APPENDIX C

REPORT OF THE COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND GRIEVANCES CONCERNING THE CODE BAN ON ADVERTISING

By action taken at its regular meeting in Minneapolis on May 24, 1994, the Board of Governors asked the Committee to consider the following question:

> Whether as a matter of NAA policy, the current code ban on advertising should be continued?

Recognizing the controversial nature of the question posed, and the need to hear from the membership concerning the changed circumstances that are said to exist requiring a change, the Board authorized the Committee to seek membership opinion through various means, including the holding of an open forum. All members of the NAA were given notice, by several means, that the Committee had been asked to undertake such a study and they were invited to present their views at the open forum or in writing, before and after the open forum.

The open forum was held in Boston on October 30, 1994. In order to stimulate interest, David Feller, who was designated to chair the open forum, made arrangements for the publication of "Point" and "Counterpoint" arguments in *The Chronicle*, authored by Jack Dunsford and Elizabeth Neumeier. Approximately 85 members attended the open forum, which lasted approximately two and a half hours.

At the outset of the open forum, George Fleischli, Chair of the Committee, summarized the background leading up to the open forum. Arthur Stark and Alex Elson, immediate past chairs of the Committee, were then afforded an opportunity to make opening statements, setting forth the pro and con arguments. There were 14 additional speakers, a number of whom provided the Committee with important background information concerning the changed circumstances that currently exist, particularly in the case

of those members who do a significant amount of employment arbitration and ADR work generally.

All members of the Committee received a copy of the transcript and all correspondence sent to the Committee's recorder, Don Weckstein. In addition, the recorder prepared a tabulation and analysis of the correspondence received and past advisory opinions, for use by members of the Committee.

Each member of the Committee was asked to independently prepare a position statement for consideration by other members of the Committee. The Committee met in Chicago on April 2, 1995, to discuss the results. All members of the Committee were present, except for Mike Bognanno, who had advised the Chair in advance of his inability to attend. Member Bognanno has kept the Chair informed of his position, and was present in San Francisco for the adoption of this report.

I. The Consensus Reached

In his 1987 report to the Board of Governors, Arthur Stark opined:

> It is obvious that unanimity will never be achieved on the question raised. At best, a general consensus may be obtainable, but vigorous dissent will remain.

While this statement no doubt remains true today, the Committee finds that a strong consensus has emerged among our members concerning the need for a modification but not a repeal of the ban on advertising. That same strong consensus was reflected in the statements of position prepared by members of the Committee.

Some members of the Committee initially expressed the view that there should be little or no change in the interpretation and application of the code ban on advertising beyond that reflected in the recent interim opinion dealing with the Martindale-Hubbell *Dispute Resolution Directory*. Their reasons can best be summarized by referring to the language of parts 1-C-1 and 1-A-1 of the code. They feel that any form of advertising has the potential to detract from the dignity and integrity of the office of arbitrator and may compromise the essential personal qualifications of honesty and impartiality. However, these same members recognize that, due to changed circumstances, the ban, as currently interpreted and applied, has placed an undue and unfair burden on some of our members, particularly those who perform or seek to perform employment-related arbitration and other forms of ADR work.

Other members of the Committee initially expressed the view that the ban should be repealed and replaced with a provision that would permit all advertising that is not untruthful or misleading. Their reasons can best be summarized as arising out of concerns over the legality of the ban or a desire not to infringe on the personal freedom of other members. However, like all other members of the Committee, these members also expressed concern about the possible negative impact that some forms of advertising could have on those same considerations cited by the members who expressed a personal preference for little or no change.

All members of the Committee were in agreement that any continued restriction on advertising must be tailored in such a way that it does not unreasonably interfere with the free flow of needed information about arbitrators for use by the parties that they serve. Further, all members of the Committee were convinced that some past interpretations and applications of the code, which were sound and reasonable when drafted, need to be changed because they are interfering with this necessary flow of information, particularly in non traditional areas of dispute resolution. Consequently, the Committee focused its efforts on identifying and articulating the changes in interpretation and application which would need to be made in order to accommodate these changed circumstances.

The Committee ultimately reached unanimous agreement that, as a matter of policy, there is no need to change the general principle set forth in part 1-C-3 of the code, but that there is a need to change the illustrative and explanatory notes that accompany it and to set forth herein, an explanation of the intent of those changes and the impact they will have on past interpretations and applications of the code. We therefore propose that the general principle set forth in part 1-C-3 of the code be retained, but that the two illustrative and explanatory notes be replaced with four new notes. A copy of our proposal is attached to this report.

II. Proposed Changes and Commentary

> a. (1) providing accurate, objectively verifiable biographical information (including fees and expenses) for inclusion in administrative agency arbitration rosters, dispute resolution directories.

While the proposal to extend the code's coverage to employment arbitration brought this problem to the forefront, the problem would still exist even if the code is not amended. Any advertising for such work that includes biographical information would

ordinarily include some reference to the arbitrator's background and experience as an arbitrator of labor-management disputes.

Parties who utilize arbitration (and other forms of ADR procedures) to resolve employment disputes generally depend upon public and private agencies that maintain rosters and publish dispute resolution directories to provide information about the availability and background of arbitrators. Frequently, the agencies involved charge a fee for inclusion on such rosters or inclusion in such directories.

