Chapter 12

ABANDON SHIP! OR NOT? DILEMMAS OF MID-CASE RECUSAL

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Speakers: Shyam Das,† Richard M. Goldberg,‡ Robert D. Mariani§

A party requests the arbitrator's recusal, or the arbitrator decides to recuse, based on mid-case disclosures, unethical conduct, or other events that may affect arbitrator neutrality and/or the finality of the arbitration award. What ethical and professional obligations do arbitrators and advocates have under the Code of Professional Responsibility for arbitrators or rules of professional conduct for attorneys?

Odom: What do we do when, after a hearing is set or has begun, we're asked to recuse ourselves or we, ourselves, discover facts that raise concern about our serving? Though it's a simple question, the potential answers are multiple. And I've got three gentlemen here with a total of 110 years of experience who are going to answer that question.

On my left is Bob Mariani. He'll provide a union perspective. On his left is Shyam Das, arbitrator. And on his left, Dick Goldberg, who'll present the employer's viewpoint. Shyam is going to give us an outline of how we're going to proceed.

Das: Thank you, Jim. Just a few preliminary remarks. The program materials contain excerpts from the National Academy's Code of Professional Responsibility (hereinafter the Code). We will be referring to some of those provisions this afternoon. Also, I refer you to a 1991 article on disclosure and recusement by the

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late Walter Gershenfeld, a former President of this Academy to whom this meeting is dedicated.[1] A third item we will be citing is a very short 2009 decision from the U.S. District Court, District of Massachusetts: *United Steelworkers v. Keyspan Energy*.[2] In that case, an arbitrator was asked to recuse herself after the hearing was closed but before she issued her award. She declined to recuse. It was a discharge case and the union, which had asked for recusal, went to court to vacate the award. Judge D. J. O'Toole granted a motion for summary judgment, denying *vacatur*, finding that the union had failed to make a case for recusal.

We are going to review several scenarios, and then have a dialogue or, I guess, a trialogue among Bob and Dick and myself. Both Bob and Dick have worn different hats at different times but, for today's purposes, Bob is going to be the union advocate and Dick the employer advocate. We hope to raise some questions, point out some relevant considerations, and perhaps throw

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[1]His is one of several articles in the chapter titled "Professional Responsibilities of Arbitrators," that can be found in THE PROCEEDINGS on the Academy's website—www.NAARB.org.

[2]United Steelworkers of America, Local 12003, Petitioner, v. Keyspan Energy Delivery, Respondent, August 3, 2009, *inter alia*:

> The Federal Arbitration Act ("FAA") allows vacatur of an arbitration award "where there was evident partiality or corruption in the arbitrators." 9 U.S.C. § 10(a)(2) (2009). In *Commonwealth Coatings Corp. v. Continental Casualty Corp.*, 393 U.S. 145, 150 (1968), a plurality of the Supreme Court agreed that "evident partiality" meant "an appearance of bias." Several courts, including the First Circuit, have interpreted the Court's "appearance of bias" standard as requiring an objective assessment of whether a reasonable person would believe that an arbitrator was partial to a party to the arbitration. . . .
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> A party seeking to set aside an award on the basis of 'evident partiality' must show that the alleged partiality is or was "direct, definite, and capable of demonstration rather than remote, uncertain or speculative." . . .
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> The relationship between Garraty's husband and Keyspan's law firm was too attenuated for any reasonable person to believe that because of it Garraty acted with partiality towards Keyspan during the arbitration proceedings in question. Kerr had participated in a single training session of short duration. In doing so, Kerr was acting within the scope of his employment for an independent contractor that had an arm's-length relationship with the law firm. (The parties stipulate that the 2006 training was the only time Goodwin retained Triad.) The subject matter of the training program was unrelated either to labor–management disputes in general or, of course, the dispute between the Union and Keyspan in particular. Further, the training program was held about a year prior to Garraty's appointment as the neutral arbitrator in this case; it was not contemporaneous with Garraty's service as an arbitrator. The parties agree that Garraty first learned of the relationship after the arbitration hearings concluded and she had already announced her decision. It is not possible reasonably to think that her decision had been influenced by a relationship she was unaware of. . . .
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> A single, brief, and unrepeated interaction between Kerr and Goodwin Procter attorneys other than Smith, not involving Keyspan and involving career training rather than labor issues, would not lead a reasonable person to believe that Garraty, who was unaware of the relationship when she heard and ruled on the grievance, had acted with evident partiality in favor of Keyspan and against the Union.

in some advice about a variety of circumstances. Each scenario presented will entail recusal in some respect.

