CHAPTER 6

HOW REPRESENTATIVE ARE PUBLISHED DECISIONS?

I.

HOWARD A. COLE*

We consider here the publication of arbitration decisions. This is a subject that has commanded substantial attention within the Academy in recent years. It has been the center of some lively debate, principally as to the extent to which the arbitrator's role in the publication process is limited by considerations of ethics and good practice.

There is no disagreement among us, so far as I know, that the arbitrator cannot properly submit a decision for publication, if the parties do not consent. Paragraph 44 of the Code of Professional Responsibility for Arbitrators expressly states that "It is a violation of professional responsibility for an arbitrator to make public an award without the consent of the parties." Implicit in this, I think we all agree, is the proposition that the arbitrator can properly submit a decision for publication, if the parties do consent. Further, we all agree, and the Code clearly provides, that the arbitrator is free to request the parties' consent. Our disagreement has been over how and when the arbitrator can properly make such a request.

The Code says the following, in Paragraph 45:

> "*An arbitrator may request but not press the parties for consent to publish an opinion.* Such a request should normally not be made until after the award has been issued to the parties."

This language has been interpreted by the Academy's Committee on Professional Responsibility and Grievances in two formal advisory opinions, the first issued in October 1982 and the second in May 1983.

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The October 1982 opinion held that it was not consistent with the Code for an arbitrator to assume consent from a party's silence after announcing that consent would be assumed in the absence of an expressed objection. The opinion found such an assumption of consent to be unjustified in most cases. It pointed out that there might be various reasons for the silence of a party in the circumstances described, that the silence might be due to a favorable attitude toward publication, but that it might also be due to oversight, or to a perception that the arbitrator might be offended by an express denial of permission to publish, or to some other factor not indicative of consent to publish. The opinion went on to say that, even if consent to publish could reasonably be assumed from the parties' silence, it was doubtful that such consent would have been obtained in a manner consistent with the Code—because, in many situations at least, by placing a burden of response on the parties, the arbitrator would be going beyond requesting consent and would be pressing for consent.

The May 1983 opinion, which has been designated Opinion No. 11, examined the question of whether the parties' attitudes toward publication could properly be inquired into by the arbitrator at the arbitration hearing. It was held that that could not be done in the absence of unusual circumstances. This holding was based essentially upon two things: (1) a finding that, in most cases, at least, an arbitrator-initiated inquiry as to whether the parties consent or object to publication is considered by the parties to be, and in effect is, a request by the arbitrator for consent to publish; and, (2) the express Code language that a request for consent to publish "should normally not be made until after the award has been issued to the parties."

It is noted that this opinion was issued by the Committee only after a vote of formal approval by the Board of Governors of the Academy. On Wednesday of this week, a motion in opposition to the opinion was overwhelmingly defeated by the Academy membership. Clearly, every Academy member has a duty to comply with the Code as interpreted in this opinion. In this connection, consider the comments made in a recent letter from a member of the Joint Committee that drafted the Code, Sylvester Garrett. Syl wrote, in reference to Opinion No. 11: "It is carefully written and seems consistent with the relevant Code language. It thus would seem that those who are unhappy with this policy will either have to find practical solutions for the

problems they visualize, consistent with the Code, or obtain some change in Code language."

As indicated in these words from Syl, there are some who believe that the Code, as presently written and interpreted, is too restrictive in this area. They are concerned that, unless the arbitrator is free to request consent to publish before the award is issued, or is at least free to assume consent from what may be a cold silence after the award is issued, consent from the losing party is not likely to be obtained. In effect, they advocate some dilution of the parties' present rights of privacy in the interest of making more decisions available for publication. Thus, we are challenged to make some hard judgments about the relative values that should be placed on these sometimes conflicting considerations—i.e., the parties' rights of privacy versus nourishment for the publication process.

Our judgments in this regard should be better, if we are provided with some more and better objective data. A cold can't be hurt by chicken soup, and a debate can't be hurt by a few facts.

II.

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Grievance arbitration is widely accepted in the United States to resolve disputes over the interpretation and application of collective bargaining agreements. However, because the arbitration process belongs to the parties, decisions are not usually made available for publication if either the union or the employer objects. Furthermore, in cases in which the arbitrator is selected directly by the parties, rather than through an appointing agency such as the American Arbitration Association (AAA) or the Federal Mediation and Conciliation Service (FMCS), the arbitrator is also involved in the publication process. The final decision regarding publication is, of course, made by the publishing organizations, which publish only a very small proportion of all decisions received.

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