CHAPTER 7

RECENT DEVELOPMENTS IN PROFESSIONAL ETHICS: IMPLICATIONS FOR ARBITRATORS AND ADVOCATES

I. INTRODUCTION

GEORGE R. FLEISCHLI*

In November 1984, Jean McKelvey made a presentation to members of the Academy at its continuing education conference in Chicago.[1] In that remarkable presentation, she described the historical development of the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes and the changes that had occurred since its adoption, 10 years earlier, in response to the urging of Alex Elson[2] and under the guidance of Bill Simkin.

Nearly 13 years have passed since Jean McKelvey delivered that paper. While the Code clearly has withstood the test of time, there have been some significant changes in its wording and coverage in the past 13 years, beginning with the establishment of new procedures for requesting permission to publish awards.[3] The most significant changes were formally adopted just last year in response to the dramatic changes in the social, economic, and legal environment in which labor arbitration exists today.

The adoption of these changes has not been without controversy. Some believe that the changes went too far; others maintain that they did not go far enough. While a clear answer to that continuing debate may or may not come with the passage of time, today you will have an opportunity to judge the situation for yourselves.

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[1]McKelvey, *Appendix D: Ethics Then and Now: A Comparison of Ethical Practices*, in Arbitration 1985: Law and Practice, Proceedings of the 38th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1986), 283.

[2]Elson, *Ethical Responsibilities of the Arbitrator: I. The Case for a Code of Professional Responsibility for Labor Arbitration*, in Arbitration and the Public Interest, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators, eds. Somers & Dennis (BNA Books 1971), 194.

[3]*See* §2.C.1.c (1996).

Our first panelist is Walter Gershenfeld, a distinguished scholar and arbitrator from Philadelphia and past president of the Industrial Relations Research Association. Walter will provide us with an overview of the situation, beginning with a summary of Jean McKelvey's observations in 1974 and concluding with his own observations about problems he sees developing as a result of, or in spite of, the changes to be discussed by the other panelists.

Dave Feller is well-known to all of you, primarily for his role in the development of the *Steelworkers Trilogy*[4] and as an eminent legal scholar and arbitrator. What you probably do not know about Dave is that, along with Richard Bloch and Tim Bornstein, he has become an authority on the ethical concerns that can arise when an arbitrator is asked to serve as an expert witness. Since April 21, 1976, it has been deemed "inconsistent with continued membership in the Academy" for a member admitted after that date to "undertake thereafter to serve partisan interests as advocate or consultant for Labor or Management in labor-management relations."[5] Because this restriction raises questions that are related to similar restrictions found in the Code itself, enforcement of the provision was reassigned from the Membership Committee to the Committee on Professional Responsibility and Grievances (CPRG) on May 20, 1991. When is it appropriate and when is it inappropriate for an Academy member to appear as an expert witness? Dave will offer his thoughtful opinions on that subject, which affects arbitrators and advocates alike and is being raised with increasing frequency in the current environment.

Don Weckstein and Phyllis Florman, who hail from San Diego and Louisville, respectively, both have had extensive experience in the study and enforcement of codes of ethical conduct. They both served on the CPRG during the period when the recent changes in the wording and coverage of the Code were being developed and contributed significantly to that effort. They were also responsible, along with Beber Helburn, for conducting an in-depth review of all prior advisory opinions and the drafting of annotations to those opinions. The changes they will discuss include the extension of the provisions of the Code to cover arbitrators who perform employment-related arbitration work. Those changes were drafted by a CPRG subcommittee, which I chaired for Alex Elson, after the

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[4]*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

[5]National Academy of Arbitrators By-Laws, art. VI, §6.

Board of Governors approved the recommendation of the Beck Committee (sometimes referred to as the "If Any" committee),[6] which called for such changes. Another significant recommendation of the Beck Committee—modification of the Academy's statement of purpose—was adopted only in part.[7] That is an area that, some maintain, will need to be revisited, along with the other area of change to be discussed today, modification of the limits on the restriction on advertising.

Within the ranks of the Academy's membership, the changes in the Code restriction on advertising were far more controversial than the change that prompted them, that is, the extension of the coverage of the Code to employment-related arbitration. I suspect that the opposite may be true among the ranks of the advocates present today. In either case, I hope that the presentations will provoke some worthwhile discussion and debate.

II. PROFESSIONAL ETHICS: ARE THEY A-CHANGIN'?

WALTER J. GERSHENFELD*

Yes, they are. Factors affecting change in arbitration include the growth of employment arbitration cases and related advertising developments, concern about arbitrators who have difficulty in performing their functions, and the problems posed by unilateral training relationships with parties. An additional emerging issue is the relationship of the signatories to the Code of Professional Responsibility for Arbitration of Labor-Management Disputes (Code), to each other with regard to the imposition of discipline for Code violations.

It is important to recognize that, with appropriate changes, the Code has served well the Academy and other signatories in the past, and I anticipate that it will continue to meet emerging needs as they arise.

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[6] *Appendix B: Report of the Committee to Consider the Academy's Role, If Any, With Regard to Alternative Labor Dispute Resolution Procedures*, in Arbitration 1993: Arbitration and the Changing World of Work, Proceedings of the 46th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1994), 325.

[7] *See* National Academy of Arbitrators Constitution, art. II, §1, where it remains the stated purpose of the Academy to establish and foster standards of conduct "among those engaged in the arbitration of labor-management disputes on a professional basis," but now goes on to state that it is also the purpose of the Academy to "promote the study and understanding of the arbitration of labor-management and employment disputes" and to "cooperate with other organizations, institutions and learned societies interested in labor-management and employment relations."

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Background

I begin by taking a short tour of the Academy's historic concern with questions of ethics. Two primary sources are the excellent papers by Alex Elson and Jean McKelvey documenting our early approach to ethics.[1]

The Academy's interest in ethics goes back to its formation in the late 1940s when the first two standing committees were Membership and Ethics. The American Arbitration Association (AAA) and the Federal Mediation and Conciliation Service (FMCS) were also interested in ethical matters, and the three groups joined in drafting a Code of Ethics and Procedural Standards for Labor-Management Arbitration in 1951. In 1971, Alex Elson noted that the 1951 statement was limited in that it emphasized what he termed "thou shalt nots" and failed to provide procedures for enforcement. He was also somewhat puzzled by what in retrospect appears to be *chutzpah* in the Code's inclusion of admonitions to parties regarding their behavior in arbitration. Elson stressed the goals of achieving or maintaining impartiality, competency, and expedition in the handling of cases, and control of fees and expenses. He successfully recommended use of the appellation "Professional Responsibility" borrowed from the Bar in connection with revision of the Code which took place in 1974. An additional Code change involving publication of opinions occurred in 1985.

Meanwhile, the Ethics Committee became the Ethics and Grievances Committee in 1965, and later the Committee on Professional Responsibility and Grievances (CPRG) in 1975.

In her 1984 paper, Jean McKelvey pointed out that the Code changes in 1974 took place as a result of the comments of Alex Elson and questions about the Code by Rolf Valtin, William Loucks, and Allen Dash, among others. While most of us did not agree with much of what Judge Paul Hays had to say, we were all conscious of his criticism of arbitration and arbitrators at the time. Other important reasons for change included growth in the public sector generally and interest arbitration in particular.

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[1]Elson, *Ethical Responsibilities of the Arbitrator: I. The Case for a Code of Professional Responsibility for Labor Arbitration*, in Arbitration and the Public Interest, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators, eds. Somers & Dennis (BNA Books 1971), 194; McKelvey, *Appendix D: Ethics Then and Now: A Comparison of Ethical Practices*, in Arbitration 1985: Law and Practice, Proceedings of the 38th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1986), 283.

Substantively, Jean McKelvey summarized the 1974 changes to the Code as follows:

> 1. It applies to any procedures in which the neutral is empowered to make decisions *or* recommendations.
> 2. It applies to *statutory* as well as voluntary procedures in which impartial third parties are called upon to function, such as advisory arbitration, impasse resolution panels, statutory arbitration, fact-finding, and other special procedures.
> 3. It stresses the importance of technical competence on the part of the arbitrator as well as the need for an arbitrator to keep current with the principles, practices, and developments in his or her field of arbitration practice.
> 4. It states the obligation of experienced arbitrators to cooperate in the training of new arbitrators.
> 5. It covers new areas such as mediation by an arbitrator and med-arb; independent research and reliance on other arbitration awards; the use of assistants; consent awards; the avoidance of delay; and detailed prescriptions on fees.
> 6. It sets forth standards of prehearing, hearing, and posthearing conduct.[2]

McKelvey pointed out that enforcement was mentioned only in the Preamble of the Code. However, it is present and has been applied, resulting in membership discipline by the CPRG. She noted that there had been only 11 advisory opinions issued by the CPRG in the first 33 years of its existence. That number has doubled in the 13 years since her 1984 presentation. From the beginning and to the present day, topics of importance have included advertising and solicitation. The 1985 Code also adopted Elson's request for more positive behavioral statements and ended, except in some indirect situations, the Academy's attempt to regulate the parties.

McKelvey emphasized that a major change involved recognition of our responsibility for keeping up with new substantive and legal developments. The interrelationship between substantive and legal developments has been highlighted recently by three factors: growth of nonunion employment arbitration, related advertising concerns, and the *Gilmer*[3] decision, which supported mandatory arbitration agreements involving statutory claims.

One outcome is that the Code was modified in 1996 to include nonunion employment and fair-share cases. Part II, A.3. of the 1996

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[2]McKelvey, *supra* note 1, at 291–92 (emphasis in original).
[3]*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 55 FEP Cases 1116 (1991).

Code, however, makes it clear that no arbitrator is obligated to accept either of these types of cases.

The next section of this paper will examine the nexus between alternative dispute resolution (ADR) and advertising, particularly as it has affected Academy members and the parties. Emphasis will be placed on advertising involving employment arbitration and mediation.

ADR, Advertising, and the Academy

Nonunion employment arbitration has seen growth in the last few years, especially in the major markets of New York City, Chicago, Los Angeles, and San Francisco. Although growth has taken place, it has not reached the level anticipated by many observers.

