CHAPTER 8

DISSEMINATION AND ENFORCEMENT OF THE CODE OF ETHICS

I. PARTNERS IN THE CODE—THE NAA AND THE DESIGNATING AGENCIES

ARNOLD ZACK*

I started coming to meetings of the National Academy of Arbitrators in 1957 when I was an intern for Saul Wallen. In those early years, there was great camaraderie and institutional zeal among the arbitrators and the union and management advocates. They had shared common experiences in the War Labor Board during World War II. They had shared the trauma of going out on their own professionally into the untested waters of that private dispute settlement process called arbitration. They had shared 10 years of being so-called professionals in the first decade of the NAA. And most of all they had shared a joint commitment to develop a private system of conflict resolution to protect the rights of the parties through due process. They were building a system which would demonstrate to the grievants, the parties, the public, and the courts that self-regulation was workable, acceptable to all the participants, and worthy of acceptance and respect as a credible judicial institution. If they had failed in that effort the parties and the courts would not have afforded its decisions the "full faith and credit" so essential to the survival and continued acceptability of the system.

The importance of that quest for respect and credibility is underscored by the fact that at the founding meeting on September 14, 1987, as Jean McKelvey has noted,[1] only two committees were established, the Membership Committee and the Ethics Committee. That orientation gives some credence to the view that the NAA was founded mainly in response to criticism that arbitrators were of dubious ethical standards, currying

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[1]McKelvey, *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. Walter J. Gershenfeld (Washington: BNA Books, 1986), 283.

favor to protect their acceptability.[2] The first Code was promulgated in 1951. It was not solely an Academy Code; rather it was developed in recognition that the Academy would not be the sole proclaimer, protector, or enforcer of such a Code of Ethics. It was developed with the active cooperation and consultation of the Federal Mediation and Conciliation Service (FMCS) and the American Arbitration Association (AAA).

After charges by Judge Paul Hays[3] of abuse by arbitrators whose self-interest was asserted to be superior to their professional responsibility, in 1971 Alex Elson[4] called for a new Code of Professional Responsibility. The NAA, the FMCS, and the AAA again worked together to formulate revisions of the Code, commencing in 1972 and culminating in the issuance of the current revisions in April 1975. That Code is still the controlling document for monitoring professional responsibility in labor arbitration.

The Code draftsmen were mindful of the expanding role that arbitration was playing in labor relations. More and more parties were embracing arbitration as their preferred system for resolving their internal disputes. The court systems also approved arbitration as the forum of choice for resolving questions of contract interpretation and application. Arbitration was successful because of the integrity of the players and the respect it attained in the eyes of the parties. With the expanding number of contracts calling for arbitration came an expanding demand for arbitrators, with many parties turning to non-NAA arbitrators. As guardians of the process, the Academy, the AAA, and the FMCS again cooperated to assure that the standards of professionalism would continue to be respected and adhered to even by those arbitrators and advocates who were working in that ever-growing field fueled by the public sector that existed outside the NAA.

Though we in the NAA may claim authorship, the present Code has evolved as a tripartite effort of the NAA, the FMCS, and the AAA. The cynical view is that the tripartite approach was encouraged to assure that the non-NAA arbitrators would

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[2]Davey, *Introduction*, in Proceedings of the 10th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1957), viii.

[3]Hays, Labor Arbitration: A Dissenting View (New Haven: Yale Univ. Press, 1966), 52.

[4]Elson, *Ethical Responsibilities of the Arbitrator*, in Arbitration and Public Interest, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1971), 194-233.

behave in a decorous manner to prevent odious behavior that might erode the prestige of the NAA members and avoid cracking the golden egg. Some say that the NAA members, rather than being the problem, may have become the victim of outsiders who are not so tightly held to standards of professionalism. The more generous view, and one that has been borne out by history, is that this tripartite approach extends the reach of the Code to the majority of the arbitrators who are not in the NAA and strengthens the esteem of arbitration in the eyes of union and management participants.