We expect to show how recusal issues can become more complicated—not necessarily from an ethical point of view but in a practical sense—when they arise after the arbitration has begun, as opposed to when the arbitrator is first appointed or shortly thereafter.

Our first case is a simple one. It's a discharge case. During the course of the hearing, the arbitrator learns that the company is 50 percent owned by a large corporation in which the arbitrator owns 100 shares of stock worth about $3000. The first question is, what should the arbitrator do? If you read Walt's article, you'll see that he refers to anecdotal evidence that many arbitrators would not disclose, whether at the beginning of the hearing or when they were appointed, such an insignificant financial stake in the company. In his experience, advocates didn't expect disclosure in that circumstance.

But as members of the National Academy of Arbitrators (or, if we aren't Academy members but we are arbitrators on FMCS or AAA panels), we are governed by the Code. Code Section 2.B[3]

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[3]Code of Professional Responsibility for Arbitrators of Labor-Management Disputes

2 RESPONSIBILITIES TO THE PARTIES

B. Required Disclosures

1. Before accepting an appointment, an arbitrator must disclose directly or through the administrative agency involved, any current or past managerial, representational, or consultative relationship with any company or union involved in a proceeding in which the arbitrator is being considered for appointment or has been tentatively designated to serve. Disclosure must also be made of any pertinent pecuniary interest.
   a. The duty to disclose includes membership on a Board of Directors, fulltime or part-time service as a representative or advocate, consultation work for a fee, current stock or bond ownership (other than mutual fund shares or appropriate trust arrangements) or any other pertinent form of managerial, financial or immediate family interest in the company or union involved. . . .
3. An arbitrator must not permit personal relationships to affect decision-making. Prior to acceptance of an appointment, an arbitrator must 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, which might reasonably raise a question as to the arbitrator's impartiality.
   a. Arbitrators establish personal relationships with many company and union representatives, with fellow arbitrators, and with fellow members of various professional associations. There should be no attempt to be secretive about such friendships or acquaintances but disclosure is not necessary unless some feature of a particular relationship might reasonably appear to impair impartiality.
4. If the circumstances requiring disclosure are not known to the arbitrator prior to acceptance of appointment, disclosure must be made when such circumstances become known to the arbitrator.

talks about required disclosures, and Paragraph 1 states that, before accepting an appointment, an arbitrator must disclose various things. But if you go to Paragraph 4, you'll see that, if the circumstances requiring disclosure are not known to the arbitrator prior to acceptance of appointment but later come to the arbitrator's attention, then disclosure must be made at that time.

So let's assume that the hearing has begun, and that the arbitrator learns that the employer has a parent corporation in which he owns some stock. Code Paragraph 1, "Required Disclosures," says that "disclosure must also be made of any pertinent, pecuniary interests." Pertinent is the zinger here: What is a "pertinent interest?" Paragraph 3 of the Code says that there's an obligation to disclose any circumstance that might reasonably raise a question as to the arbitrator's impartiality. I define a "pertinent interest" as being any circumstance that might raise a question as to the arbitrator's impartiality, impartiality being the bedrock of the Code in terms of the requirement for disclosure.

If you own 100 shares of stock (worth $3000) in a large corporation, and that corporation owns half the shares of the company that is appearing before you, it seems to me a stretch to say that that would reasonably raise a question as to impartiality. Perhaps in a smaller company, such ownership could be a different circumstance. Yet Paragraph 1a of the Code says that the arbitrator's duty to disclose includes current stock or bond ownership, other than mutual fund shares or appropriate trust arrangements. And as Walt points out in his article, there is no *de minimis* exception. This suggests that we might perhaps want to change this code provision.

So for our purposes, I'm the arbitrator and I'm going to disclose my ownership in the parent corporation. But I'm also going to state that I feel fully confident that this will have no impact on my ability to hear the case and to decide it fairly and impartially.

Bob, let me turn to you. What do you do with my disclosure?

Mariani: Well, Shyam, I think that there's no question that that ownership of stock is immaterial. The arbitrator's stockholder relationship with the company that's at the arbitration is so attenuated that it's not grounds for recusal.