Appointing agencies, such as the AAA and JAMS/Endispute (JAMS), have entered into vigorous competition for the employment arbitration business. Nowhere has this been more marked than in California, where the competing agencies have recruited "stars" such as retired state supreme court justices and introduced them to the parties via newspaper advertising and well-provisioned cocktail parties, enticements that are "no-no" activities for Academy members handling labor-management arbitration cases.

In the past few years, some Academy members suggested that it was in order for the Academy to reconsider its ban on advertising. The immediate focus involved listing in a new Martindale-Hubbell *Dispute Resolution Directory*. Another concern was the use of "NAA" on members' business cards and stationery. Perhaps surprisingly from today's vantage point, such listings had been considered improper under the Code. Both requests were approved, and Advisory Opinion No. 18[4] of the CPRG was revised to those effects.

We have stopped short of going further with regard to advertising, or, indeed, solicitation. Solicitation raises a host of issues that go beyond advertising and are not covered in this paper. The basic thesis here is that the apparently simple change of allowing factual listings in directories is likely to lead to more in the way of full-scale advertising in the future.

The term "factual," like much contract language, is subject to interpretation. The Code indicates that biographical data are what

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[4]Code Provision 1-C-3: "An Arbitrator Must Not Advertise or Solicit Arbitration Assignments" (May 29, 1988).

was intended by factual, and adjectival or editorial comments are not acceptable. I do not believe that ends the discussion. For example, a number of individuals in this room have been selected, regionally or nationally, as AAA's Arbitrator of the Year. Is not a listing of that honor a "factual" biographical matter as opposed to an adjectival or editorial comment?

Further, some of our members have banded together to create organizations providing ADR services. Other members have ongoing proprietary relationships with profit-making providers. One leading activity that they engage in is mediation. Clearly, mediation is outside the Code, and advertising of mediation is legitimate. Or, is it?

Certainly, CPRG Advisory Opinion No. 21[5] supports the argument that neutral availability for mediation activity may be advertised. Reflecting the mediation/arbitration advertising dichotomy, I have been told by some member ADR providers that they will not advertise their availability for labor-management disputes, but that they feel comfortable in making their mediation talents known to the public.

One problem is that Advisory Opinion No. 21 "muddies the waters" by stating that a mediation advertisement may not be used when it is an "indirect suggestion of the availability of the author for arbitration assignments . . . ." How can it not be such an indirect suggestion when the advertisement indicates the abilities of the individual or firm in ADR work generally? ADR subsumes mediation and arbitration. If the word mediation is used by itself in an advertisement, there may be no problem, but, even here, I wonder about the carryover value of name recognition.

Further, the Preamble to the Code states that it does not apply to mediation or conciliation when there is no authorization in advance for the mediator to make decisions or recommendations. The typical interest mediator is usually not given any prior authority as such to make recommendations. However, mediators know they are frequently required to make recommendations for settlement of the dispute in which they are involved.

Technically, this could mean that arbitrator members have unknowingly come under the Code when they have not been explicitly retained as mediators with authority to make recommendations and then do so. I suspect strongly that we will create some

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[5]Advertising and Solicitation (May 26, 1991).

"Alice-in-Wonderland" decision situations for CPRG as a by-product of our attempts to regulate member advertising.

Illustratively, the Code now covers nonunion employment cases. Presumably, our ban on advertising, other than directory listings, applies to these cases. Should members facing strong advertising competition for employment cases have the option to consider advertising? If the answer is "yes," do we believe that advertising for employment arbitration cases has no carryover to labor-management cases? Of course it does. If the answer is "no," questions can be raised about enforcing an advertising ban on a dispute-resolution activity that is not a criterion for membership in the Academy. Also, non-Academy members who advertise their employment arbitration qualifications will probably not hesitate to let the world know of their labor-management arbitration qualifications.

I sense that many of us have an ingrained distaste for public relations. Just as with lawyers and doctors, the vast majority of us will be temperate in our approach to reaching the public. However, just as with lawyers and doctors, there will be some few who choose to cross the low-key line. My expectation, however, is that if we contest self-promotional efforts by arbitrators, we are likely to lose and will undergo unnecessary travail in the process.

One very legitimate concern involves the way the parties will perceive us if advertising is broadened. I believe they have demonstrated their ability to handle advertising by lawyers and select suitable advocates. The same is likely to happen if arbitrator advertising grows. And it will. Recently, in Florida I passed a full-scale billboard with a picture of a larger-than-life attorney who advertised his skills in mediating and arbitrating any and all disputes. I doubt that the parties who see that advertisement will seek that individual's services.

Given all of the circumstances and our proclivities, I anticipate that we in the Academy will temporize about additional advertising for a time. I also expect that accumulating pressures will result in significant liberalization of advertising before another decade passes.

Unilateral Requests for Training Assistance

I find growing concern by arbitrators about requests to provide training and similar assistance to individual parties. Companies, unions, and law firms have often asked us to conduct or review mock arbitrations or talk about arbitration trends and effective-

ness in arbitration. When such training takes place under neutral auspices and personnel from both sides are present, there is no problem. No real difficulty occurs under AAA or other sponsorship when either management or labor is represented by personnel from many union or management organizations. This is the sort of thing that occurs when we provide training for the George Meany Center or a manufacturers' association.

Many of today's arbitrators perceive that problems of neutrality arise when they are asked to perform training for one company, one union, or one law firm. The fact that the training is of a broad nature does not offset the identification with one side. At times, organizations such as AAA ask us to provide such training, and, feeling discomfort at the prospect of working for one side (even through neutral auspices), more of us are rejecting the invitation. Typically, if the invitation is accepted, the expectation is that the individual will not accept a future arbitration assignment involving that party. At the least, disclosure will be required, and I have elsewhere urged disclosure when there is any doubt about the right thing to do.[6]

The problem is compounded when an Academy member is asked to provide training for a law firm, be it management or labor. There may be a number of attorneys present whom you expect to see in subsequent arbitration cases. I suspect that many of them would be surprised if you disclosed the training for the law firm. Again, barring a heavily one-sided emphasis on training management or labor personnel by an arbitrator, the principal Code problem is disclosure, and I believe such disclosure is in order if the training has occurred recently, say within the past three years.

My observation is that a growing group of arbitrators are concluding that they prefer to preserve neutrality and do not want to become involved in necessary disclosure requirements. I expect surprise, particularly from individuals at law firms who find that arbitrators who handled training requests in the past for their organizations are no longer available. I would be interested in comments from the parties about this development.

Arbitrators With Personal Problems and the Code

Arbitrators occasionally hear from parties who try to tell them about problems they are having with other arbitrators. The arbitra-

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[6]Gershenfeld, *Professional Responsibilities of Arbitrators: Part II. Disclosure and Recusement—When to Tell and When to Leave*, in Arbitration 1991: Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1992), 218.

tors with whom I have spoken tend to discourage the recital of difficulties with other arbitrators and may suggest that the parties discuss the matter with the arbitrator involved or point out that they are free to go to appointing agencies and, in the case of an Academy member, to the CPRG.

Unless an individual is a close friend of the arbitrator involved, the matter has generally stopped there for the recipient arbitrator. If you happen to be friendly with the arbitrator who allegedly has a problem, you might try to discuss the situation, hopefully sensitively, with the individual. The sensitivity is particularly necessary when the underlying problem may involve substance abuse.

Probably the most pertinent portion of the Code is section 1.C.1., which states: "An arbitrator must uphold the dignity and integrity of the office and endeavor to provide effective service to the parties." An arbitrator who has a condition that affects performance, such that the goals of section 1.C.1. cannot be accomplished, should not be serving as an arbitrator.

We are fortunate that relatively few cases have found their way to the CPRG. Under the Code, allegations of arbitral misbehavior may be raised by either an affected individual or a member of the Academy.

One positive step scheduled to take place at this meeting of the Academy is a Code change authorizing an immediate past president of the Academy to bring charges in the event of a reported problem when no affected individual or member has taken such action. Unfortunately, in my opinion, this change requires charges when the apparent intent is solely to make a preliminary determination as to whether further investigation is desirable. The important point is that we are electing not to walk away from difficult Code questions that arise informally. In sum, we are no longer free to close the door of our hearing room and adopt the posture that what goes on in the next room does not affect us. If the process is being damaged, it does involve us.

An additional desirable step is the recent formation of a Special Committee on Arbitrator Assistance. We deal with parties who have had employee-assistance programs in existence for some time. Establishment of similar procedures for Academy members is desirable. The most positive aspect of employee-assistance activities is that it permits the member involved to seek help without adverse publicity. It also provides an opportunity for affected parties and members who may be loath to report a problem to the CPRG to have a meaningful alternative. The existence of the committee or its operational successor will encourage individual

members to talk with a colleague who may need encouragement to address a problem.

Code Discipline by Code Signatories

Finally, there is a growing concern about the relationship among Code signatories, NAA, AAA, FMCS, and the National Mediation Board, which also operates under the Code. The problem involves imposition of penalties for arbitrator misbehavior. The issue has come to the fore following publication of proposed new FMCS rules which include procedures for suspension or removal of arbitrators from the FMCS panel.

To the best of my knowledge, and as might be expected, the signatory agencies have all operated independently in dealing with complaints against arbitrators. Penalties imposed by one organization have no automatic parallel in another organization. I would not be surprised if most parties and arbitrators believe this is the way it should be. After all, the most common complaint is delay in issuing opinions by arbitrators, and the organization to which the complaint is directed is the one required to respond.

However, I do not believe the matter ends there. Would we not all benefit by an exchange of opinions among signatory organizations, both membership and appointing agencies, as to the standards on which they base their discipline? How much due process is involved, and how similar or different are the approaches to progressive discipline? Organizations would, of course, be free to adapt or adopt the product of these discussions as they see them meeting their needs.

I suggest that interorganization discussions should delve further in order to deal with other problems of alleged arbitrator misbehavior. If one organization learns of a situation and concludes the arbitrator is no longer fit to be on its list or membership rolls, should the other organizations be made aware of that fact? It is easy to understand that there will be positions on both sides of the question, but the bottom line is that we need to explore together such issues and their implications. Whatever the NAA and appointing agencies decide about problems arising in one bailiwick and about their impact on others should be a conscious decision.

