CHAPTER 9

ETHICAL BOUNDARIES BETWEEN ARBITRATORS AND THE PARTIES

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An eminent American historian, Charles Beard, was once asked if he could summarize the lessons of history. He is reputed to have answered, "I can do so in four sentences."

"Those whom the gods would destroy they first make mad with power."

"The mill of the gods grinds slowly, but it grinds exceedingly fine."

"Even the bee pollinates the flower it robs."

"When it is darkest, you can see the stars."

I have not been able to verify that these are valid conclusions to history's lessons. But the Italians have a saying in cases like this: *"Se non e vero, e ben travato,"* or, "Even if it's not true, it's certainly well said."

Professor Beard's four great lessons are also applicable to arbitration and the Code of Professional Conduct for Arbitrators of Labor-Management Disputes. They remind us that power can be tricky, even dangerous; that the slow march of time changes and refines ideas, institutions, and the Code; that the inevitable result of our struggle to be impartial and our duty to disclose are greatly influenced by the ethical climate; and, finally, trying moments can reveal the strength and beauty of the National Academy of Arbitrators (NAA) and its Code of Professional Conduct.

Power Can Be Tricky: Disclosure

The duty exists to disclose any current or past relationship before accepting or continuing an arbitration appointment. All doubts should be resolved in favor of disclosure. Doing so ensures the integrity of the process and keeps both feet of the arbitrator in bounds.

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The U.S. Supreme Court set forth the basic rules on disclosure: "We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealing that might create an impression of possible bias."[1]

The general principle is clear: Arbitrators should declare any real or apparent conflict and should be prepared to disqualify themselves in any proceeding in which their impartiality might reasonably be questioned. The ancient doctrine of good faith—*uberimmæ fidæ*—means not only to refrain from misleading, but also—within the post-Enron sunrise milieu—the disclosure of any factor that a reasonable person might regard as material.

Title 28, Paragraph 455 of the Federal Civil Judicial Procedure and Rules serves as the model for our current discussion.[2] Those rules force judges to answer certain prehearing questions about their past associations, fiduciary interests, and the relationships and interests of their immediate family to the parties before the case can be accepted. This part of the Federal Rules has served as a model for several states in the promulgation of similar questions for arbitrators. Under these rules, a judge is to disqualify him- or herself in any proceeding in which his or her impartiality might reasonably be questioned. The duty to disqualify extends, for example, to cases where

- the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts;
- the judge has in private practice served as lawyer in the matter in controversy or has served with a lawyer who has dealt with this matter or has been a material witness concerning it;
- the judge, while in governmental employment, has acted as counsel, adviser, or material witness concerning the proceeding or expressed an opinion concerning its merits; and
- the judge or members of his or her family has a financial interest in the matter or any other interest that could be substantially affected by the outcome of the proceeding.

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[1] *Commonwealth Castings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 149 (1968).

[2] Federal Civil Judicial Procedure and Rules tit. 28, §455, Judiciary & Judicial Procedure (rev. ed. West 2000).

The Emerging Problems

The lack of arbitration protocol in some quarters, the proliferation of arbitration techniques into the commercial arena, and the increase in arbitrators, many self-anointed and questionably appointed, has cast a pall over the arbitration profession.

The *San Francisco Chronicle* published a series of articles on arbitration in 2001 asking the question, "Can the public count on arbitration?" Their answer was "no."[3] Reynolds Holding, the author of the series and a staff writer for the *Chronicle*, discovered that the American Arbitration Association (AAA) owned "millions of dollars' worth of stocks and bonds in major corporations whose legal disputes its arbitrators have heard."[4] While the AAA denied that any of these financial relationships affected its ability to provide fair and neutral arbitrations, Holding contended that the arbitration industry is riddled with conflicts of interest. Arnold Zack raised his voice in defense of arbitrators, asserting that "[t]he only thing that keeps arbitrators in business is their integrity."[5]

California Governor Gray Davis was not convinced, and on September 26, 2001, he signed a bill mandating that arbitrators disclose any attorney-client relationship the arbitrator has or had with any party or lawyer-party to the arbitration, and any professional or significant personal relationship that the arbitrator, the arbitrator's spouse, or the arbitrator's minor child living in the household has or has had with any party to the arbitration proceeding.[6]

The Judicial Council of California (JCC) has unanimously approved minimum ethics standards for private arbitrators. Because of the efforts of John Kagel, arbitrators of labor-management disputes have been exempted. In a rush to meet a legislative deadline, the standards, which were the first of their kind in the country, were adopted by the council with the stipulation that they be subjected to further review. Private neutral arbitrators involved in consumer arbitration will be held to the same standards as court-appointed arbitrators.

