You may think, as I do, that these questions are offensive. But is this not the kind of thinking and suspicion that may be fostered by arrangements starting with escrow of the arbitrator's fee? If the administrative agency insists upon the escrow payment, some of the stigma of the prepay arrangement may shift to it. I doubt, however, that all of it would be removed from the arbitrator who sets the escrow amount and is the ultimate beneficiary.

As to the joint-and-several-liability solution, the employer is not likely to be overly enthusiastic about serving as the arbitrator's bill collector. Employees who have refused to pay an arbitrator are likely to be equally or even more disenchanted when the arbitrator collects the entire fee from the employer, who thereupon demands payment from them. Whether use of this device affects perception of the arbitrator's neutrality, only time will tell. For now, I would use it only as a last resort.

In preparing this paper, I have been made aware of a small but growing band of joint-and-several-liability proponents who have found in this doctrine the answer to an impecunious arbitrator's prayers. By this approach, there is no need to worry about the nonpaying party's hostility, obstinacy, or inability to pay. One can write to the other party, recite the joint-and-several-liability doctrine, and collect the fee. I am told by Hal Leeper, John Shearer, and Sol Yarowsky that it works for them.

To sum up my own tentative conclusions on employer-promulgated systems, I am not terribly happy with any of the solutions to fee-payment or fee-collection problems inherent in these systems. One conclusion to be drawn is that perceptions of an arbitrator's neutrality do not consist solely of impressions of impartiality concerning management and labor. For better or for worse, our even-handedness is judged also by our handling of matters having no necessary connection to the partisan inter-

ests of companies or unions. Perceptions that an arbitrator doesn't trust an employee to pay, that the arbitrator is too quick to ask the company to pay all and recover back, or that the arbitrator is too concerned with protecting the fee may be transformed into doubts as to the arbitrator's even-handedness and, hence, "judicial temperament."

Interim Accounts Receivable

The next item to be examined is interim accounts receivable, unpaid by one of the parties before the case moves to a further stage of hearing or decision. It is this situation that, I believe, prompted the inclusion of this accounts receivable subject in the present program. I find it the least troublesome of the three situations discussed here, because the choices seem simpler than in the employer-promulgated or bad-debt situations.

What worries arbitrators (or the parties for that matter) when they ask about arbitral neutrality in the face of accounts receivable? As I understand it, they worry that if one of the two parties to a pending case has not paid the arbitrator for previously billed services, that circumstance may sooner or later be perceived as affecting the arbitrator's impartiality. On the one hand, the worry is that an ensuing decision for the paying party may be viewed as retribution against the nonpaying party for its failure to pay. On the other hand, a decision for the nonpaying party may be viewed as an effort to obtain payment. After all, winners may groan, but they usually pay the arbitrator's bill. It's the losers who gripe about fees or refuse to pay them.

How does an arbitrator avoid such a situation or, at least, minimize its potential for mischief? Should you write in advance to say you believe it unwise to proceed further until both parties have paid for prior services? Should you notify the other party that its adversary has not paid prior fees and expenses? Should you keep quiet? Should you invoke the aid of the administrative agency, if any? If you go to a hearing on the merits without having resolved the imbalance of payments, should you hold up the award until the nonpaying party has paid up?

In my own view, the risk that one party or the other will think that a decision for or against a nonpaying party has been influenced by these considerations is small. If not, we are in deep trouble. If it is suspected that our integrity is for sale because of unpaid accounts receivable in partly-heard cases, we can do little

to redeem our honor. One way *not* to redeem it is to take great pains to ensure there are no unpaid accounts—in other words, to insist that fees be paid before going forward with the case.

For good or ill, the parties are used to arbitrators maintaining a fairly long pipeline of expenses and unreimbursed hearing or study time. We may try to change the system, but until we do they may wonder why the arbitrator is making so much of getting paid for services as they are performed? In brief, I think the supposed cure (collecting the interim account receivable) is worse than the supposed disease (being thought biased for or against a party who hasn't paid an interim bill).

The foregoing observations apply to the ordinary interim accounts receivable case. I recognize that there may be cases of unusual magnitude entailing many days of hearing, research, and drafting during which all other income-producing work must be put aside and special pay-as-you-go arrangements must be made in order to live. The prudent arbitrator will make arrangements before the start of proceedings. If one of the parties is delinquent about honoring these special arrangements, the arbitrator has a sound, established platform from which to press for payment. I believe the parties understand the need for pay-as-you-go in these cases. If they do not, recourse to escrow payments or to joint-and-several-liability may be appropriate.

Bad Debts

The bad-debt situation differs significantly from the other two scenarios because the arbitrator has finished the case, and the identities of the winner and the loser are known. One of them has not paid. Typically it is the loser who refuses to pay. If it is a question of inability to pay, either winner or loser may be involved.