The comments by then NAA President Dave Miller, prepared for delivery on October 11, 1974, shortly before he died, underscore now even more than they did 14 years ago the important role of the designating agencies in the administration of the Code:

> It is important to understand that the proposed Code of Professional Responsibility is not simply an internal document applicable to Academy members. The Committee represents the Academy, the AAA, and the FMCS. And there is *nothing new* about this. Since 1951 we have operated under a code that was developed and approved or adopted by the same three organizations. . . .
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> When the original Code was adopted, there were only about 200 members in the Academy—and probably no more than 300 or 400 persons with any significant experience in labor-management arbitration. The nucleus of that group was widely experienced both in practice and in the ethical commands of the newly developing profession. It is probably fair to say that as individuals they did not require great guidance either in practice or in ethical principles. However, we face a vastly different situation in 1974. There are now upwards of 2,000 persons holding themselves out as available to serve as arbitrators. Many have no real background training to qualify them in terms of either the ethical principles or practical guides we have developed and which we respect in the performance of our work. Our own membership is rapidly approaching 500, and many applicants wait in the wings for admission. . . .
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> Whether we like it or not and whether or not we accept a vast new membership, the fact is that the burgeoning supply of arbitrators will be engaged in the public or private sector in various roles—under expedited systems, statutory appointments, or selection by the parties. What they do and how they conduct themselves will become public knowledge and will tend to establish the standards of competence, integrity, and good practice by which our profession is judged. If their performance is inferior, the adverse impressions

> they make will spill over and muddy the public's view of the entire process.
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> It seems to me a matter of sound, intelligent self-interest to recognize that Academy membership does not insulate us from the conduct of nonmembers. I contend that 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. . . .[5]

That standard, valid in 1974, is even more pertinent today. NAA membership is pushing 700, with some 5,000 persons holding themselves out to be arbitrators and with arbitration under even greater scrutiny. Although our stewardship is endorsed by Supreme Court cases such as the *Steelworkers Trilogy* and *Misco*, there is increasing evidence of institutional problems.

We are at a juncture where trade union membership is dropping, nonunionized enterprises are increasingly asking us to serve on management-created arbitration panels, external law pressures of the courts are greater, termination at will forums are being widely considered, and the survival of our entire institution is more and more at risk. The NAA has committed itself to increased discussion of (and hopefully adherence to) the Code among its own members. This is therefore an appropriate occasion to consider the external aspects of the Code as it touches upon the role of the designating agencies and the majority of arbitrators who operate outside the Academy. Are the designating agencies, the prime contacts with and perhaps the prime beneficiaries of the new crop of arbitrators doing their share to preserve the standards of professionalism they so long ago agreed to help maintain? Are they properly policing the Code for their cases which are handled by NAA members? Admittedly the signals are confused: We are the party to the Code with the specified appeal procedure for registering and appealing complaints of its violation or excesses. We are the party with the machinery for initiating interpretations and undertaking revisions of the Code. And we are the party which provides training on the issues raised by the Code.

The administrative procedure established by the Academy to process complaints of Code violation to date has been our own private vehicle for policing conformity to the precepts of the

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[5]Miller, *Presidential Reflections*, in Arbitration—1975, Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), 4–6.

Code. Although the NAA and the Committee on Professional Responsibility and Grievances have been involved in several extended exercises to amend certain sections of the Code and change some of the 18 advisory interpretations thereof, enforcement proceedings against violators of the Code have been virtually nonexistent. Even then the jurisdiction of our machinery has been mercifully restricted to our own membership. As a result we subject our own membership to the potential of stricter adherence to the requirements of the Code than those imposed upon non-Academy arbitrators, although in theory all arbitrators are asserted to be bound thereby.

If, as Dave Miller argued, we must bear the scars of the unethical and nonprofessional behavior of those arbitrators who are beyond the jurisdiction of our in-house Academy procedures, should we not rely upon the designating agencies more? Are we entitled to their support and assistance in bringing that great number of outside arbitrators into conformity with the Standards of Conduct by which we have all committed ourselves to be bound? And shouldn't the AAA and FMCS as signatories to the Code join us in a louder call for universal adherence to the Code's precepts? That would help to strengthen professionalism for all practitioners, enhance the acceptability of the process, and insulate against ethical or legal challenge for all its participants. Won't it increase the respect for those designating agencies to be known as purgers of the unethical, protectors of professional responsibility, and sponsors of arbitrators who meet the standards of the Code?