All members of the Committee agree that, so long as the biographical information provided by such means is accurate and objectively verifiable, such listings are appropriate, regardless of format. With regard to content, the Committee agrees that the type of information that is customarily included in FMCS and AAA biographical sketches (including fees and expenses charged) and in publications such as *Who's Who* or the *IRRA Membership Directory* (including representative publications) would undoubtedly be appropriate.

a. (2) providing name, address, phone numbers and identification as an arbitrator in telephone directories, change of address and/or change of services offered announcements.

For the same reasons as those set forth in the preceding subsection of this report, arbitrators whose practice extends beyond traditional labor-management disputes find it necessary to provide the parties they serve with information concerning their availability to provide the services in question and the information necessary to contact them. This includes the listing of an arbitrator's name, address and phone numbers under appropriate headings in telephone directories. Similarly, it would include the sending of announcements to give notice of such things as changes of address or changes in services offered.

b. Information provided under paragraph (a) may not include editorial or adjectival comments concerning the arbitrator's qualifications.

While all members of the Committee agree that past interpretations of what constitutes prohibited advertising ought to be modified to permit the free flow of information as described, to allow statements that are laudatory or self promotional would amount to an abandonment of the general principle. It was never the purpose of the prohibition, to interfere with the free flow of needed information. Its purpose has always been—and would remain

under our proposal—to discourage the type of conduct which goes beyond that which is reasonably necessary to give all potential users equal access to information concerning one's availability and credentials to serve in the role of a quasi-judicial decision-maker.

c. It is a matter of personal preference whether an arbitrator includes "Labor Arbitrator" or similar titles on professional letterheads, cards and announcements.

The first sentence found in part 1-C-3 a., as it currently appears in the code, was intended to make it clear that the use of titles such as "Labor Arbitrator" or other similar notations on letterheads, cards or announcements was not considered to constitute advertising. Our proposal would endorse the continuation of this non controversial practice. After considerable discussion and debate, the Committee agreed to delete the second, emphasized sentence, which currently serves to prohibit the inclusion of references to memberships or offices held in professional societies, including the Academy, or listings on rosters of administrative agencies on letterheads, cards and announcements. There was a strong consensus view that even though such practices may raise questions of taste—over which reasonable people may differ—the decision of whether to engage in such practices should be left to individual arbitrators. However, several committee members feel strongly that the code ought to continue to prohibit such conduct.

d. Solicitation, as prohibited by this section, includes the making of requests for arbitration work through personal contacts with individual parties, orally or in writing.

The code does not currently define what constitutes advertising or solicitation. New explanatory notes a., b. and c., as described herein, constitute a significant departure from the prior definition of prohibited advertising as it was reflected in the code and advisory opinions. In view of this, the Committee feels that it would be helpful to set forth a basic statement of what constitutes solicitation. It is not intended to be all inclusive. Its purpose is to set forth a fundamental distinction between advertising and solicitation.

III. Activities Not Covered

With these changes, part 1-C-3 will continue to place restrictions on advertising by *arbitrators* of labor-management disputes and it will place those same restrictions on *arbitrators* of employment disputes who will become subject to the code, if it is amended to

include such work. It will not place any new restrictions on advertising for work as a mediator, as an arbitrator of disputes not covered by the code or as a provider of any form of ADR services in other types of disputes.

It should also be pointed out that, like all code provisions, the remaining restrictions apply to individual arbitrators and not appointing agencies. Such agencies may choose to publish advertisements which include the names and background information of arbitrators on their roster, who may or may not be asked to share in the cost of such advertising. It is the Committee's understanding that such practices have become quite common in order to provide information to potential users of employment arbitration services and other ADR services, where the potential users have less access to such information than do the parties to labor-management disputes.

IV. Impact on Existing Opinions

Since the NAA began publishing advisory opinions in 1953, nine of the 22 opinions have dealt with advertising or solicitation. If the changes proposed in this report are adopted, Opinions 4 (reference to Academy or panel membership on letterheads), 17 (solicitation on behalf of intern), and 18 (whether various activities would violate the Code) would require substantive modification, and some other Opinions may need clarification.

Presented at San Francisco, California, on May 24, 1995, by The Committee on Professional Responsibility and Grievances:

George R. Fleischli, Chair

Reginald Alleyne
Mario F. Bognanno
Tim Bornstein
Martin A. Cohen
David E. Feller
Phyllis E. Florman
Margery F. Gootnick
I.B. Helburn
Nathan Lipson
Richard McLaren
Richard Mittenthal
Francis X. Quinn
Thomas T. Roberts
James J. Sherman
Janet Maleson Spencer
Donald T. Weckstein

New explanatory notes to 1.C.3 of the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes:

3. An arbitrator must not advertise or solicit arbitration assignments.

a. For purposes of this standard, advertising shall not include:

(1) providing accurate, objectively verifiable biographical information (including fees and expenses) for inclusion in administrative agency arbitration rosters, dispute resolution directories, and

(2) providing name, address, phone numbers and identification as an arbitrator in telephone directories, change of address and/or change of services offered announcements.

b. Information provided under paragraph (a) may not include editorial or adjectival comments concerning the arbitrator's qualifications.

c. It is a matter of personal preference whether an arbitrator includes "Labor Arbitrator" or similar titles on professional letterheads, cards and announcements.

d. Solicitation, as prohibited by this section, includes the making of requests for arbitration work through personal contacts with individual parties, orally or in writing.

[*Editor's Note:* Approved by the Board of Governors on May 24, 1995.]