Chapter 9

ARBITRATION IN A FISHBOWL: THE ETHICS OF DISCLOSURE

I. Introduction

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Good morning, and welcome to this important session on the ethics of disclosure, aptly titled "Arbitration in a Fishbowl." The program brochure notes the increasing demands imposed by statutes, appointing agencies, and courts upon arbitrators in commercial cases to disclose prior client contacts. In light of the *Gilmer*-sanctioned expansion of arbitral jurisdiction over important matters of public policy in not only the employment area, but also health care, consumer protection, regulation of the various product markets, and other fields, it is not surprising that public and quasi-public agencies are insisting upon a greater degree of accountability.

Carrie Menkel-Meadow, in a *Miami Law Review* article, "Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not,"[1] breaks down the ethical issues in arbitration into what she calls "the 10 C's of dispute resolution ethics":

1. ***Choice/Consent/Coercion*:** Is it ethically improper to impose arbitration on persons who have not really chosen it?
2. ***Courts or Contracts*:** Is it ethical for courts to mandate arbitration and, if so, what ethical rules apply?
3. ***Confidentiality*:** Although parties may seek confidentiality, is it ethical from a public perspective?
4. ***Competence and Credential*:** Should competency and credentials be governed by an ethical code?
5. ***Corporate-organizational Liability*:** To what extent should arbitration providers be governed by ethical rules?

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[1]56 Miami L. Rev. 949 (2002).

6. ***Communication and Counseling*:** Should lawyers be ethically required to counsel their clients about arbitration or other forms of alternative dispute resolution?
7. ***Costs and Fees*:** Do the costs and fees associated with arbitration raise ethical concerns?
8. ***Complaints and Grievance Systems*:** From an ethical standpoint, should parties be provided with a forum in which they can complain about alleged arbitration improprieties?
9. ***Conflict of Laws*:** Whether, and, if so, how should the conflicting statutes, rules, and codes of arbitration ethics be reconciled?
10. ***Conflicts of Interest*:** Do arbitrators face improper conflicts of interest to the extent they are trying to please repeat-player clients or serve as party-appointed arbitrator advocates?

It is the last of these 10 C's that we take up this morning. In many ways it is the one over which we have the most control—our own conduct. In imposing the various disclosure requirements, the statutes, appointing agencies, and courts invariably express a concern about "public confidence in the integrity and fairness of the process."[2] In *Commonwealth Coatings Corp. v. Continental Casualty Co.*,[3] the Supreme Court's 1968 pronouncement on the subject, each of the three opinions on the arbitrator's duty to disclose reason from this theme of integrity and fairness. In *Commonwealth Coatings*, a subcontractor on a construction project sued the prime contractor's surety to recover money allegedly due on the prime contractor's bond. Under an arbitration clause in the painting contract, the subcontractor and prime contractor each selected an arbitrator, who selected a third "neutral" arbitrator. The neutral arbitrator, an engineering consultant, previously had engaged in business relations with the prime contractor, which he did not disclose until after the award. The subcontractor challenged the adverse award based on the arbitrator's failure to disclose the preexisting relationship. Citing Section 10 of the Federal Arbitration Act (FAA), Justice Black noted that arbitration awards could be set aside for evident partiality or undue means. The majority also conceded the existence of no claim that the third arbitrator was actually biased or improperly motivated, but said that an arbitrator

[2] *See* California Standard 1(b).
[3] 393 U.S. 145 (1968).

must be unbiased and must avoid the appearance of bias. Justice Black characterized the nondisclosure in *Commonwealth Coatings* as a "manifest violation of the strict morality and fairness"[4] expected of the arbitrator.

Justice White concurred in *Commonwealth Coatings* but made it clear that in vacating the award the majority did not decide to hold arbitrators to the same standard as Article III judges. Arbitrators are not to be disqualified by a business relationship with the parties as long as the relationship is disclosed or it is trivial. Justice White viewed disclosure as creating an "atmosphere of frankness at the outset" that preserves an amicable and trusting atmosphere and voluntary compliance without need for judicial enforcement.[5] He also suggested that arbitrators err on the side of disclosure, which would facilitate the courts' identification of relationships "too insubstantial to warrant vacating an award."[6]

Justice Fortas, who dissented, would not set aside an award under the FAA in the absence of actual partiality. Noting the "essential consensual and practical" nature of arbitration, Justice Fortas describes it as a "system characterized by dealing on faith and reputation for reliability."[7] For Fortas, it follows that the FAA is "obviously designed to protect the integrity of the process with a minimum of insistence upon set formulae and rules."[8]

Because we in the Academy are committed to practicing arbitration at the highest levels of excellence and integrity, the issues for us are matters of *education* or *information* rather than *professionalism*. To help us in this educational enterprise, two of our exemplary members will share with us their wisdom and encounters with the duty to disclose.

Matt Goldberg was admitted to practice law in California in 1971. Since then, he has served as a field attorney with the National Labor Relations Board (NLRB) and as an administrative law judge (ALJ) for the California Agricultural Labor Relations Board. Matt has arbitrated and mediated full-time a wide range of private and public sector cases for more than 17 years. He has served on a number of permanent panels including: SBC and the Communications Workers of America, the U.S. Postal Service and American Postal Workers Union, Kaiser Aluminum and the

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[4] *Id.* at 148.
[5] *Id.* at 151.
[6] *Id.* at 152.
[7] *Id.* at 154.
[8] *Id.* at 154–55.

United Steelworkers of America, Northern California Retail Food Stores and the United Food and Commercial Workers, and Las Vegas Metro Police Department and the Las Vegas Metro Police Protective Association, to which he will allude in his talk today. Matt has also lectured and provided training to a variety of labor-management organizations and for the Center for Negotiation & Dispute Resolution at the Hastings Law School.

John Kagel is a past president of the Academy. He has had a distinguished career as an arbitrator and mediator for more than 35 years. John has arbitrated more than 8,000 cases and mediated more than 500, not to mention other ADR neutral functions in labor, employment, discrimination, securities, commercial, international, public, and private sector cases in the United States, Canada, and Great Britain. John was appointed by the Chief Justice of California as a member of the blue ribbon panel of experts to establish the California Ethical Rules of Arbitration. John is largely responsible for the exclusion of labor-management arbitration from what many consider to be an unduly onerous set of rules. He has also authored a number of articles and book chapters on arbitration topics including most recently contributions to the second edition of *The Common Law of the Work Place*[9] and the sixth edition of Elkouri & Elkouri, *How Arbitration Works.*[10]

[9] (BNA 2005).
[10] (BNA 2003).