The obvious partners in such a crusade are the FMCS and the AAA, although the National Mediation Board and state and municipal designating agencies would likewise benefit from such a consciousness-building effort. Conformity to the requirements of the Code as well as a sense of institutional symmetry call for rigorous enforcement of the demands of the Code for all arbitrators, whether or not the plumpness of their caseload and their longevity in the practice have accorded them NAA membership. At the outset, there should be more widespread education as to the Code and its requirements. The Preamble of the Code imposes that obligation on the agencies:

> *Application of the Code*: The AAA and the FMCS will apply the Code to the arbitrators on their rosters in cases handled under their respective appointment or referral procedures.

That affirmative obligation requires more than passing the buck to the parties with the claim that it's their process. It is a commitment which implies an awareness of the Code by the agency staff and non-NAA arbitrators and a duty to blow the whistle on Code violators. What are the AAA and the FMCS doing to fulfill that commitment? Do they train new panel members or their clients on the requirements of the Code? Do they supply the NAA Advisory Code interpretations thereof? The answers appear to be "no" except for rare exceptions by the more eager staff administrators. Are the administrators of the agencies aware of the Code, its content, and its interpretations? Too many are not. Alertness to the Code content by administrators could do much to forestall nonprofessional behavior and outright Code violation.

I recognize the salary problems of maintaining a tenured staff in a governmental or nonprofit agency, but doesn't the commitment in the Preamble impose an obligation on the agencies to train their administrators in the content of the Code? Administrators and arbitrators must be provided copies of the Code and training programs prior to their cases. For years the Academy has been providing training to our own members in Code-based issues both in regional meetings and in our Fall Conference. Perhaps there could be Code training for new arbitrators as a precondition for listing on the panels? The NAA regions could cooperate with AAA and FMCS offices by co-sponsoring training sessions on the Code for panel arbitrators and agency administrators. State agency personnel should also be brought in. It is reasonable to expect tribunal administrators to be similarly trained before undertaking to handle the sensitive Code problems which may arise with the parties and the arbitrator. Administrators should be able to warn an arbitrator when there is potential improper behavior, such as solicitation of more cases, an overcharge, or delays in issuing awards.

As a corollary of the foregoing, if the agencies are committed to "apply the Code to the arbitrators on their rosters," doesn't it follow that they must take some action against those who violate the Code? Should the agency inform arbitrators that they are being "frozen" for perceived Code violations? Should they inform the NAA? Is it applying the Code for an agency to quietly refrain from using an arbitrator? Should an arbitrator of ques-

tionable ethics be provided to clients who specifically ask for him or her?

As things stand now, only the Academy of the three signatories provides a visible channel for protesting alleged violations of the Code before peers. Ironically the procedures are enforceable only against our own members, while those outside the Academy who are not held to that standard are permitted to live by the standards of the "marketplace" rather than professionalism standards of the Code and the Academy. Thus, nonmembership in the NAA, or more poignantly perhaps, rejection for membership in the NAA, carries the liberty to disregard the canons of the Code—a far cry from the exemplar that Miller foresaw for the Academy championing of the Code. If the institution of arbitration is to survive its detractors, to meet the expectations of its supporters, and to avoid the skepticism of those who increasingly identify it as a trade rather than a profession, it is essential that arbitrators both in and out of the Academy, as well as administrators, be instilled with knowledge of the Code. They must also be alerted to the questionable, let alone prohibited practices that the drafters of the Code recognized would, if permitted, bring about the demise of the recognized integrity and independence that characterizes the present arbitration practice. We can't be so smug as to point the finger at only non-NAA arbitrators as the miscreants.

We all have a stake in preserving the golden goose of arbitration. But what can we expect of the designating agencies whose primary commitment is to servicing the needs of the parties who, if dissatisfied, would select directly, declining further use of such agencies? Should they designate an unethical arbitrator if unethical parties ask for one? The credibility of the agency says no, but how is that reconciled with meeting the parties' needs? Is it proper for the agencies to send out NAA lists? Is it proper to comply with a firm's warning that they will use the agency only if it lists their five favorite arbitrators? or two? or one?