My concern is primarily with refusal to pay, not with inability to pay. When a party is unable to pay, the situation is somewhat analogous to that of impecunious employees in employer-promulgated arbitration cases. Recourse to a joint-and-several-liability claim against the party who can pay seems to be warranted in this circumstance. Assuming that the law clearly makes each party to a collective bargaining agreement liable for the entire amount of the fee, it is entirely appropriate for the arbitrator to

look to the solvent party to make up the other party's share of the arbitration costs.

When the nonpaying party is able to but refuses to pay, the dynamics of the situation are obviously very different. The nonpaying party is usually hostile and is refusing to pay for any one of a number of stated reasons, ranging from the size of the fee to questions about the arbitrator's character or competence. These may mask the unstated reason: the party's anger at the outcome of the case. These are difficult cases because they arouse strong emotions in arbitrators as well. Our performance, and with it, perhaps, our sense of identity, has been called into question.

These are not difficult cases, however, from the viewpoint of the present topic, that is, the damage to the arbitrator's perceived neutrality from disappointed litigants, who become nonpaying parties. This is a matter essentially beyond our control because it has already been set in motion by the party's adverse reaction to the decision. Just as complaints against fees or competence may mask a party's anger at the outcome of a case, so may a charge or feeling that the arbitrator is not truly neutral. We can do nothing to prevent a disappointed loser from adding bias to the list of charges against us.

A law suit to recover unpaid fees and expenses may provide further aggravation and confirm the outraged party's conviction that the arbitrator has an unresolved bias against management or labor, as the case may be. But the conviction has already been established by the party's reaction to the ruling. Unless the ruling is flawed, the pursuit of payment for services rendered is plainly justified and not complicated by extraneous considerations.

Similarly, under the joint-and-several-liability principle, the arbitrators may look to the other party to pay the entire fee and expenses. In this instance, however, I believe we should exhaust the possibilities of collecting from the hostile party before seeking further recompense from the party who has already paid. Joint-and-several-liability claims against the paying party are of value, but like escrowed fees and joint and several liability in employer-promulgated cases, asking one party too quickly to pay all will have the deleterious effect of appearing too concerned with protecting fees. Face up to your accuser. Don't skulk away and seek payment from the party who has already paid its fair share of the fee.

Summary

Disclosure is the watchword insofar as the Code is concerned. The existence of accounts receivable is a "pecuniary interest" or "other circumstance," which might reasonably raise a question as to impartiality, which the arbitrator is obligated to disclose. As a matter of practice, it may assuage the defensive feelings of the nonpaying party if the arbitrator announces that disclosure is required by the Code.

With regard to the impact of accounts receivable on perceptions of the arbitrator's neutrality in the three situations discussed, my conclusions are:

1. *Employer-Promulgated Systems.*

(a) In the employer-pays-all cases the pay arrangement has been consciously chosen by the employer. It has an interest in the arbitrator's demonstrable impartiality, which is likely to outweigh any expectation that it will receive favorable treatment because it is paying the bills. As to the employee, however, the fact that the employer is paying the bill will likely spell automatic skepticism as to the arbitrator's neutrality.

(b) In the impecunious employee cases the practice of escrowing fees may be the most practical way to insure payment, but it should be examined carefully to be sure the device does not undermine the mutual trust that any system of justice requires for effectiveness. If an administrative agency handles the escrow, the arbitrator may be partly insulated against blame for the arrangements, but not entirely so. The joint-and-several-liability solution may be a practical answer to uncollectible accounts receivable and, by extension, an advance guarantee that an employee's inability or unwillingness to pay will not be an obstacle to collection. I have some doubt as to whether joint and several liability applies to cases which do not arise out of a contract. Even if it does, its application in a case of an unsuccessful, impecunious grievant in an employer-promulgated system is likely to produce employee disenchantment and employer resentment when asked to pay all. The joint-and-several-liability approach should be used only as a last resort.

2. *Interim Accounts Receivable.*

The risk that a party will consider neutrality compromised because of an interim account receivable is small. In the ordinary case more damage may be done to the arbitrator's image of

probity by efforts to collect the interim account than to perceived neutrality if the arbitrator continues to serve in a case where one party has not paid its share of an interim bill. In very large cases, arrangement for interim billing should be made in advance and enforced, if necessary, by an escrow payment and/or a joint-and-several-liability demand of the party who has paid.

3. *Bad Debts.*

When the nonpaying party is unable to pay, it is appropriate to look to the other party to pay the entire fee. When the nonpaying party is able to but refuses to pay, I believe the arbitrator should exhaust the possibilities of collecting from the hostile party before seeking further payment from the paying party.