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[3]Holding, "Private Justice: Can Public Count on Fair Arbitration? Financial Ties to Corporations Are Conflict of Interest, Critics Say," *San Francisco Chronicle*, October 8, 2001, at A15.
[4]*Id.*
[5]*Id.*
[6]Cal. Civ. Proc. Code §1281.9(5)(6).

Under the JCC standards of 2002, arbitrators must disclose any personal or financial relationships with the parties before them and disclose when they have done prior work for a party. The new standards also will allow a party to disqualify an arbitrator if misrepresentation or omissions are discovered following an arbitrator's assignment. A controversial provision requiring alternative dispute resolution providers to also make known personal and financial ties to clients will take effect July 1, 2003.

Partiality of an arbitrator constitutes well-recognized grounds for reversal of an award. Undeclared past relationships of the arbitrator to one of the parties can make it appear that the arbitrator is not impartial. Failure to disclose relationships—business or social—has resulted in challenges to many arbitration awards. The court usually asks that the partiality or bias be established. The United States Federal Arbitration Act has long suggested that courts may make an order vacating an award "where there is evident partiality."[7] More arbitration awards have been set aside—vacated—because of the appearance of partiality than for infidelity to follow the language of the contract.

The Slow March of Time Has Refined the Code

In the Academy 30 years ago, Alex Elson eloquently made the case for an ethical canon to amplify conflict of interest situations and evident partiality.[8] This Academy has had an Ethics Committee from its beginning in 1947. It was renamed the Ethics and Grievances Committee in 1965, and the Committee on Professional Responsibility and Grievances (CPRG) in 1975. The roster of individuals who served successively as chair gives you an idea of the importance the Academy places on the CPRG: Nate Feinsinger, David Cole, Gabe Alexander, Harry Platt, Ben Aaron, Pat Fisher, Syl Garrett, Abe Stockman, Russ Smith, Dick Mittenthal, Sandy Porter, Howard Cole, Bill Fallon, Arthur Stark, Alex Elson, George Fleischli, Reg Alleyne, and Dana Eischen. The importance of our Code is further demonstrated by the references thereto in our Constitution, our Statement of Purpose and Aims, our Membership Policy, and our Web site.

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[7] 9 U.S.C. §10(2).

[8] Elson, *Ethical Responsibilities of the Arbitrator*, in Arbitration and the Public Interest, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators, eds. Somers & Dennis (BNA Books 1971), 194.

At the first annual meeting in January 1948, the Ethics Committee concluded its report by stating the committee's agreement on "certain basic canons of ethics for arbitrators, embodying concepts of decency, integrity, and fair play."[9] But the committee recommended further study, especially concerning "disclosure, fraternizing, entertainment, and the like" and asked "whether a person ethically can be an arbitrator though he represents or consults with the same or other unions or employers in other matters."[10]

While the *Steelworkers Trilogy*[11] was beatifying arbitrators, serious allegations were being lodged by a former arbitrator and later judge, Paul Hays, who issued a scathing indictment of the arbitration profession in a 1964 lecture at Yale Law School. Referring to rascals in arbitration, he attacked arbitrators who do not disclose their past relationships and asked: "What of the arbitrators who indulge in ambulance chasing? What of the arbitrators whose interest is in how to perpetuate themselves or of the arbitrator who in deciding a case asks himself, 'How secure am I in my position?'"[12]

Hays' criticisms prompted a response at the 1971 NAA meeting in Los Angeles, whose theme was "The Ethical Responsibilities of the Arbitrator." The Academy, together with the AAA and the Federal Mediation and Conciliation Service, began to draft the *Blue Book: The Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.*

Herbert Sherman of the University of Pittsburgh researched what was known as the famous Rule 3 of the original Code of Ethics of the NAA, which required an arbitrator "to disclose to the parties any circumstances, associations, or relationships that might reasonably raise any doubts as to the impartiality . . . for the particular case."[13] Sherman's survey emphasized the need for disclosure in a variety of situations.[14] His research concluded that judges are bound by stricter canons than arbitrators. Where judges are required to recuse themselves, arbitrators may be limited to disclosure. Professor Sherman described the results of his survey on what

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[9]*Id.*

[10]*Id.* at 188.

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

[12]Hays, *Labor Arbitration, A Dissenting View* 52 (Yale Univ. Press 1966).

[13]Elson, *supra* note 8.

[14]Sherman, *Arbitrator's Duty of Disclosure, A Sequel*, in Arbitration and the Public Interest, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators, eds. Somers & Dennis (BNA Books 1971), 203, 221.

an arbitrator must disclose to the parties. Thirty questions could be answered "yes" or "no," or with the Jesuitical "it depends." I have for the sake of brevity reduced Sherman's questionnaire to 10 questions, which we intend to repeat now viva voce or vivo manu. You will vote and so will our respondents.