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5. The burden of disclosure rests on the arbitrator. 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, the arbitrator should withdraw, irrespective of the expressed desires of the parties.

The difficulty that arises from the union perspective, though, is this: You've got a grievant who's been fired. My experience has been that that, generally, the grievant is distrustful of just about everybody in the room. And ironically, by the arbitrator raising this issue, to the uninitiated the conclusion is going to be: "Well, there must be something to this? Why would this arbitrator tell us this if he didn't deem it significant?" So now, I go to the union. (Assume that this is a union I've been working with for some time and that they have confidence in me.) And I tell them, "Look, I don't see any basis for recusal and there's no desire on my part to move for recusal." But the grievant says, "I don't like this. This guy's in bed with the company." That's the kind of thing I've heard on many occasions when representing unions.

And what the union then has the right to do is to tell the grievant, "We understand your concern but don't worry about it. We're going to go forward." However, if, over the grievant's objection, you do proceed with that arbitrator and the grievance is denied, and the grievant loses his or her job, the union may have litigation after that. That litigation will likely be unsuccessful but, from the union's standpoint, they don't want to have to defend the lawsuit; they're not interested in spending $25,000 defending themselves in federal court, even if the case goes out on summary judgment.

So even though, in my view, there's absolutely no basis for recusal here, I may find myself coming to Shyam and saying, "You know what? I need to move to recuse you." Not because there are realistic grounds for recusal, but because I have a grievant whose perspective is that the process has been tainted. That's not an unusual situation.

Das: Dick, assume Bob has moved for recusal. You're the employer advocate. Do you respond in some fashion?

Goldberg: Yes. In the situation you have described, the advocates themselves will conclude that recusal is unnecessary. But I recognize Bob's concern: We represent clients. And if our client objects to the arbitrator continuing, we have to take that objection seriously. But also remember that we've gone through a selection process, and both parties have found the arbitrator to have been acceptable. We've gone through the time and expense of preparing for the arbitration. It's a discharge case. The burden is on the employer. The employer has spent time and effort preparing to present the case on the appointed date. To redo everything and to step aside over something that is so truly insignificant is unwarranted, and I would strongly oppose it. In the final analysis, it's

going to be up to the arbitrator to determine whether he or she should participate in the case.

Das: So what do I do? Can I say, "Look, this is silly. Look at the harm my recusal will cause." Dick has alluded to the cost and time expended, not just by the employer, but by the union and by the employee who's seeking to get his job back.

What should I do? Well, the first recourse is always to look to the Code. Paragraph 5, the last paragraph of Section 2-B, states "the burden of disclosure rests on the arbitrator." Well I've done that. And here comes the more difficult sentence. "After appropriate disclosure the arbitrator may serve if both parties so desire." It doesn't say the arbitrator may serve if only one party desires and the arbitrator thinks that the recusal request is baseless. It says what it says.

I recently served as chair of the Committee on Professional Responsibility and Grievances for the Academy. And today, of course, I'm speaking entirely for myself, not for the Academy. But I know we batted around the meaning of that language, and there was not unanimity. My own view is that, because the provision states that you can serve only if both parties so desire, I would recuse myself under the circumstances I have described.

Let's say I try to persuade the union to withdraw its request, I'm unsuccessful, I hear the case, and decide that the union loses. The grievant then goes to court. Dick, how should the court rule?

Goldberg: Well, first of all, I think that you've an overly restrictive view of the sentence you've cited in the Code. If that interpretation prevails, then an arbitrator would be mandated to recuse himself or herself if any party objected—for any reason. And I don't think the rules intended that result. I think the discretion still remains with the arbitrator.

If I were the court, I would rule that the disclosure in no way impaired your neutrality. I would dismiss a petition to vacate.

Das: Bob, would you expect the same from the court?

Mariani: I would. Although I would ask you the question, does it really make sense for you to proceed if you think that one party doesn't want you? Going forward in that circumstance is fraught with peril. As the case proceeds, if it's a hard case, nonrecusal in the face of a request will loom increasing larger in the minds of the unhappy people on my side.

Das: Well, I'm not sure it is a good idea. But just to get us moving, I went that way in order to show that things that may seem one-dimensional have multidimensional facets to them. I want to

turn back to something Dick said. He read the Code as still leaving discretion to the arbitrator; that an arbitrator need not accede to a recusal request based upon a single party's substanceless objection. And he may well be right. But the provision I read—Section 2-B—applies after the arbitrator has decided to disclose something. I would argue the Code presumes that the arbitrator made the disclosure because he or she thought it might reasonably be pertinent to the parties' perception of his or her impartiality or, in the case of the stock ownership, because the Code expressly mandated disclosure.