Conclusions

The Code of Professional Responsibility has come a long way from its origins as an ethical statement of desired behavior. As

chronicled by Alex Elson and Jean McKelvey, we moved into an enforcement mode in the 1970s. Not unexpectedly, required interpretations of the Code have grown, particularly in the area of advertising.

The existence of the *Gilmer* decision and the growth of employment arbitration have brought new advertising issues to the fore. One question posed by this paper is whether or not minimal approaches to advertising (truthful listings in directories) are likely to end advertising questions. I have indicated my belief that advertising will grow.

The seemingly independent role of mediation advertising is questioned here, especially as it becomes involved with general ADR providers who are also available as arbitrators. Advertising of arbitrator availability for employment arbitration cases creates another set of problems.

Arbitrator assistance activity raises new Code questions. It also brings into sharp relief the potential for differential Code enforcement by Code signatories. The desirability of discussions among Code signatories is indicated.

As I stated in the title of this paper and its first paragraph, ethics are in a changing mode. Succeeding generations tend to believe their problems are unique. Fortunately, we have a sufficient number of seniors among our members and the parties such that a direct comparison can be made between the present and the past. My supposition is that there will be strong support for the thesis that ethical issues, although they have always been with us, are likely to become more significant and complex in the near future.

III. SERVICE BY AN ACADEMY MEMBER AS AN EXPERT WITNESS

DAVID E. FELLER*

Although this talk is listed under the heading "Recent Developments in Professional Ethics," I want to make it clear at the outset that the issue I am addressing is not, strictly speaking, a question of professional ethics at all. The question that I have been asked to address is not part of the Code of Professional Responsibility. It is rather a condition of membership in the Academy and applies, strictly speaking, only to Academy members and not to arbitrators generally.

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In 1976 the Academy amended the Membership section of its By-Laws to read that it is "inconsistent with continued membership in the Academy: (a) for any member who has been admitted to membership since April 21, 1976, to undertake thereafter to serve partisan interests as advocate or consultant for Labor or Management in labor-management relations...."[1] As a result, the question arose as to whether or not and under what circumstances this restriction prevents an Academy member from serving as an expert witness.

This is 1997. The question of whether service as an expert witness violates this membership policy has been around now for 20 years. Since the issue is not one of ethics, strictly speaking, but one of eligibility or continued eligibility for membership, the adjudication of the question was, for many years, properly the province of the Membership Committee or the Board of Governors. The By-Laws, however, did not specify any procedure for enforcement or interpretation. This was remedied in 1991 when article VI, section 6 was amended to provide that any charges or complaints alleging a violation of the membership policy should be referred to the Committee on Professional Responsibility and Grievances (CPRG) under article IV, section 1, which sets forth the procedure for prosecuting and adjudicating claims of violation of the Code. Hence, although the question is, strictly speaking, not a question of ethics, it has been analogized to one as a result of it being handled by the body designated in the By-Laws to handle questions of ethics.

The issue is one of delicacy and sensitivity, and although it was raised from time to time since 1976, nothing was done until 1995. That year, prompted by queries from two members of the Academy who had been asked to testify as experts, the CPRG appointed a subcommittee, consisting of Tim Bornstein as chair and Rich Bloch and myself as members, to consider the subject and make its recommendation. Rich and I had somewhat differing views. He had argued in a paper presented to the 44th Annual Meeting that an arbitrator asked to testify as an expert witness should "Just Say No."[2]

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[1]National Academy of Arbitrators, The Constitution and By-Laws, art. VI, §6.

[2]Bloch, *Professional Responsibilities of Arbitrators: Part I. Arbitrators as Expert Witnesses*, in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1992), 207.

Eventually we did agree on a report that set forth our respective views and the matter then went to the committee for its consideration. George Fleischli, who is chairing this session, prepared with some help a proposed opinion for the committee. Subsequently, that proposed opinion was accepted by the committee and has been approved by the Board of Governors at this meeting. I will now proceed to discuss the contents of that report.

It is important to make clear at the outset what we are and what we are not talking about. Members of the Academy may have all sorts of expertise that may serve to qualify them as expert witnesses. In addition to being arbitrators, they may have other unrelated areas of learning. I, for example, was found by a court to be a qualified expert to testify on the effect of the *Bakke*[3] decision on admissions policy at American law schools because I have put in many years as a member or chair of the admissions committee at Boalt Hall and had served on a committee of the American Association of Law Schools in connection with the *Bakke* case. Obviously my testimony on that subject would in no way conflict with the Academy's membership policy.

A related situation involved my testimony in a case before the U.S. Tax Court on the intricacies of the basic steel supplemental unemployment benefit plans. The issue before the court was whether the "contingent liability" incurred under the plans was really contingent and thus not currently deductible from a company's income, or whether it was absolute but contingent only as to the date of payment. As an expert on these plans, I testified in support of Inland Steel's position that, although labeled contingent, the liability was really not contingent.

What article VI, section 6 speaks to is advocacy "in labor-management relations," and what we are talking about is expertise relating to the arbitration process or the interpretation of collective bargaining agreements. First, as a result of their experience or study as grievance arbitrators, members may be said to have some expertise in labor relations. More particularly, they may qualify as experts on the grievance procedure and the role of the union in determining whether to take a grievance to arbitration and the necessity, if the procedure is to operate satisfactorily, for unions to screen grievances rather than automatically refer every grievance to arbitration.

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[3] *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 17 FEP Cases 1000 (1978).

Second, and even more specifically, experienced arbitrators may be able to offer testimony as to how, in their experience, particular claims of violation of a collective bargaining agreement would be decided by an arbitrator. On this second type of issue, a court may sometimes refuse to permit expert testimony on the theory that the question is a question of law for the court to determine. However, the question remains as to whether by agreeing to testify and preparing the testimony on such an issue a member would violate the policy established by the By-Laws.

Both kinds of questions arise in a lawsuit brought by an employee claiming that his or her union failed or refused to arbitrate his or her grievance. The second question arises because counsel in *Vaca v. Sipes*[4] failed to convince the Supreme Court that when a breach of the duty of fair representation is shown in such a case, the only remedy is to order the union to arbitrate. Once a breach of duty is shown, the Court said, it is appropriate for the Court to determine whether the grievance that was not arbitrated would have been granted, and if so, to provide the plaintiff with a remedy.

An example is *Buchholtz v. Swift & Co.*[5] In this case, I testified as an expert witness that the decision not to arbitrate was entirely reasonable because there was no merit in the vacation claim. The company denied vacation pay to over 1,000 employees when it closed a plant prior to the contractual eligibility date. The union filed grievances but agreed not to arbitrate in return for pension benefits for some older but unvested employees. The trial court found both a breach of the duty of fair representation and that the plaintiffs were entitled to the disputed vacation pay. It awarded more than $1 million in damages against both the company and the union. The court of appeals reversed, holding that the vacation pay was not due under the collective bargaining agreement.

Another situation in which an arbitrator may be offered as an expert witness would be a suit by an employer seeking damages for an alleged breach of a no-strike clause where the question is whether the particular action complained of constituted a strike in violation of the collective bargaining agreement.

In addressing these kinds of situations, there are competing considerations. A judicial proceeding is a search for the truth, and if a member of the Academy possesses expertise that would assist that search, it can be argued that the arbitrator, if a member of the

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[4]386 U.S. 171, 64 LRRM 2369 (1967).

[5]609 F.2d 317, 102 LRRM 2219 (8th Cir. 1979), *cert. denied*, 444 U.S. 1018, 103 LRRM 2143 (1980).

Academy, should not be precluded from providing that assistance. Sometimes that assistance is sorely needed, particularly if the matter is tried to a jury.

Let me give an example. In the case which became *Bowen v. U.S. Postal Service*,[6] an employee was discharged for engaging in fisticuffs. The union processed a grievance on his behalf, but when the matter was sent to national headquarters to determine whether to proceed to arbitration, a 15- to 30-minute review of the file persuaded the reviewer that the case should not be taken to arbitration. Bowen then sued both the employer and the union. A so-called expert witness testified for him. That expert's qualification was that she had processed grievances for and served as president of a small local union in a different industry. She testified that it was impossible to determine fairly whether to process a grievance to arbitration in 15 to 30 minutes. Relying on that testimony, the jury found that the union's decision was "perfunctory" and that it therefore had breached its duty of fair representation in refusing to arbitrate. The jury also found that Mr. Bowen had been improperly discharged and assessed substantial back and front pay. It is my firm belief that an experienced arbitrator could truthfully testify that it would take perhaps less than 15 minutes to determine that a grievance in that situation was not winnable and should be abandoned, but no such expert testimony was offered by the employer or by the union.

In determining whether the By-Laws permit a member to testify as an expert in a situation like *Bowen*, the committee concluded there are really two questions. The first is whether giving expert testimony is the same as acting as a consultant or advocate for the party calling the witness. The committee concluded that it is. Although an expert witness, like other witnesses, is sworn to tell only the truth, it is nevertheless also true that a party employs the expert, pays the expert, and does so only to advance his or her cause. Indeed, a party will not produce an expert witness unless satisfied as a result of prior consultation with the witness that the proffered testimony will have the effect of advancing its case.

That, however, leaves unanswered a second question. Article VI, section 6 speaks only of serving "partisan interests . . . for Labor or Management in labor-management relations." If labor and management were aligned on the same side in a proceeding, does

[6]459 U.S. 212, 112 LRRM 2281 (1983).

service as an advocate or consultant serve "partisan interests?" The answer, the committee concluded, was "no." The intention of article VI, section 6 was to prevent members from serving either management or labor in opposition to the other. Hence, to refer back to the *Bowen* case, testimony as an expert defending against Mr. Bowen's claim against both parties would be permissible.

That conclusion holds even if, unlike the situation in *Bowen*, only management or (less likely) only labor, that is, the union, were named as a defendant. The question is whether there is a conflict between them and the expert is serving one against the other.

Under this interpretation, would it be permissible for an Academy member to serve as an expert for a plaintiff, in opposition to both management and labor? The answer is yes. My own view is that a member should not do so, but I do not base that view on the By-Laws and will discuss that issue later.