So far the NAA has been rather passive in undertaking enforcement of the Code. Perhaps we don't want to place NAA members at a disadvantage by being held to a higher standard of professionalism than non-NAA members. But isn't that what our sponsorship of the Code is supposed to be about? Perhaps we expect too much from the clients to expect them to blow the whistle on an unethical arbitrator they may have to face in the future. But couldn't the agencies help us in that area?

First, perhaps it is time to call on the agencies to help us enforce the Code against all its violators. Do we dare ask them to police the Code against our own members doing agency cases?

Clearly, the agencies are privy to more information from the advocates about the performance of our members than what is likely to be revealed by our own policing procedures. They learn of the seamier sides of the practice. The parties, smarting under an excessively tardy award, an unwarranted solicitation, or an unconscionable bill, are more willing to protest to a confidential tribunal clerk than to the NAA or the arbitrator in person. Should we ask the agencies to routinely report complaints to the NAA? Should we or they provide a hearing on such complaints? Revelation of such information would tend to increase the effectiveness of the Academy's Code-policing activities and would increase our credibility in seeking to enforce the Code against non-NAA arbitrators. It would probably do little to enhance the likelihood of the charging clients identifying themselves. Do we dare to solicit criticism of our own members while nonmembers need not undergo such scrutiny or exposure? Is it in the self-interest of the agencies to undertake or encourage such whistle blowing? Would it enhance their credibility or encourage the perception that they are squealers?

The agencies themselves have little to gain from such an enforcement role since they can now urge detractors to go public in NAA proceedings and thus avoid taking the heat as the administrators or "enforcers." They have the authority to take internal recourse by freezing the perpetrator from panel listing—a pocketbook penalty that may exceed in effectiveness any ethical transgressions found by the Academy, but one that loses its impact if the arbitrator is not told he's being frozen because of questionable conduct. How many of us rationalize that there just aren't any cases arising in a relationship if we're not called back to it?

Second, should we become the vehicle for the designating agencies to enforce the Code?

Although both the FMCS and the AAA have internal procedures for handling protests against arbitrators, they have not had access to the peer review attributes of the Academy procedures. Would it be feasible to channel questions of ethical performance by non-NAA members on the agency rosters to scrutiny by the NAA appeal procedures? Should we entertain client protest transmitted by the AAA or the FMCS concerning

excessive tardiness by non-NAA arbitrators? Would we be willing to expend our resources, time, and money to process a complaint against a non-NAA member? Consistency with our proclaimed goal of the universal need for improving professionalism would dictate that we undertake such a role as a step beyond asking the agencies to monitor the Code compliance of our own members. A different reaction could well be expected by the non-NAA recipient of the ethics charge who might well object to the Academy, of which he or she is not a member or from which rejected, rendering judgment as to whether or not his or her behavior was "proper." Should we serve to enforce the Code against non-NAA arbitrators? Would we be willing to run the risk of legal action against us when an advisory opinion or ruling results in the separation of the arbitrator from the FMCS or AAA roster?

On December 31, 1987, Chuck Cooper of the AAA San Francisco office issued a notice to panel arbitrators stating: "It is the practice of this office to refrain from listing arbitrators who require longer than 30 days from the close of the hearing to render an award." Should we place ourselves in a position to police or defend complaints against that agency for its laudatory rulings on timeliness?

Third, should we assume a more active role in soliciting questions for interpretation of the Code from non-NAA members or designating agencies?

There is much to be said for clarifying questionable areas of the Code regardless of whether the arbitrator triggering such questions is an Academy member. On unsettled issues there may be willing submission to the jurisdiction of the NAA Committee. We are indeed the only body with experience in interpreting the Code. In cases of universal interest the issue could be raised in an anonymous fashion as a type of declaratory judgment with the name of the non-NAA member and even the names of the charging parties kept in confidence by the referring designatory agency. We could thus answer questions such as: What must be included in an arbitrator's listing of "basis of fees" or what is the length of a "day"? Must medical treatment of the wife of the company owner by the arbitrator's spouse be disclosed?

The elucidation which would come from such submissions could provide valuable advisory opinions for universal guidance without waiting until a live case on that issue arose within the Academy membership. We do advisory opinions for our own

membership. Why shouldn't we do them for others sharing similar doubts as to what is acceptable conduct under the Code?