1. Does an arbitrator have a duty to disclose that 10 years ago he received $1,000 from one of the parties for a matter not related to labor relations?
   In 1970, Sherman found that the majority said "yes."
2. Does the labor arbitrator have a duty to disclose that she received a free lunch when she gave a talk at the Industrial Relations Research Association, which included some of the company representatives present?
   In Sherman's survey, the majority said "no."
3. Does the arbitrator have the duty to disclose that one of the representatives of the parties is a former student?
   In Sherman's survey, 47 percent said "yes," 31 percent said "no," and 12 percent were Jesuitical.
4. Does the arbitrator have to reveal that he owns 500 shares of company stock?
   The majority of Sherman's survey said "yes."
5. Does the arbitrator have to disclose that his wife owns 500 shares?
   The majority of Sherman's survey said "yes."
6. Suppose the arbitrator's wife owns 50 shares?
   A smaller majority of Sherman's survey said "yes."
7. Does the arbitrator have to reveal that she went out to dinner with the company lawyer at the last annual meeting?
   The majority of Sherman's respondents said "no."
8. Does the arbitrator have to disclose that he played golf with the union rep?
   The survey was split: 28 percent said "yes," 38 percent said "no," and 25 percent said "it depends."
9. Does the arbitrator have to reveal that she and the company rep are neighbors?
   The Sherman survey said "no."
10. Does the arbitrator have to report that he is a member of the Sierra Club—which is testifying at the hearing?
    The Sherman survey said "yes."

One of the effects of Sherman's survey and Elston's rhetoric was the development of Chapter 2B of the new Code. Bill Simkin, Sylvester Garrett, Ralph Seward, and others crafted a powerful canon on required disclosures. Chapter 2B of the Code of Professional Responsibility for Arbitration of Labor-Management Disputes requires the arbitrator to do the following:

- Before accepting an appointment, to disclose directly or through the administrative agency involved any current or past managerial, representational, or consultative relationship with any company or union involved, as well as any pertinent pecuniary interest. This duty to disclose includes membership on a board of directors, any service as a representative or advocate, consultation work, stock or bond ownership, or other financial interests.
- Disclose recent or current activity as an advocate for or representative of other companies or unions in labor relations matters. An arbitrator must disclose such activities to an administrative agency if he or she is on that agency's active roster or seeks placement on a roster.
- Prior to acceptance of an appointment, disclose to the parties or to the administrative agency involved any close personal relationship or other circumstance, in addition to those specifically mentioned earlier in this section, that might reasonably raise a question as to the arbitrator's impartiality.

After appropriate disclosure, the arbitrator may serve if both parties so desire. If the arbitrator believes or perceives that there is a clear conflict of interest, he or she should withdraw, regardless of the expressed desires of the parties.

In summation, the burden of disclosure rests with the arbitrator. If some feature of a particular relationship appears to impair impartiality, disclose it. If in doubt, disclose it. Contrary to Nancy Reagan, don't say "no"; when in doubt about disclosing the relationship, the membership, the partnership, or the ownership—past or present—just say "yes." Disclose it!

Even the Bee Pollinates the Flower It Robs

Even though the Code appears to be clear, there are different models for disclosure within the Academy. Some insist that disclo-

sure should be in writing prior to the scheduled hearing so the parties can consider the information at their leisure and make an informal judgment as to whether it precludes the arbitrator's participation.[15]

Some maintain that the arbitrator should be required to sign an oath—usually provided by the designating agency affirming the absence of present or preexisting ties.[16] Some suggest that a disclosure should always be made on the record and that the disclosure should be total, including prior awards for the same parties if involving different advocates. In *City of Fairbanks Municipal Utility System v. Lees*,[17] the City of Fairbanks sought to vacate an arbitrator's award after an arbitrator overruled an employee's termination. The city charged that the arbitrator failed to disclose that he had issued an earlier award in favor of the same employee. The Alaska Supreme Court rejected the challenge to the award and held that the failure to disclose a prior award for the same parties was a harmless error.

Even if you believe that the parties will find your disclosure unnecessary or even humorous, it is better to err on the side of disclosure. No one should have trouble with the basic thrust of financial disclosure. No exceptions are made for de minimis situations. An arbitrator—even one appointed to an umpireship—should always disclose holdings in the company involved. Err on the side of caution. There should be no attempt to be secretive about relationships. New grievants and new supervisors may be puzzled about your apparent genial relationship with the other side. Walter Gershenfeld suggests that this requires going beyond disclosure to circumspect behavior at the hearing on the part of the arbitrator, especially when all involved know each other very well.[18]

Obviously, family and close friend relationships are to be made known, as are former partners or associates at the arbitrator's law firm. Former teacher-student history should be made public, and former cases between the parties should not be hidden. Even when

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[15]Gershenfeld, *Disclosure and Recusement—When to Tell and When to Leave*, in Arbitration 1991: The Changing Faces of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1992), 218.