The By-Laws ban has certain limits. When it was adopted in 1976, it was expressly made inapplicable to those who became members prior to its adoption on April 21st of that year. They are permitted to act as advocates for or consultants to either management or labor, if they so desire. Nor does the ban apply, in the committee's opinion, to expert testimony that is produced in response to an order by the trial judge or other decisionmaker provided that the order is not procured by a party to the litigation.

There are other situations, referred to in the committee's report but not spelled out in its opinion, in which the ban would not apply. Among those would be testimony before a congressional committee or similar body on proposed legislation about labor-management relations. Nor, as I have indicated earlier, would the ban apply to expert testimony not related to "labor-management relations."

Everything that I have so far said deals with the question of whether an Academy member may testify as an expert witness without violating the Academy's By-Laws. Nothing, and I repeat, nothing that I have said deals with the question of whether a member should do so. Rich Bloch argued strongly at our 1991 meeting that even where there is no conflict between management and labor members should "Just Say No." He argued that by providing testimony for the defendants in a suit brought by a grievant against both the company and the union "there is a certain tarnishing potential . . . in the Company and the Union joining hands to defend the grievance procedure that may well be attacked as collusive in the first place." He particularly objected to an

arbitrator who testified for a plaintiff on the merits of a grievance in a lawsuit arising from the refusal of a union to arbitrate. It "is certain," he said, "the arbitrator is not, and may not be, an advocate. Yet, here the arbitrator becomes an advocate, a rent-a-judge . . . ," a posture inadvisable for an arbitrator.

That is certainly a tenable position, but it is not a question of ethics, even assuming that testifying is a question of ethics. My *Webster's New World Dictionary* distinguishes between the words "ethical," "moral," and "virtuous." "Ethical," it says, implies conformity with an elaborated code "sometimes specifically with a code of a particular profession." "Moral" implies conformity with generally accepted standards of goodness or rightness in conduct or character, and "virtuous" implies a morally excellent character, connoting justice and integrity. The question of whether a member should, as a matter of choice, testify as an expert where permitted by the By-Laws is really a question of virtue on which members of the Academy are entitled to differ.

My own view about the case that Rich discussed, where a member testified in support of the plaintiff that his grievance, if arbitrated, would probably have been sustained, is that his view is the one I would elect to follow, but for different reasons.

To be quite specific, if an arbitrator were satisfied that there is no collusion between management and labor and the union quite appropriately determined not to process a grievance for permissible reasons—as was the case in *Bowen* and in *Bucholtz*, a case in which I did testify—I believe that it is entirely virtuous for an arbitrator to testify as an expert witness in defense of both management and labor.

On the other hand, my personal view is that the converse is not true. I would not agree to testify on behalf of a disappointed grievant against both management and labor unless I believed that there was in fact collusion between them. The reason is not that by testifying I would be assuming the role of an advocate. Of course, I would. But I would be an advocate against the collective bargaining process that necessarily and properly requires unions in certain circumstances to refuse to arbitrate dubious grievances or even, on occasion, to trade them for benefits accruing to the larger group that the union is obligated to serve. But this, as I have said, is not a matter of ethics or of membership policy but one of virtue on which Academy members are entitled to differ.

Two cautionary notes. I do believe that where there is any uncertainty as to whether there is a conflict between the interests

of management and labor in a particular proceeding, the answer is not to "Just Say No" but to ask. If management requests your service as an expert in a proceeding and there is any uncertainty as to whether the union involved has a view contrary to that of management, or vice versa, just ask and refuse to testify if you discover a conflict.

Second, remember section 201 of the United States Criminal Code.[7] It makes it a crime, punishable by fine and imprisonment, to receive or accept anything of value for testifying in any trial, permitting only the statutory witness fee and the cost of travel, subsistence, and the value of time lost. There is an exception in the case of expert witnesses. They may receive "a reasonable fee for time spent." Academy members should make certain then that any testimony they provide comes as a result of being properly qualified as an expert. Otherwise members risk going to jail for accepting a fee in excess of their daily arbitration charge.

IV. Alternative Dispute Resolution, Advertising, and the Code

Phyllis E. Florman*

Congratulations to the National Academy of Arbitrators (NAA) on its 50th anniversary. An invitation to address the Academy is a privilege at any time. But it is especially so in 1997 as we mark our half-century anniversary. It is a wonderful and perhaps amazing achievement.

We are in good company. In 1947 Jack Roosevelt "Jackie" Robinson broke the color barrier in major league baseball. In 1947 the Taft-Hartley Amendments to the National Labor Relations Act were passed. And in 1947 the Academy was founded. Each of these events is a milestone.

The revisions to the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes are milestones as well. There are now three of them. Each reflects a shift in scope, focus, and coverage. The most recent one, effective in the year preceding the Academy's 50th Anniversary, embodies a major shift.

The presentation addresses two 1996 Code revisions. One extends coverage to employment disputes, including fair share fee

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[7] 18 U.S.C. §210.

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disputes. The other revises the illustrative and explanatory notes that accompany the advertising and solicitation ban.

Extending the Coverage of the Code to Arbitration of Employment Disputes

Background

Use of the arbitration process to resolve employment disputes in the unionized sector of the U.S. work force is well-established. In 1960 the U.S. Supreme Court endorsed the process in the *Steelworkers Trilogy*.[1] Safeguards for unionized employees and employers are entrenched in the culture.

Arbitration as a means of resolving employment disputes in the nonunion sector is a much more recent phenomenon. It is of particular importance to the Academy for several reasons. First, almost 90 percent of the private sector of the U.S. work force is nonunionized. Second, the Commission on the Future of Worker-Management Relations (the Dunlop Commission) examined the use of alternative dispute resolution (ADR) procedures and concluded that parties should be encouraged to adopt alternatives to litigation, but that any private system should meet standards of fairness.

Furthermore, in 1991 the U.S. Supreme Court in *Gilmer*[2] held that nonunion employees may be precluded from suing in court where an arbitration procedure is in place as part of the individual contract of employment. This represents a significant departure from the *Alexander v. Gardner-Denver Co.*[3] pronouncement in 1974, in which a unanimous Supreme Court held that employees covered by a collective bargaining agreement have the right to sue under antidiscrimination or related statutes regardless of the existence of an arbitration clause in that agreement and an arbitrator's award.

The developing interest in ADR generated a number of responses that impact on Academy members. Among them was the approval by the American Bar Association in 1995 of "A Due Process Protocol for Mediation and Arbitration of Statutory Dis-

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[1] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

[2] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 55 FEP Cases 1116 (1991).

[3] 415 U.S. 36, 7 FEP Cases 81 (1974).

putes Arising out of the Employment Relationship."[4] Another was that the Academy has expanded the scope and coverage of the Code to include arbitration of employment disputes. How did this evolve?

In May 1990, then–President-Elect Howard S. Block and President-Elect Nominee Anthony V. Sinicropi jointly appointed a committee to consider the Academy's role, if any, with regard to alternative labor dispute resolution (ALDR) procedures. Chaired by Michael H. Beck, the committee's charge was set forth by President-Elect Block as:

> In recent years, an increasing number of Academy members have been asked to serve in cases involving: (1) arbitration of grievances in unorganized plants; (2) mediation of grievance and interest disputes; and (3) wrongful termination. It is time, I believe, to determine whether the Academy can play a constructive role in one or more of these areas. In particular, I have in mind consideration of the practical and ethical questions confronted by our members as well as the additional training and education that might be indicated in order to broaden a labor arbitrator's basic skills in these areas.[5]

The Beck Committee's 1993 final report recommended "a significantly broader institutional role for the Academy with respect to the arbitration of employment disputes outside the context of a collective bargaining agreement."[6] Its report explained that a basic question concerned the Academy's present authority for an expanded role,[7] and it determined that the Academy's Constitution should be amended to cover those disputes.[8]

Amending the Constitution

To implement the recommendations that were adopted, article II, section I of the NAA Constitution, which sets forth the purposes of the Academy, was amended on June 1, 1993. The words "and employment" have been added in two places:

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[4] *Appendix B: A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, in Arbitration 1995: New Challenges and Expanding Responsibilities, Proceedings of the 48th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1996), 298.

[5] *Appendix B: Report of the Committee to Consider the Academy's Role, If Any, With Regard to Alternative Labor Dispute Resolution Procedures*, in Arbitration 1993: Arbitration and the Changing World of Work, Proceedings of the 46th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1994), 325, 325.

[6] *Id.* at 340–41.

[7] *Id.* at 329.

[8] *Id.* at 341.

Section I. The purposes for which the Academy is formed are: . . . to promote the study and understanding of the arbitration of labor-management and employment disputes; . . . to cooperate with other organizations, institutions and learned societies interested in labor-management and employment relations, ...

Amending the Code

Added to the Foreword is the paragraph:

In 1996, the wording of the Preamble was amended to reflect the intent that the provisions of the Code apply to covered arbitrators who agree to serve as impartial third parties in certain arbitration and related procedures, dealing with the rights and interests of employees in connection with their employment and/or representation by a union. Simultaneously, the provisions of 2 A.3. were amended to make clear that an arbitrator has no obligation to accept an appointment to arbitrate under dispute procedures adopted unilaterally by an employer or union and to identify additional disclosure responsibilities for arbitrators who agree to serve under such procedures.

Added to the Background of the Preamble is:

The provisions of this Code deal with the voluntary arbitration of labor-management disputes and certain other arbitration and related procedures which have developed or become more common since it was first adopted.

. . .

Arbitrators of labor-management disputes are sometimes asked to serve as impartial third parties under a variety of arbitration and related procedures dealing with the rights and interests of employees in connection with their employment and/or representation by a union. In some cases these procedures may not be the product of voluntary agreement between management and labor. They may be established by statute or ordinance, *ad hoc* agreement, individual employment contract, or through procedures unilaterally adopted by employers and unions. Some of the procedures may be designed to resolve disputes over new or revised contract terms, where the arbitrator may be referred to as a Fact Finder or a member of an Impasse Panel or Board of inquiry, or the like. Others may be designed to resolve disputes over wrongful termination or other employment issues arising under the law, an implied or explicit individual employment contract, or an agreement to resolve a lawsuit. In some such cases the arbitrator may be referred to as an Appeal Examiner, Hearing Officer, Referee, or other like titles. Finally, some procedures may be established by employers to resolve employment disputes under personnel policies and handbooks or established by unions to resolve disputes with represented employees in agency shop or fair share cases.