The Federal Arbitration Act and many parallel state acts provide that an arbitrator's award may be vacated for "evident partiality." The court case that's in the materials, the *Keyspan Energy* case, cites a 1968 U.S. Supreme Court decision that defined "evident partiality" as "an appearance of bias." The Court went on to say that the appearance of bias should be based upon an objective assessment of whether a reasonable person would believe that an arbitrator was partial to one of the parties to the arbitration. The question I put to you is this: Is that "objective assessment" standard the same standard that the arbitrator should apply when deciding whether or not to disclose, or should we disclose in broader circumstances? (And certainly, if we're going to disclose, it is better to do so the day we get the appointment, rather than in the middle of the case.)

Let's move on to our second hypothetical situation: a discharge case involving alleged off-duty misconduct. I arrive at the hearing. I see my good friend Dick and I say, "Hi, Dick, so good to see you. I have such fond memories of us when we were on our visit to Poland just a few years ago when we were there for a conference. Do you remember that night we went out and our hosts provided one shot of vodka after the other? Wasn't that a gas?"

Goldberg: This is a true scenario, by the way.

Das: Having done that, I then turn to Mr. Mariani and say, "Good morning. I don't think we've worked together before, have we?" Upon which the grievant sitting next to Bob says, "What's going on here?" What do you say to him?

Mariani: I don't know. I don't know what's going on here. This situation has happened numerous times over the years simply as a function of the fact that, if you do this kind of work, you're going to know arbitrators and they're going to know you. And even though you may not see them socially, you've come to have a cordial relationship, and to address each other on a first name

basis. Now, the facts here are a little over the top, but I don't think it's grounds for recusal. Nonetheless, particularly in a discharge case, this will require that I explain to my client, an employee who's never been involved in an arbitration hearing, that despite the obvious fact that the opposing counsel knows the arbitrator and that the two have downed vodka together, the arbitrator is going to give him—the employee—a fair shake. If the grievant has enough confidence in the union and in me to know that we're not giving him a line of baloney, the case can proceed. But exchanges like those described are not good for the process. I don't think they are grounds for recusal, but they are not a good way to start a hearing.

Goldberg: In reality, this happens. Again, we have to keep in mind that the advocates have clients who may not be familiar with the process. It's extremely important for the neutral to appear, totally, as a neutral. Referring to one of the advocates by his or her first name, that type of familiarity is detrimental to the process. (Looking around the room, I see many people that I'm on a first-name basis with. But yet, I'm certainly not going to refer to them on a first-name basis in front of my client or opposing counsel.) I don't see that a motion to recuse should be made there, or would be granted. But I still say that we all should be more considerate of the process.

Das: Here's another hypothetical. Dick, after opening statements have been made describing the evidence we're about to hear, I do the colloquial "let's go out in the hall" with the advocates. I take Bob and Dick out in the hall, and I say to you, Dick, "I think you have a pretty weak case here. The parties should settle it." You're outraged. What do you do?

Goldberg: I'm going to tell the arbitrator why I'm outraged. Number one, an arbitrator has an ethical responsibility to be an arbitrator and not necessarily a mediator, unless the parties ask you to play that role. Be mindful of what's come before this hearing: a lengthy selection process, a lot of preparation by the parties. If cases can be mediated, 95 percent of them will be mediated prior to coming to the arbitration hearing. So, at the outset, we expect the arbitrator to recognize that he has been selected to hear the case and make a decision, and not to try to mediate.

Number two, engaging in the mediation process is antithetical to the advocacy process. In order to mediate, you have to understand both parties' cases. My clients are going to be very reluctant to reveal facts as they would be required to for the arbitrator

to engage in effective mediation. There are some arbitrators for whom mediation is a modus operandi. When they suggest mediation, I tell them that I would like to go on with the hearing.

Number three, when I return from the hallway conference and my client asks, "Well, what were you doing out in the hall? I'd have to inform him of what the arbitrator said, including the arbitrator's comment about our having "a pretty weak case." Then the client figures the arbitrator has prejudged the case based solely on the opening statements, and that we're not going to get a fair shake.