[16]National Academy of Arbitrators, *The 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.

[17]705 P.2d 457 (Alaska 1985).

[18]Gershenfeld, *supra* note 17.

serving on a panel for a number of years entailing frequent association with one or both advocates, remember that there may be new eyes and new perceptions present. Some arbitrators will probably handle disclosure with all the parties present, some on the record, some in the hall. If in doubt, disclose.

Californians remind us that they have new state standards for disclosure for arbitrators, perhaps a harbinger, identifying general categories and specific types of matters that must be disclosed, such as personal relationships or affiliations between the arbitrator or a member of the arbitrator's family and any party or lawyer in the arbitration; any past, present, or expected service as a dispute resolution neutral for a party; or a lawyer for one of the parties. According to the California Judicial Counsel, there are now 17 categories and 21 subcategories of disclosure. The new California statute encompasses disclosure of prior service as an arbitrator; a list of prior cases in which the arbitrator has served the parties; disclosure of membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, or sexual orientation; and, finally, a "catch-all" provision that requires arbitrators to disclose any other matter that might cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial.

Ethical discernment requires a sensitivity to the proprieties required by the Code. Disclosure may come in advance of acceptance of the appointment, or it may be made when the circumstances become known to the arbitrator. Disclosure is the watchword as far as the Code is concerned. The arbitrator may not realize some information is pertinent until the hearing. The arbitrator's general responsibility is to disclose appropriate information as soon as the need to do so becomes known.

There is added emphasis in civil judicial procedures and rules—both on the federal and state level—to disclose interests that could affect the outcome of the proceeding, namely those of spouses and persons within the third degree of relationships. I am reminded of Lewis Gill's famous questions concerning the arbitrator's spouse and the arbitrator's ego.[19] Gill posed a series of questions beginning with whether it is helpful to have a companion en route to the hearing, whether spouses should sit in on hearings, and what to do

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[19]Gill, *The Presidential Address: The Role of the Arbitrator's Wife*, in Labor Arbitration at the Quarter-Century Mark, Proceedings of the 25th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1973), 1.

if they cannot restrain themselves from bursting out loud at ridiculous testimony. More seriously, the intent of the new rules is to determine if your spouse or those living under your roof have any interest in the outcome of the proceeding.

Trying Moments Can Reveal the Strength and Beauty of the Academy

The world of 2002 is expanding our existing duty of disclosure, demanding more sunlight on financial interests, relationships, affiliations, familial relationships, prior service for a party or attorney, or membership in an organization that practices invidious discrimination. Modern disclosure includes revealing if one is not physically or mentally able or if one simply cannot devote sufficient time or attention to the matter. Disclosure is a continuing obligation. In every hearing, it begins again. No Enron tactic—no Danny Almonte or George O'Leary tactic, but rather a positive disclosure of any factor that a reasonable person might regard as material.

Now for your final exam. Answer the following questions with:
_____ yes _____ no _____ it depends

1. You have been appointed to decide the matter involving the arbitration fees charged by another member of this Academy.
   a. Will you accept the appointment?
   b. Will you disclose that you are a member of the NAA?
2. Do you have to disclose that the management representative is a cousin—a third-degree cousin?
3. Do you have to disclose that you played golf with the union rep yesterday, the day before the hearing?
4. Do I have to disclose that yesterday I met with and had a drink with Messrs. Jarin and Lightman (my co-panelists)? And if so, do I have to disclose who paid the bill?

In the current milieu, we take great pride in our Code of Professional Responsibility, and the comments of past President David Miller sound a prophetic warning: Academy membership does not insulate us from the conduct of nonmembers. We are the preeminent organization in the profession and thus are obliged to

set the standards by which every aspirant should be guided and judged.[20]

Those whom the gods would destroy they first make mad with power . . . arbitration can be tricky, even dangerous. When in doubt, disclose!

The mill of the gods grinds slowly, but it grinds exceedingly fine . . . the slow march of time changes and refines the Academy and the Code.

Even the bee pollinates the flower it robs . . . disclosure is greatly influenced by the current ethical climate. And, finally:

When it is darkest, you can see the stars . . . trying moments reveal the strength and beauty of this Academy and its Code of Professional Conduct.

Try to keep both feet in bounds.

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[20]Miller, *Presidential Reflection*, in Arbitration 1975, Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1976), 6.