The standards of professional responsibility set forth in this Code are intended to guide the impartial third party serving in all of these diverse procedures.

The description of the Code's Scope has been rewritten to read:

> This Code is a privately developed set of standards of professional behavior for arbitrators who are subject to its provisions. It applies to voluntary arbitration of labor-management disputes and the other arbitration and related procedures described in the Preamble, hereinafter referred to as "covered arbitration dispute procedures."

Part 2, A.3 of the Code (Part 2. Responsibilities to the Parties, A. Recognition of Diversity in Arbitration Arrangements) contains a new paragraph;

> 3. An arbitrator who is asked to arbitrate a dispute under a procedure established unilaterally by an employer or union, to resolve an employment dispute or agency shop or fair share dispute, has no obligation to accept such appointment. Before accepting such an appointment, an arbitrator should consider the possible need to disclose the existence of any ongoing relationships with the employer or union.
>
> a. If the arbitrator is already serving as an umpire, permanent arbitrator or panel member under a procedure where the employer or union has the right unilaterally to remove the arbitrator from such a position, those facts should be disclosed.

What Is Not Included in the Expanded Scope of the Code

Mediation activities continue to be excluded from coverage of the Code. There is no intent to abandon the basic, traditional role of the Academy in connection with collective bargaining. Rather, the stated intent is to recognize the changing nature of labor relations, to address the expanding role of Academy members in employment matters beyond the collective bargaining context, and to remain an association of arbitrators.

Revising the Illustrative and Explanatory Notes That Accompany the Advertising and Solicitation Ban

Background

Institutional interest in employment disputes outside the collective bargaining context drove the review of Part 1, C.3. of the Code: An arbitrator must not advertise or solicit arbitration assignments.

By action taken at the Annual Meeting of the Academy in Minneapolis in May 1994, the Board of Governors asked the Committee on Professional Responsibility and Grievances (CPRG)

to consider the question, "Whether as a matter of NAA policy, the current Code ban on advertising should be continued?"[9]

Membership opinion was sought through various means, including an Open Forum in Boston at the Fall Education Conference in October 1994. CPRG Chair George Fleischli reported to the Board at its May 1995 meeting that the CPRG found that a "strong consensus has emerged among our members concerning the need for a modification but not a repeal of the ban on advertising."[10] The committee 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.[11]

Amending Part 1.C.3. of the Code

Part 1, Arbitrator's Qualifications and Responsibilities to the Profession, C. Responsibilities to the Profession, retains the principle: An arbitrator must not advertise or solicit arbitration assignments. However, original paragraphs a and b have been eliminated. They *had* read:

> a. It is a matter of personal preference whether an arbitrator includes "Labor Arbitrator" or similar notation on letterheads, cards, or announcements. *It is inappropriate, however, to include memberships or offices held in professional societies or listings on rosters of administrative agencies.*
>
> b. *Information provided for published biographical sketches, as well as that supplied to administrative agencies, must be accurate.* Such information may include membership in professional organizations (including reference to significant offices held), and listings on rosters of administrative agencies.

Paragraphs a and b have been changed and new paragraphs c and d have been added. They state:

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[9] *Appendix C: Report of the Committee on Professional Responsibility and Grievances Concerning the Code Ban on Advertising,* in Arbitration 1995: New Challenges and Expanding Responsibilities, Proceedings of the 48th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1996), 305.

[10] *Id.* at 306.

[11] *Id.* at 307.

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.

Impact of the Revisions

This significant departure from the 1985 Code reflects five current Academy policies. First, so long as information being provided by an Academy member meets the content standards set out in Part 1, C.3.a.(1), the listing is considered appropriate, regardless of its format. This is in recognition of the fact that users of administrative agency arbitration rosters and of dispute resolution directories do so to gain information about an arbitrator's background, experience, and availability.

Second, it reconfirms, that it was never the intent of the advertising ban to interfere with the free flow of needed information. The intent and purpose has been to discourage the type of conduct that 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 decisionmaker. Part 1, C.3.a.(2) specifically addresses telephone directory and announcement information.

Third, the prohibition on including memberships, or offices held, or roster listings on letterheads, cards, or announcements has been deleted. This acknowledges it is a matter of taste, rather than of regulation, and is to be left to personal choice.

Fourth, there can be no ambiguity that editorial or adjectival comments regarding one's qualifications are inappropriate. This is to ensure that advertising and other forms of communication will not be deceptive, false, or misleading.

Fifth, to set forth a fundamental distinction between advertising and solicitation, a basic statement of what constitutes solicitation has been included.

Activities Not Covered

Part 1, C.3. does not reach advertising or soliciting of mediator services, or activities of appointing agencies, or other forms of ADR services outside the scope of the Code.

As we study these changes to the scope, focus, and coverage of the Code, it becomes evident that the Academy membership is to be commended for continuing to take responsibility. *Proceedings* of the Academy are replete with thoughtful papers reviewing responses to ethical dilemmas that bubbled up, or in some cases erupted, over the course of our 50 years. As the arena in which we find ourselves, as individuals and as an institution, continues to evolve, the Code continues to guide, lead, and inspire us to recognize and to accept the obligations that come with the honor of Academy membership.

V. PROFESSIONAL RESPONSIBILITY CODE AMENDMENTS, ADVISORY ETHICS OPINIONS, AND THE FUTURE

DONALD T. WECKSTEIN*

The Impact of 1996 Code Amendments on Opinions of the Committee on Professional Responsibility and Grievances

The Code of Professional Responsibility for Arbitrators of Labor-Management Disputes (Code) has provided the principal source of ethical standards for labor arbitrators since it was approved in 1951. The Code was drafted by a joint committee of the National Academy of Arbitrators, the American Arbitration Association (AAA), and the Federal Mediation and Conciliation Service (FMCS), and it has been applied by these original sponsors, the National Mediation Board (NMB), and numerous other state, local, and private agencies. As summarized by Walter Gershenfeld[1]

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During the debates, consideration, and adoption of the amendments, the author served as a member of the Committee on Professional Responsibility and Grievances (CPRG); a member of the ad hoc committees (1) to consider potential ethical standards if the Code were amended to cover mediation (Rehmus Committee), and (2) to recommend Code revisions regarding advertising and solicitation (Kagel Committee); as well as Recorder for CPRG's consideration of the advertising issue. While this article reflects information and insights I acquired in these capacities, the opinions expressed herein are those of the author and do not necessarily reflect those of other committee members or of the Academy.

[1]As noted therein, the code was originally styled as a Code of Ethics and Procedural Standards for Labor-Management Arbitration. The present title was adopted in 1974.

earlier in this chapter, the Code has been substantively amended in 1974, 1985, and 1996. This paper will focus on the purposes of the 1996 amendments to the advertising provisions of the Code. I will indicate how the amendments were influenced by, and, in turn, impacted upon existing Formal Advisory Opinions of the National Academy's Committee on Professional Ethics and Grievances (CPRG).[2] In addition, an attempt will be made to identify developments concerning arbitral ethical standards that are likely to take place in the near future, especially concerning employment dispute arbitration.

Why Were the Advertising Standards Modified?

The amendments to the Code's advertising provisions, adopted in 1996, were intended to serve two objectives that in the past had been considered somewhat incompatible. It was deemed important that we continue to maintain the dignity of the labor arbitration profession and the integrity of its members. At the same time, we recognized the need to provide potential users of arbitration services with factual information about arbitrators that was relevant to their selection.[3] Thus, the amendments to Part 1, C.3. preserved the general prohibition on arbitrators advertising or soliciting but redefined those terms to exclude from the proscription the providing of accurate and objective information that parties might need or want in selecting an arbitrator.

The permissible scope of this information will vary with its context. Extensive biographic information is more appropriate in a dispute resolution roster or directory that is likely to be consulted by a party in search of an arbitrator than in a change of address or services notice. The amendments appropriately allow information of the latter type to be broadly distributed, but not to be used as a courier for an implied solicitation of arbitration appointments. In neither type of distribution, however, are editorial or adjectival

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[2]The Committee has been variously labeled over the years: "Committee on Ethics" between 1947 and 1965; "Committee on Ethics and Grievances" between 1965 and 1975; and "Committee on Professional Responsibility and Grievances" from 1975 to date. For ease of reference, the abbreviation of its latest title, "CPRG," or "the Committee" will be used in this paper.

[3]*See Appendix C: Report of the Committee on Professional Responsibility and Grievances Concerning the Code Ban on Advertising*, in Arbitration 1995: New Challenges and Expanding Responsibilities, Proceedings of the 48th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1996), 305, 307–09 [hereinafter called CPRG Report]. *See also* Gruenberg, Najita & Nolan, The National Academy of Arbitrators: Fifty Years in the World of Work (BNA Books 1997), 205–07, 290–93; Florman, *supra*, this chapter.

comments or endorsements concerning a particular arbitrator permissible since they go beyond strictly factual data and have a tendency to be misleading.[4]

The availability of more information in a greater variety of sources concerning the qualification of potential arbitrators was recognized as being of particular value to those selecting neutrals to resolve statutory and other employment disputes not arising out of collective bargaining between employers and unions. To some extent, at least the timing of the advertising amendments was driven by the expansion of the Code to include arbitration of employment disputes. It was recognized that the dissemination of biographical data to management and union parties in traditional labor arbitration was less necessary because they were likely to be repeat users with access to a variety of networks and publications concerning the qualifications of labor arbitrators. Thus, few arbitrators were likely to take advantage of broadened advertising opportunities to increase their labor arbitration practice since such efforts would probably be unnecessary, unwelcome, and even counterproductive.