Das: Would you then ask the arbitrator to recuse?

Goldberg: If my clients are outraged, then I might consider it. If I think my client's faith in the arbitrator's impartiality has been destroyed, or that the atmosphere of neutrality is gone, then I will likely ask the arbitrator to recuse himself or herself.

Das: Bob?

Mariani: Several aspects of this scenario are troublesome. The first is that the attorneys were pulled out in the hall. That is very disconcerting for the participants who have been involved in the process and are now being excluded. They want to know why the company's lawyer and you are in the hallway with the arbitrator. And obviously, they're entitled to know. In terms of both the actual integrity of the process and the participants' perception of the integrity, those corridor conferences should be kept to a minimum.

Second, while I don't see anything wrong with the arbitrator asking the advocates whether they've discussed settlement or want to do so, if the arbitrator then advises one side or the other, following opening statements, that they've ". . . got a pretty weak case and the parties should settle it," I think that arbitrator is crossing the line. I would not be surprised if the opposing counsel responded by saying, "You're drawing conclusions far too prematurely and making it difficult for us to proceed with you." Nonetheless, I would still be arguing against recusal, because I think it's a close question.

Where it gets most difficult is where the arbitrator decides that he or she is going to mediate the dispute, and wants to informally learn more about each party's case—the weak points as well as the strong points—in an effort to broker a settlement. If the advocates indicate that they don't want mediation, the arbitrator should stop.

Once the advocates comply with the arbitrator's informal inquiry into the weak and strong points of their cases, the arbitrator has undermined the arbitration process. While there's nothing wrong with the arbitrator trying, in a noninvasive way, to suggest that the parties discuss settlement, if carried too far, the arbitrator loses his or her quasi-judicial status. In that circumstance, the arbitrator, if asked, should consider recusal.

Goldberg: In the scenario Shyam has presented, the arbitrator offered his assessment of the weakness of the case at the conclusion of the opening statements. Opening statements are not evidence, and advocates' claims are often not borne out by the evidence subsequently presented. So both the arbitrator's gratuitous assessment and its timing were inapt.

I agree with Bob that guiding the parties toward a settlement can sometimes be productive. But the arbitrator should bear in mind that, by the time a dispute has found its way to the arbitration hearing, settlement is no longer a probability. That is why you have been retained by the parties. You are there to hear the evidence and the arguments and make a decision.

Das: Let me read a brief paragraph from Walter Gershenfeld's article:

> Rulings made in the course of a case, no matter how much they may anger one party, are generally not a proper basis for recusement. The request for recusement could be a plot to delay the arbitration, or it could be a search for what is perceived as a more favorable forum. What if you are convinced the request is honest and based on a deep-seated belief that your ruling has caused an advocate to lose confidence in your ability to hold a fair hearing? The answer is that recusement is improper in all but the most unusual circumstances. The process is not served when an arbitrator elects to walk away from a case before or during a hearing because one party has indicated a lack of confidence after an adverse preliminary ruling.[4A]

Interestingly, Walt said, "One possible exception may be if an arbitrator has effectively communicated a decision in a case without a request from the parties."

Bob, you mentioned to me at least one advocate who uses requests for recusal as a sort of form of intimidation of arbitrators, not really expecting the arbitrator to recuse.

[4A]Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, DISCLOSURE AND RECUSEMENT—WHEN TO TELL AND WHEN TO LEAVE, by Walter J. Gershenfeld, at page 227 in chapter 11, available at www.naarb.org/proceedings/index.asp (under the "author" drop-down box, enter "Gershenfeld," then go to page 218 of chapter 11).

Mariani: If there are baseball fans out there, it's very much like the late Billy Martin kicking dirt on the umpire's shoes, recognizing that he's not going to have that decision reversed but hoping that maybe the next call will go in his favor. I have advocates attempt to employ the same strategy with arbitrators: a meritless but tactical motion for a recusal, designed to straighten you up and move you in a direction more favorable to the advocate's side. The exchange can be unpleasant, perhaps even heated. You may be called upon to defend yourself and your integrity. And that brings me to a related point.

One of the things you need to do, no matter how vocal or insistent an advocate is, is to retain control of the hearing. If one of the advocates can push you around or bully you, that hearing is going to fall apart. You are the judge for this case; you've got the hammer and you've got to use it. When you rule on something, particularly an evidentiary ruling, and counsel argues with you, you've got to put the advocate in his place. And if a tactical motion for recusal is made, meet it head-on and refuse it. It's important for the process.