Fourth, should the NAA join with the agencies to establish a tripartite Committee for enforcement and intepretation of the Code? This is the toughest question, but one we must face if the Code of Professional Responsibility is to have the universal application its creators hoped for.

If the NAA, the FMCS, and the AAA have committed themselves to upholding the Code, doesn't it follow that having shared in developing the pronouncements therein, they should also share in assuring compliance with the Code? Should the NAA be the only participant on record as willing to undertake enforcement of the Code, albeit weakly, and then only against its own members? Is such a masochistic approach consistent with the expressed goal of universal adherence to Code precepts? The three sponsoring organizations stopped short of developing a mutually-agreed-upon enforcement mechanism in the Code itself. Isn't it time for a broader enforcement brush embracing the other signatories to the Code?

Such an endeavor might commence with the appointment of a tripartite committee to negotiate a new professionwide appeal and enforcement procedure as well as a procedure for rendering advisory opinions like our present Committee. Perhaps it is time to bring in some of the consumers of the process—union and management representatives—the real victims of any unprofessional practices or ethical wrongdoing.

The FMCS and the AAA may argue that they are merely appointing agencies serving the needs of their client employers and unions. But doesn't their responsibility to the parties include their continued acceptability to those parties by monitoring panel members to assure the clients of the integrity of the service and vigilance in assuring adherence to professional standards. Is the time propitious for developing a joint committee on Code interpretation and enforcement? Are the external pressures on the institution of arbitration sufficiently strong to motivate such a daring recourse? Or are the institutional risks and legal threats just too intimidating to permit such an undertaking?

Academy members repeatedly object to efforts to intervene in the livelihoods of our members under the guise of maintaining professionalism. Dare we undertake to expand those risks to an audience over which we have even less control—the non-NAA arbitrators? Our professional self-interest says we must in order

to maintain the standards for the benefit of all in the arbitration arena. Our legal self-interest forces a careful consideration of the risks of lawsuits for so doing. If the ever-scrutinized, ever-fragile institution of arbitration is to survive with continued respect for the professionalism and integrity of its practitioners, now is the time to take the necessary steps to implement more meaningfully the commitment of the NAA, the FMCS, and the AAA to their obligations under the Code.

Conclusion

The Academy and the designating agencies share a commitment to the perpetuation of, enforcement of, and adherence to the Code. It is an area where cooperation is of mutual benefit to all concerned. We should strengthen the role of the designating agencies and assist them in their efforts to help us preserve the high standards of our profession. Perhaps greater enlightenment as to the Code and conformity therewith will come from the agencies undertaking a more active training and education role. Perhaps it will come with the NAA facilities serving as an interpretation vehicle for those outside the NAA who question the meaning and application of the Code provisions. Perhaps it will come only with the NAA helping the agencies to take a more forceful stance in exposing the wrongdoers. Perhaps it will come only with a reconvening of the Code authors to explore the development of more stringent, more comprehensive Code enforcement to which all agencies and the NAA would be bound.

Whatever the result, the increasing pressures on the system require that all its beneficiaries—the arbitrators, the designating agencies, and the parties—face up to the need to reassure society of their commitment to excellence and professionalism as a prerequisite to the survival of this unique and precious system of self-regulation.

II. The Arbitrator's Duty to the Process

Robert Coulson*

Today, I hope to persuade you, to energize you towards more actively supporting alternative dispute resolution. I will also talk about arbitrator ethics.

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Labor arbitration became professionalized in the United States and Canada largely due to the efforts of the National Academy of Arbitrators, which has encouraged competence and ethical behavior. From what I see you have succeeded. Labor arbitrators provide an excellent service at a reasonable price. I leave it to others to describe the relatively rare situations where arbitrators make mistakes, show faulty judgment, or overreact. They are exceptions.

The Code of Professional Responsibility for Arbitrators of Labor-Management Disputes was drafted and adopted by the National Academy of Arbitrators, the American Arbitration Association, and the Federal Mediation and Conciliation Service. It covers three primary obligations of the arbitrator: (1) responsibility to the profession; (2) responsibility to the parties; and (3) responsibility to administrative agencies.[1] In my view arbitrators should have a fourth responsibility, that is, to the process itself. The American Arbitration Association helped draft the Code. We support it. Today I suggest one addition, a provision encouraging arbitrators to speak up for grievance arbitration and for private dispute resolution.