The market for arbitration of employment disputes, however, is very different. It is quite competitive among major institutional provider agencies and individual would-be arbitrators. Although some employers might employ both labor and employment arbitrators, individual employees are likely to be represented, if at all, by a broader range of advocates who, at least initially, will not be repeat users with access to pertinent information regarding qualified, neutral dispute resolvers. Unlike the situation in labor arbitration, the market for employment arbitration is not as heavily populated by National Academy members. Indeed, extensive service as a labor arbitrator may hamper, rather than help, selection by employers fearful of the labor arbitrators' "just-cause" orientation, or by employee-claimant representatives seeking more extensive remedies than are customarily awarded by labor arbitrators. Under these circumstances, an arbitrator's experience and back-

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[4] *Compare* American Bar Association Model Rules of Professional Conduct, Rule 7.1 (1983), stating: "A communication is false or misleading if it: . . . (c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated."

Walter Gershenfeld questions whether being given an honor, such as AAA Arbitrator of the Year, is factual data, permissible in a biographic sketch, or a forbidden adjectival or editorial comment. See Gershenfeld, *supra*, this chapter. I believe it falls into the permissible, factual category. An apt analogy may be found in the rules of major league baseball salary arbitration which prohibit consideration of testimonials and comments of the press but permit the arbitrator to consider recognized awards for playing excellence. *See, e.g.*, Major League Baseball Basic Agreement, art. VI, §F(12)(b)(1990–1993).

ground should be available to potential parties both as a matter of fair competition and accurate disclosure.

Another factor leading to the Code's advertising amendments was the existence of previously issued formal advisory opinions (FAOs) that had interpreted the Code in a manner that restricted the dissemination of pertinent data about arbitrators. Some of those restrictions were now recognized as unnecessary to preserve the dignity and integrity of the labor arbitration process or profession. The controversy concerning paid listings in the Martindale-Hubbell *Dispute Resolution Directory*[5] illustrated this problem and resulted in an interim opinion permitting such listings.

Opinions issued by the CPRG have played an important role in articulating the ethical posture of the Academy and have provided a useful gloss on the meaning of the Code. That role and the impact of the 1996 amendments on preexisting FAOs will now be examined.

The Role and Nature of Formal Advisory Opinions

Among the By-Laws functions of the CPRG is the duty to advise the Academy membership and others by written communication concerning the application of the Code to particular situations. CPRG also is charged with the duty to decide when an FAO should be issued. Only after a proposed FAO has been provided to, and approved by, the Board of Governors, however, may it be issued by CPRG.[6] On some occasions, opposition of Board members has resulted in withdrawal or modification by CPRG of a proposed opinion. This nonaction, although far from definitive, also can influence how the Code will be interpreted.

Until 1975, when the Academy adopted a complaint and due process adjudication procedure, FAOs, which were issued on matters of general application, served as the primary mechanism to achieve Code compliance by covered arbitrators.[7] In many cases, however, the committee chair, sometimes after consultation with other members, procured adherence to Code provisions by counseling individual members when they requested advice or on initiative of the committee when a troublesome matter was brought to its attention. This informal method still continues as an effective control mechanism.

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[5]*See* CPRG Report, *supra* note 3, at 306.
[6]National Academy of Arbitrators By-Laws, art. IV, §2(a) (as amended 1984).
[7]*See* Gruenberg, Najita & Nolan, *supra* note 3, at 202.

Formal Advisory Opinions and the 1996 Advertising Amendments

As a result of the interaction between the highly respected leadership of the CPRG and Academy members, the perceived need for the issuance of formal advisory opinions during the 50 years of Academy existence has been limited. To date, CPRG has issued 23 FAOs. Of these, nine have dealt with issues relating to advertising or solicitation. Prior to the submission of the advertising amendments for approval by the Board and adoption by the membership, CPRG Chair George Fleischli appointed a subcommittee to identify the impact the amendments would have on existing formal opinions. The subcommittee determined that four of the FAOs required modification as a result of the 1996 Code amendments. While a redrafting of these opinions was considered, the committee opted, instead, to add a "CPRG Note (June 1996)" to those Opinions[8] to reflect their current efficacy and to provide notes on other opinions, whether or not dealing with advertising or solicitation, that merited clarification or amplification as an aid to their contemporary understanding and application.

The FAOs requiring a different response, at least in part, in light of the 1996 amendments to Part 1, C.3. of the Code, and the nature of those modifications, will be summarized here briefly.

Opinion No. 3 (April 4, 1972) involved a proposed letter-notice sent by an arbitrator to parties for whom he had heard cases during the year that he would be out of the country for six months and unavailable to hear cases. The committee concluded that this letter would be unethical because (1) it was to be sent to persons with whom he did not have a continuing relation (as an umpire or panel member), and it was not sent in response to requests for hearing dates; and (2) it would constitute an implied solicitation that future cases be referred to him upon his return. Although rendered pursuant to a Code provision that later was superseded by an amendment effective in 1975, the language of that amendment would not have altered the opinion's result. The 1996 amendments, however, would modify the committee's first stated conclusion because the amendments expressly permit an arbitrator to send an announcement of a change of address, or of services

[8]These include Opinions No. 7 (June 10, 1980), Donation of Arbitration Files to Libraries, updated Code references in light of 1985 Amendments; 10 (October 1, 1982) and 11 (May 24, 1983), Publication of Awards and Opinions, superseded by 1985 Amendments; and 22 (May 26, 1991), Duty to Disclose, noting need to consult applicable laws.

offered, to generally interested persons whether or not they have a current and continuing relation with the arbitrator.

The second ground for disapproval, according to the 1972 committee, was that this notice of unavailability was "precisely the kind of solicitation which . . . the Code meant to prevent. . . .[T]he purpose of the prohibition . . . is to avoid the appearance of advertising or solicitation." In retrospect, when viewed by this 1997 labor arbitrator and professional ethics scholar, these observations appear overstated. Many acceptable activities of labor arbitrators—writing books or articles, giving speeches, or teaching classes on labor law or arbitration—have marketing value and could be said to give an "appearance of advertising or solicitation." They are not condemned, however, and may indeed be encouraged, because they serve other legitimate purposes beyond their implicit advertising value. Likewise, notices of unavailability, change of address, or of services offered also serve legitimate purposes when sent to parties who may have an interest in such information. This acceptable purpose should be seen as outweighing any appearance of advertising or solicitation.

Opinion No. 4 (April 3, 1973) stated that it would be "a gross impropriety" for an arbitrator to list membership in the National Academy of Arbitrators or on panels of the AAA or FMCS on a professional letterhead. This conclusion was made even more explicit by a 1975 amendment to the general language of the 1951 Code. The 1975 language stated that it was inappropriate for a labor arbitrator "to include memberships or offices held in professional societies or listings on rosters of administrative agencies" on letterheads, cards, or announcements. This language, however, was intentionally omitted by the 1996 amendments, thus implying that such listings would no longer be unethical. In debating the proposed amendments, this implication generated considerable discussion within the Academy. Ultimately, however, it was agreed that such listings were a matter of taste rather than ethical responsibility and were best left to the personal discretion of individual arbitrators.[9]

Opinion No. 17 (May 29, 1988) held that a letter proposed to be sent by an arbitrator-mentor soliciting arbitration business on behalf of his intern was improper because (1) it was sent to parties with whom the mentor had no continuing relationship; (2) the

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[9] *See* CPRG Report, *supra* note 3, at 309; Gruenberg, Najita & Nolan, *supra* note 3, at 293.

intern's biographic sketch made reference to the mentor's Academy membership and extensive arbitration experience; and (3) the intern was to pay the mentor 10 percent of fees earned (as a method of paying the mentor for office space), thus giving the mentor a financial interest in the solicitation. While the proposed solicitation would still violate the Code as amended in 1996—especially because of the arbitrator-mentor's financial interest in soliciting on behalf of the intern—it would no longer be improper for such a letter to be sent to persons with whom the mentor did not have a continuing relation or to refer to the mentor's NAA membership. If the intern's biographic sketch unduly emphasized the extensive labor arbitration experience of the mentor, that too could be a basis for advising against the letter. Opinion 21, to be discussed below, suggests that a communication sent to parties that retain labor arbitrators and that seeks dispute resolution business not covered by the Code could still run afoul of the Code if it disproportionately emphasizes the sender's labor arbitration background.

It is noteworthy that Opinion No. 17 illustrates that the committee is willing both to tackle ethical issues not directly addressed by the Code and to interpret the potentially applicable provisions of the Code by balancing all of the interests of the Academy, not just those concerned with solicitation and advertising. Thus, the Committee recognized that the NAA has an interest in encouraging members to help train new arbitrators,[10] and implicit in the mentor-intern relationship is an expectation that once the mentor has confidence in the intern's ability, the mentor will aid the intern's career development. Accordingly, while solicitation on the mentor's own behalf would be precluded by the Code, the committee recognized that recommending the intern to parties who are familiar with the mentor would not necessarily be improper. The propriety of such recommendations on behalf of the intern would depend on "such factors as the manner in which the parties were contacted, the mentor's connection to the parties, and the nature of the recommendation." This guidance of the committee remains valid after the 1996 amendments, although, as noted, it is no longer required that the parties contacted have a current or continuing relationship with the mentor.

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[10]Code, Part 1, C.2. states: "An experienced arbitrator should cooperate in the training of new arbitrators."

Opinion No. 18 (May 29, 1988) denotes, without explanatory reasons, whether various activities would or would not violate the antiadvertising and solicitation provisions of the Code. Under the 1996 amendments, contrary to this opinion, no violation would occur for the following activities: Item 2, referring to one's NAA membership or membership on AAA, FMCS, or other panels; Item 10, purchasing a listing in the "Yellow Pages;" or Item 12, "[s]ending change of address notices to persons other than those with whom the arbitrator had worked." In addition, the "no violation" answer to Item 6 would be expanded to include listings in dispute resolution directories, whether or not subject to a listing fee. A significant factor in the Interim Opinion concerning listings in the Martindale-Hubbell *Dispute Resolution Directory* was that payment for a listing was no longer determinative of its ethical propriety. This approach is continued by the 1996 amendments, and indicates that panel fees now imposed by the AAA, and proposed by FMCS—while not endorsed by the Academy—do not run afoul of the Code to which those organizations are cosponsors. As observed below, however, a particular "panel fee" might be condemnable on other grounds, if, for example, it is really a referral fee paid to an agency to solicit business for the arbitrator.