Das: Let's move to our next scenario, a variation of the *Keyspan Energy* case. A union steward is discharged and a grievance filed. Ten days of hearings are spread over nine months. The CBA's arbitration provision calls for a tripartite board: the neutral, company representative, and union representative. Between the submission of posthearing briefs and the executive session of the tripartite board to discuss the case, the grievant learns that the neutral arbitrator's spouse, who is a CPA, had conducted a training session for the tax lawyers in the law firm representing the company in the arbitration. The training session took place a year prior to the arbitration, lasted a single day, and the CPA was paid $10,000. None of the tax lawyers involved in that firm has anything to do with this arbitration case, but some of them have done tax work for the employer. Just before the executive session, the grievant informs the union advocate and arbitrator what he has discovered and asks, "What are we going to do about this?"

Mariani: I don't see this as grounds for recusal. If the grievant tells me that, as a result of these discoveries, he is concerned about the arbitrator being biased, that concern has to be dealt with. But my advice to the union and to the grievant will be that these facts are not a basis for recusal. They say nothing about the impartiality of this arbitrator, his integrity, or the integrity of the arbitration process.

Das: Bob, suppose that you're the union participant in the executive session. Prior to the executive session, your client—the grievant—has told you about the CPA fee. During the executive session, you don't mention it. Then I, the neutral arbitrator, tell you, "You know what, Bob, you're going to lose this case." Do you do anything? Can you now ask for recusal? Are there any professional restrictions on your doing so having known about it before and not having chosen to do anything?

Mariani: Under the circumstances you describe, my waiting so long will have prejudiced the process.

Goldberg: Bob, what would happen if your client said, "Look, I don't think I'm going to get a fair shake here" and you immediately returned to the panel and requested recusal?

Mariani: Given the facts presented, I think that the argument for recusal lacks merit.

Goldberg: Would you nonetheless say to the panel, "You know what, my client doesn't think he's going to get a fair shake as a result of this."

Mariani: Yes. I'd favor disclosing the issue and having it aired. But ultimately, I could not in good conscience insist that the arbitrator recuse herself.

Das: Okay. In the actual case, the union asked the arbitrator to recuse after the arbitrator indicated she was going to rule for the company in the discharge case. The arbitrator, who had no knowledge of her husband ever having done this work, declined to recuse. The enforceability of the award went to court and, as I indicated, the court found there weren't grounds for recusal.

I think as an arbitrator, if this happens on the first day of hearing, I may be more inclined to say, "You know what, we've got a long hearing ahead of us. I don't want this to be a possible basis for somebody attacking the award, and jeopardizing its finality. I will recuse." But when this disclosure and request for recusal is made, for the first time, at the Executive Session, after nine months of hearings, then, assuming I feel that, ethically, I'm not required to withdraw, I'd rather take my chances with the appellate court then require that the parties retry the entire case before another arbitrator.

Let's vary the scenario slightly. Let's say that the arbitrator, after having indicated in the first Executive Session that she's going to rule for the union, but before issuing the written decision, learns from her husband that he had received this $10,000 training fee from the employer's law firm. The arbitrator has to think, "Well,

should I disclose this? Is that a circumstance that might reasonably raise a question as to my impartiality? I don't know where or how fine a line I want to cut here. So the best thing for me to do is err on the side of caution, and disclose it." I disclose it, and the union asks for my recusal. They know they're going to lose the case. They ask for my recusal. Having made a determination that I'm going to disclose this fact, can I now continue to serve as arbitrator if one of the parties doesn't want me to?

There was a California Court of Appeal decision in 2008 that involved a California statute that, in essence, (1) imposed an obligation on the arbitrator to disclose anything that might raise a question as to the arbitrator's impartiality and (2) provided that either party could then request recusal and the arbitrator should recuse. In the actual court case—this was not a labor arbitration—the arbitrator, who was a former judge, disclosed some prior relationship with an attorney: They had served on some joint bar association board, something pretty attenuated. The arbitrator revealed that fact "out of an excess of caution." One of the parties requested recusal, to which the arbitrator replied, "Well, that is silly. I'm not going to recuse over this. There's no good basis for it." The party that asked for recusal lost the case and appealed. And the appellate court ruled that the arbitrator really never had to disclose this; that, under the statute, it had not been a mandatory disclosure. The court affirmed the arbitration award, in effect saying, if you didn't have to disclose it even though you did disclose it, then even though the statute says either party can request, can in effect ask you to recuse, we're not going to overturn the arbitration award.[4] In labor arbitration, the same type of situation can arise under the Code: Disclosure motivated by "an excess of caution" can result in unproductive, if not frivolous, litigation.