The changes in FAOs that the 1996 advertising amendments have brought about are significant, but it is also important to understand what has not been changed. For example, under Opinion No. 18, it would still violate the Code, as amended, for an arbitrator to be identified as such in connection with the purchase of ads or tables at testimonial dinners or tributes, to entertain parties or advocates in order to advertise or solicit arbitration assignments, or to distribute business cards, except upon request, to advocates or potential party-clients. Under both Opinion No. 18 and Opinion No. 5 (May 8, 1979), it is still improper for an arbitrator, without mutual consent of both parties to a collective agreement, to attend separate meetings of unions or employers, or their advocates, to be interviewed for the purpose of potential selection as a neutral arbitrator. The committee was concerned that this situation would raise questions, not only of solicitation, but of the dignity and integrity of the office of arbitrator and of ex parte contact or questionable personal relations with a potential party. Attendance at joint sessions of the parties for arbitral selection consideration would not appear to raise these concerns and was stated as not violating the Code in Opinion No. 18, Item 7. An arbitrator's participation in unilateral training sessions

is, as recognized by Walter Gershenfeld, an issue worthy of additional exploration.

The holding of Opinion No. 19 (May 28, 1989), that the Code was violated by an arbitrator who handed out ballpoint pens imprinted with his name and new address to parties and others present at hearings, is probably unchanged by the 1966 amendments. The committee reasoned that because the pens would serve as a useful writing tool, they would constitute a continuing reminder of the arbitrator's availability and, thus, were considered a form of advertising or solicitation. The pens would have that effect whether or not intended by the arbitrator. Thus, the Opinion suggested that notifying party representatives at a hearing of an arbitrator's address for the purpose of subsequent communications is more appropriately accomplished by handing them business cards.

Although some of the grounds might vary from those originally articulated, the findings of ethical impropriety in Opinion Nos. 14 (June 7, 1986) and 16 (October 29, 1987) continue to be valid under the 1996 amendments. The submission of biographical data with announcements of an arbitrator's relocation or availability in new locations would enlarge the informational purposes of such communications to those of advertising or solicitation.

Opinion No. 14 found it improper for an arbitrator to write to management and labor representatives throughout the country for the purpose of expanding a labor arbitration practice to diverse regions, and to enclose a biographical sketch that refers to the arbitrator's Academy membership and offices held. This communication was condemned as "plainly solicitation" even though it did not expressly ask for the parties to appoint the arbitrator. The Opinion states that this letter, "with its implicit request for arbitration work" [seems pretty explicit to me], was stated to do "precisely what the no-solicitation rule was meant to prevent." Under the 1996 amendment to Part 1, C.3.a.(2), it is now permissible for an arbitrator to send a "change of services offered" announcement to interested persons, but it must be limited to the arbitrator's name, address, and phone numbers. Thus, whether or not one categorizes a letter seeking to expand an arbitration practice to other regions throughout the country as a "change of services offered" announcement, it would still be impermissible to enclose a biographical sketch. As the Opinion notes, however, an arbitrator may give a biographical sketch to appointing agencies or to 'any labor or management representative who requests it" but may not send

"unsolicited letters and biographical data to those who employ arbitrators." Attention also should be called to the new definition of "Solicitation," in Part 1, C.3.d., as "the making of requests for arbitration work through personal contacts with individual parties, orally or in writing." Thus, the Code amendments distinguish between a listing in a directory, which is available to all who may seek to select an arbitrator, and an unsolicited letter requesting arbitration work sent to persons who select arbitrators.

Opinion No. 16 holds that it would be a Code violation for an arbitrator-attorney to send to members of the local bar association, lawyers practicing labor law, and unions throughout the state (not all of whom had used his services) a four-page printed announcement that he has relocated his law office, including a statement that he is "Engaging Primarily in the Practice of Arbitration and Mediation/Conciliation." The announcement contained the arbitrator's vitae, listing, among other data, professional memberships (including the Academy) and a description of his experience in a variety of types of disputes. Also included was a basic fee schedule and a statement of his availability to serve as an arbitrator, mediator, factfinder, trainer, or expert witness for unions, management groups, the courts, environmental groups, and others. Consistent with the 1996 amendments, the Opinion recognized that an arbitrator may distribute change-of-address announcements to the labor-management community, but the instant announcement went beyond this purpose and clearly was intended to publicize the sender's availability and credentials in order to encourage parties to use his services. The Opinion appropriately noted that the arbitrator's status as an attorney had no bearing on the propriety of his actions under the Code.

While mediation or services other than labor or employment arbitration are still not included within the Code's coverage, Opinion 21 (May 26, 1991) held that it would be unethical to solicit mediation and other such assignments by sending letters to the "person in charge of arbitration" at various corporate subsidiaries and unions, along with a curriculum vitae containing the writer's extensive experience as an arbitrator, which included a long list of companies and unions served. As contemplated by the 1996 amendments, it would be inconsistent with the requirement of accuracy in listings for an arbitrator to exclude appropriate reference to labor-management arbitration experience in biographic sketches permitted by the Code. On the other hand, nonproportionately lengthy listings of extensive arbitral experience in a communica-

tion nominally seeking mediation business, but sent to company and union personnel who select arbitrators, would continue to violate the Code. The rationale of Opinion No. 21 carries increasing importance with the coverage of the Code expanded to arbitration, but not mediation, of employment disputes.

The Impact of the 1996 Code Amendments on Employment Arbitration and Mediation

After extended deliberation and debate, the National Academy of Arbitrators endorsed the expansion of its jurisdiction to include "the study and understanding of the arbitration of . . . employment disputes" in addition to labor-management disputes, and cooperation with other organizations interested in employment, as well as labor-management, relations.[11] This modest addition to the Academy's Constitution was followed by an enlargement of the coverage of the Code of Professional Responsibility to include "arbitrators who agree to serve as impartial third parties in certain arbitration and related procedures, dealing with the rights and interests of employees in connection with their employment and/or representation by a union."[12] Accordingly, the Code's scope now encompasses arbitration of statutory, contractual, and unilaterally adopted employment, agency shop, and fair share disputes.[13] Because of membership concern with the possible unfairness, involuntariness, union-avoiding motivation, and illegality of some of these proceedings, the Code makes clear that arbitrators are neither obligated to accept or to refuse appointments in arbitration dispute procedures established unilaterally by an employer or union.[14]

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[11]National Academy of Arbitrators, Constitution, art. II (as amended, 1993). *See also* Gruenberg, Najita & Nolan, *supra* note 3, at 280–84; Florman, *supra*, this chapter; *Appendix B: Report of the Committee to Consider the Academy's Role, If Any, With Regard to Alternative Labor Dispute Resolution Procedures*, in Arbitration 1993: Arbitration and the Changing World of Work, Proceedings of the 46th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1994), 325.

[12]*See* Code, Foreword.

[13]*See* Code, Preamble; Scope.

[14]*See* Code, Part 2, A.3. In furtherance of this concern, the Academy's Board of Governors, at the 50th Annual Meeting, adopted a policy statement opposing "mandatory employment arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights." (*See* Appendix B.) In addition, guidelines were suggested to aid an arbitrator in determining whether to accept appointments to arbitrate such cases. (*See* Appendix C.).

Despite the liberalization of advertising standards, discussed above, those arbitrators seeking to expand their practice in the growing market of employment disputes may still regard the newly applicable Code as unduly restrictive. Until recently, the American Arbitration Association had classified arbitration of employment disputes as commercial rather than labor arbitration. As such, they were governed by the Code of Ethics for Arbitrators in Commercial Disputes, jointly promulgated by the AAA and the American Bar Association, which allows much greater latitude in marketing oneself as a commercial arbitrator. Under that code, soliciting appointments from parties or administering agencies is considered inconsistent with the integrity of the arbitration process, but it is permissible to advertise, or otherwise indicate, one's general willingness to serve as an arbitrator.[15] To now be governed by the more restrictive standards of the Code for Arbitrators of Labor-Management Disputes may make it difficult for arbitrators appointed by the AAA (or other Code-governed agency) to compete with other more aggressive marketers of employment arbitration services.

If, however, the marketing is done by an appointing agency or other organization with which the arbitrator is affiliated, they are not subject to the Code's restrictions. CPRG stated in its report explaining the proposed modifications in the Code's advertising and solicitation provisions that:

> [L]ike 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.[16]

This considerable "loophole" in the Code's advertising restrictions affords employment arbitrators an opportunity for more open competition. Indeed, the AAA widely promotes its employ-

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[15]Canon 1.B. Code of Ethics for Arbitrators of Commercial Disputes (Commercial Arbitrator Code).

[16]CPRG Report, *supra* note 3, at 310. This approach is consistent with the "nonaction" of CPRG in withdrawing a proposed opinion, in light of the opposition of several Board of Governor members, which would have recognized a responsibility of labor arbitrators to attempt to police promotional advertisements on behalf of educational programs in which they were involved.

ment dispute-resolver panels through advertising and general solicitations of potential institutional parties. Membership on such panels is restricted, however, and individuals seeking employment arbitration business may have to either seek affiliation with other agency marketers or choose to risk forsaking the benefits—and ethical restrictions—of potential membership in the National Academy or on labor-management arbitration panels of the AAA, FMCS, or NMB.

There also is a concern that arbitration and mediation referral agencies will go beyond imposing a reasonable administrative fee as a condition for referral panel membership and seek to participate directly in the fee received by the neutral for serving on a case referred by the agency. This practice is already employed by some agencies, including JAMS/Endispute, a major provider on the West Coast and in other areas, and questions have been raised concerning some of the fees recently imposed by the AAA on its panel members. The payment or receipt of referral fees for particular cases tends to raise provider fees, present potential conflicts of interest regarding the basis on which providers are selected, and are generally condemned expressly, or impliedly, as a form of solicitation, by many ethical codes applicable to arbitrators and mediators. For example, the Society of Professionals in Dispute Resolution (SPIDR) has adopted Ethical Standards of Professional Responsibility, which provide that: "No commissions, rebates, or other similar forms of remuneration should be given or received by a neutral for the referral of clients." While this blanket prohibition may be too inflexible, some safeguards seem necessary to prevent referral agencies from seeking to take advantage of dispute-resolution providers and users with whom they may have economic conflicts of interest and to prevent arbitrators and mediators from being selected on the basis of the referral fee paid and not their qualifications.

The adoption, in 1996, of the AAA's National Rules for the Resolution of Employment Disputes, encompassing both arbitration and mediation, may foretell the development of ethical standards for neutral employment dispute resolvers, independent of the existing ethical codes for labor and commercial arbitrators. The AAA Rules incorporate the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship, which was drafted by a multiorganizational Task Force in 1995. To help implement its vision and to guide neutrals who are asked to become involved in resolving such

workplace disputes, the Task Force has been exploring the possibility of developing ethical standards for employment arbitrators and mediators.

In addition to the separate ethical codes for labor-management and commercial arbitrators, there are several extant codes of ethics for mediators that potentially could be applied to labor and employment mediation. As part of the deliberations of the Academy in response to the Alternative Labor Dispute Resolution Report, then-President Dallas Jones appointed a Special Committee, chaired by Charles Rehmus, to consider potential ethical standards for labor and employment mediators, and whether they should be incorporated into the existing Code. After exploring several alternative ethical codes for mediators, the Rehmus Committee determined that, with relatively minor modification, the principles of the existing Code could be adapted to cover mediation, but a problem would exist in applying the then-existing advertising and solicitation prohibitions to the practice of mediation. Accordingly, the committee presented the Board with several alternatives for dealing with the perceived advertising stumbling block.[17] After another review by a Special Committee,[18] the Board ultimately chose to refer the advertising issue back to CPRG and to continue to exclude from the Code direct coverage of mediator ethics.

An approach, which is similar to that found in most other ethical standards for mediators,[19] is adopted by the SPIDR Ethical Standards, which apply to arbitrators, mediators, and other neutral alternative dispute resolution providers. These Standards state that: "All advertising must honestly represent the services to be rendered. No claims of specific results or promises which imply favor of one side over another for the purpose of obtaining business should be made." This approach reflects the "commercial speech" doctrine that constitutionally limits the extent to which governmental agencies may regulate commercial advertising. In a progression of cases beginning in 1977, the Supreme Court has rejected special treatment of lawyers because of their professional

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[17] *See* Gruenberg, Najita & Nolan, *supra* note 3, at 284, 289–90.

[18] Special Committee on Code Revision. *See* Gruenberg, Najita & Nolan, *supra* note 3, at 291.

[19] *See, e.g.*, Model Standards of Conduct for Mediators VII (1994). These standards were drafted by a joint committee of the AAA, ABA, and SPIDR, and have been adopted by the AAA, Litigation and Dispute Resolution Sections of the ABA, and SPIDR (at least as to general principles).

status,[20] and the Court has protected from state prohibition truthful and nonmisleading generic newspaper and magazine advertising,[21] targeted print advertising with illustrations,[22] and targeted direct mail solicitation letters to persons believed to need the type of legal services being marketed.[23] A limitation on direct mail solicitation has been recognized when it is sent to accident victims, or their family representatives, within 30 days of the accident or disaster.[24] It is noteworthy that the majority opinion by Justice O'Connor, upholding the Florida ban in the last situation, relied upon an empirical study that tended to support the state's interest in protecting the privacy of the recipients of the solicitation and in preventing the erosion of the professional status of lawyers.

It remains to be seen whether or not a majority of the Court will extend this rationale in future advertising and solicitation cases and overturn—as Justice O'Connor has urged in dissent in other cases[25]—the Court's rejection of the professionalism argument. For now, the First Amendment protects most commercial speech from governmental control unless it is false, misleading, or, by means of a narrowly tailored regulation, seeks to prevent offense to another legitimate state interest. This also appears to be the prevailing approach of ethics standards—even when adopted and applied by nongovernmental entities—regulating mediators and arbitrators, with the exception of those labor and employment arbitrators subject to the Code of Professional Responsibility for Labor-Management Disputes.

The Future Regulation of the Ethics of Labor and Employment Arbitrators

It can be anticipated that pressure will continue to further liberalize the Code's advertising and solicitation restrictions. The source of these pressures will be both increased competition for employment arbitration business and concern regarding the legality of the existing provisions.

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[20] *Bates v. State Bar of Ariz.*, 433 U.S. 350, 368–72 (1977).
[21] *Id.*
[22] *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985).
[23] *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988).
[24] *Florida Bar v. Went For It*, 515 U.S. 618 (1995).
[25] *See, e.g., Edenfeld v. Fane*, 507 U.S. 761, 778 (1993) (dissenting opinion): "[T]he States have the broader authority to prohibit commercial speech that . . . is inconsistent with the speaker's membership in a learned profession and therefore damaging to the profession and society at large."

Because of the manner and personnel by which labor-management arbitrators are selected, most Academy members will continue to eschew advertising or solicitation of such cases. However, that market has been shrinking for several years. Of course, there is a possibility of a turnaround in the extent of private-sector collective bargaining, and public-sector arbitration opportunities have been holding steady or even increasing. Nevertheless, as indicated by the reduction in applications for NAA membership, it is likely that few new arbitrators will be able to amass significant labor-management arbitration caseloads. Thus, those who desire to increase their involvement in the arbitration process may want to participate fully in the employment arbitration market. As one experienced Academy member stated in opposing the expansion of the NAA's Constitution to include employment arbitration: "'This is not a matter of philosophy; this is a matter of livelihood, particularly in California, where labor-management cases are going downhill fast, and the other areas . . . are expanding."[26]

Ironically, in light of these trends, it is unlikely that the Academy will reconsider its limited excursion into the employment arbitration field. To the extent that the Code denies arbitrators the opportunity to compete fairly for employment arbitration business, arbitrators may seek to amend the advertising provisions, discourage the Code's sponsors from enforcing them, ignore the Code and its sponsors as a source of arbitration business, or sue.

Unless a legitimate governmental interest can be articulated that is narrowly served by the Code's advertising restrictions, the FMCS, the NMB, and other federal and state agencies that have adopted the Code are vulnerable to legal attack under the commercial speech cases. The NAA, the AAA, and other private organizations are probably free from First Amendment challenges but may be at risk under the federal antitrust laws.

Since the present Code contains neither a total prohibition on advertising and solicitation, nor a provision for price fixing, it probably does not constitute a per se violation of the Sherman Antitrust Act.[27] Thus, the legality of the advertising and solicitation restrictions would likely be judged by the Rule of Reason. This

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[26]Gruenberg, Najita & Nolan, The National Academy of Arbitrators: Fifty Years in the World of Work (BNA Books 1997), at 281 (quoting Gentile, ALDR Transcript, October 25, 1992, NAA Archives, at 32).

[27]*See, e.g., Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (boycott to increase compensation); *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950) (standard commission rates); *cf. Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (minimum fee schedule).

expands upon the now widely accepted interpretation that only *unreasonable* restraints of trade violate the Sherman Act.[28] "Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions."[29] More specifically, the test inquires whether the challenged restraint, in fact, promotes competition or suppresses it.[30] Other relevant factors relate to the extent to which the challenged agreement or regulation imposes market control, and whether, especially in regard to a professional standard, it does or does not provide public or welfare benefits.[31] These factors could apply differently to different Code signatories. For example, the National Academy, unlike the AAA and FMCS, is not a referral source or arbitrator selection agency and, thus, is less directly involved in market control.

On its face, a restriction on advertising tends to lessen rather than promote competition, and tends to increase prices, although it may have other beneficial effects, especially regarding the quality of services available.[32] Former NAA President Arvid Anderson, in 1988, on behalf of the Board of Governors, defended the then-advertising rules on the grounds that the Academy "is a voluntary organization which does not license the practice of arbitration. Accordingly, the problem of proof that the denial of membership has caused a loss of income is very difficult. . . . We are like judges, who do not advertise."[33] In fact, there is an unpublished study that indicates that Academy members, on average, make more money from labor arbitration than nonmembers, and judges—campaigning in those states that elect them—do advertise. Neither of these facts are conclusive, however. The criteria for membership in the Academy limits entrance to successful arbitrators. Successful arbitrators make more money. With or without the Academy, success breeds success. The tenure of arbitrators, unlike judges, is the essence of at-will service; it could well demean the quality of our

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[28] *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).
[29] *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978).
[30] *Id.* at 691.
[31] *See* Lopatka, *Antitrust and Professional Rules: A Framework for Analysis*, 28 San Diego L. Rev. 301, 375–81 (1991); *cf.* Goldfarb, *supra* note 28, at 788–89 n.17.
[32] *See* Lopatka, *supra* note 31, at 369–74, reporting, inter alia, on a Federal Trade Commission study of optometric services and products. Restraints on advertising previously imposed by the American Medical Association were held to violate the Federal Trade Commission Act. *American Med. Ass'n v. Federal Trade Comm'n*, 638 F.2d 443 (2d Cir. 1980).
[33] Gruenberg, Najita & Nolan, *supra* note 26, at 209.

adjudicative function to subject arbitrators to the temptations of an open advertising market.

The legality of the advertising provisions in the Code also may be supported by the importance of those provisions to user acceptance of the integrity of labor arbitrators and of the professional status of the arbitration profession. This factor may prove to be particularly significant if Justice O'Connor's concern for maintaining professionalism for the good of society prevails in the commercial speech arena, the legal principles of which also have currency in antitrust cases. Indeed, it is even more persuasive in regard to arbitrators, who act as private judges with power to issue binding awards, than to the legal profession.

The application of antitrust principles to professional associations is a complex undertaking. The resolution may vary with the particular professional involved, the nature of the association, its extent of market control, the precise standard being challenged, whether it is incorporated as a legal standard, and the extent to which it is enforced and whether, in fact, it lessens competition, or, by contrast, bestows economic and public welfare.[34] The 1996 amendments to the advertising provisions of the Code may make our standards less vulnerable to successful antitrust attack, but there is still cause for concern. When this concern is combined with the pressures of labor arbitrators who want to expand their practices to employment arbitration and other areas of arbitration and mediation, all of which now enjoy a more open competitive market, one conclusion does seem inevitable: the issues of appropriate and legally justified restrictions on arbitrator advertising and solicitation will be revisited in the not too distant future.

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[34] *See* Lopatka, *supra* note 31, at 382–85.