Das: Let's go to the next scenario, a contract interpretation case that is based, somewhat loosely, on a real case.

Scenario: It took the parties months to agree on a hearing date and, after a date was agreed upon, the employer's advocate sought a postponement due to a personal conflict. The arbitrator denied the request.

Then, just before the scheduled hearing is to take place, the union attorney sends a request for postponement due to the unavailability of a key witness. The employer objected by email,

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[4]Luce, Forward, Hamilton & Scripps, LLP v. Paul Koch et al. 162 Cal App. 4th 720 (2008).

pointing out that the employer's witnesses had been lined up, and that the employer was ready to proceed. Additionally, the employer's advocate said, "I'm dubious as to the unavailability of the union witness but, in any event, it's not grounds for delaying the hearing."

The arbitrator granted the postponement by e-mail. The employer advocate then left a voicemail for the arbitrator, objecting to the postponement, stating that he cannot understand why the arbitrator granted the postponement at this late date, and disparaging the integrity of the union advocate (i.e., stating that the union advocate is frequently untruthful). The employer's advocate, who was hot under the collar, went on to say, "It seems like the union is getting more favorable treatment, and that raises some concerns for my client." At the end of the voicemail, the employer advocate stated, "I recognize this voice mail is *ex parte* and please share it with the union's advocate."

Did the employer advocate violate a professional obligation?

Goldberg: It is obviously unprofessional for an advocate to make those types of remarks. My question for you, as the arbitrator, is what you would do if you received a voicemail message like that?

Das: I would be inclined to call up the employer advocate and tell him that he was totally out of line, that I want him to join in a conference call with the union advocate and me, and in that conference call, he reiterate the message he left. Alternatively, I might advise the employer advocate that I will furnish the union advocate with the voice mail message he—the employer advocate—had left.

Goldberg: I agree with the wisdom of that approach.

[Due to insufficient time, discussion of this scenario was not completed.]

Das: Let's open the discussion to some audience members.

Unidentified Participant: In the first scenario you presented—where the arbitrator discloses an insignificant stock ownership in a parent company, the subsidiary company is appearing before you, and both advocates have agreed that that the stock ownership is immaterial—would counsel nonetheless be obligated to disclose that stock ownership to the grievant?

Mariani: I think I would disclose it.

Goldberg: I agree. You don't have much of a choice. It is my experience that the grievant questions me about virtually every *ex parte* discussion I have with the arbitrator. When asked by the grievant, I have to relate what was discussed.

Das: As the arbitrator, if I'm going to make a disclosure required by the Code, then I will do so in the hearing room, and not in the hallway. In contrast to that Code-mandated disclosure, if a witness comes into the room, and I served on a park commission with that witness 30 years ago, maybe I'd go out in the hall with the union and company advocates, apprise them, and then give them the option to make that disclosure to their client.

Unidentified Participant: What if only a single party requests recusal, and the other party agrees so long as it is not liable for the arbitrator's fees and expenses for the cancelled hearing.

Mariani: I have found it is an increasing desire on the part of the labor unions I represent to avoid such costs. It's not an unreasonable request, but I'm not sure they would agree to it.

Goldberg: The same is true on the employer's side. Employers are loath to incur that type of a cost.

Unidentified Participant: What if you feel you need to disclose something that counsel already knows? For example, suppose that, in a previous case, counsel told you that, in his opinion, you're a horse's ass and couldn't decide a case fairly if it hit you in the face. And yet, he picks you again. Now, he knows that his earlier remarks would predispose you unkindly to him. But his new client doesn't know that. What disclosure, if any, should you make?

Mariani: You cannot assume that because the attorney knows of your possible predisposition, his client also knows. It is your responsibility to disclose the matter to the principals in the proceeding.

Goldberg: I disagree. The obligation to disclose is not on the part of the arbitrator in that case, but rather on the part of the advocate to his own client. The advocate had a professional responsibility to his client to make full disclosure.