Arbitration is incorporated into most collective bargaining contracts. It has been a solid success. You can take much of the credit. Labor arbitrators have earned respect for their contribution to labor peace. Your understanding of dispute resolution in industrial relations gives you a unique opportunity to educate labor, management, and the public about the validity of such procedures, and about similar dispute-resolution techniques that could be beneficial to other organized groups and institutions.

Most of you agree that the American way of resolving labor grievances through bilateral discussion, capped by impartial arbitration, has probably worked better than the labor courts or government tribunals found in other developed societies. Few labor arbitrators favor increased government intervention in collective bargaining. Of course, that consensus might change in a period of runaway inflation or increased labor strife.

Looking beyond labor relations, our society seems to be addicted to litigation. That tide may be turning. Most Americans

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[1]Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, as amended and in effect May 29, 1985. Originally approved in 1951 by a joint steering committee chaired by William E. Simkin.

hate the idea of going to court. People are rightly concerned about legal expenses, lengthy delays, and the anxieties of litigation. These concerns provide an opportunity to turn people away from that process. Labor arbitrators know that good-faith negotiations can resolve most disputes. You favor that approach. Labor arbitrators, above all, should speak out for alternative dispute resolution, the notion that negotiation, mediation, and arbitration are preferable to filing lawsuits in court. Borrowing the words of President Reagan, "you should be missionaries spreading the message of Western-style democracy."

The Code says nothing about your duty to encourage arbitration. Indeed, the prohibition against soliciting may dissuade some of you from doing so. The Code states that an arbitrator may not advertise or solicit arbitration assignments, a common provision in professional codes.[2] Labor arbitrators are rightly concerned when a competitor seeks business in an undignified, improper manner. The vision of a hungry arbitrator soliciting assignments seems distasteful, particularly when accompanied by any hint that the arbitrator might favor the side being solicited. Such an approach would soon undercut your profession's reputation for impartiality and integrity.

Some would suggest a prohibition against communicating with potential clients, a Draconian rule intended to guard against occasional improper solicitations. In my opinion, such a rule would be a mistake. Every profession has an obligation to its future. How can new arbitrators get started if they can't talk to the people who might hire them?

That is the Catch 22 of labor arbitration. The aspiring arbitrator must become known and must be allowed to approach the law firms, unions, and employers that make up the marketplace. Some of this can be done by publishing technical articles, giving speeches, or mingling with labor-management practitioners. The Arbitration Day programs and seminars sponsored by the AAA facilitate such contacts. Some of our offices sponsor "Meet the Arbitrator" events to encourage exposure. Beyond that, aspiring arbitrators need to be able to discuss their availability with potential clients, as long as such activities are carried out in a professional manner. No one condones undignified behavior. Certainly, no arbitrator should promise favorable decisions to a prospective user. That would be

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[2] *Id.* at 1(c)(3).

stupid as well as unethical. The acceptability of new arbitrators is particularly fragile. That being said, let me test my thesis with a hypothetical example.

Mary Smith moves to a city called Valhalla. She has a law degree and a master's degree in labor economics. For several years she has worked as a mediator with a Public Employment Relations Board. She has some limited experience as an arbitrator and wants to practice arbitration in Valhalla. She makes an appointment to visit a leading labor attorney at his office in Valhalla. After some pleasantries Mary tells him about her experience and gives him a copy of her biography and some articles she has written on labor law. She explains that she is interested in continuing her practice as a labor arbitrator. After asking Mary a few questions about her prior experience, the lawyer thanks her for introducing herself. Nothing more. She leaves. Should that episode be regarded as solicitation? Does it detract from the dignity and integrity of the profession? I don't think so. Some may disagree. What if Mary tells him that she is on the panel of the AAA? What if the lawyer asks her which agencies have listed her? Should she answer?

Why shouldn't arbitrators print their memberships on letterheads, cards, or announcements? Agency listings are some evidence of acceptability. They may indicate competence; they are at least relevant. Why not allow an arbitrator to refer to them? For that matter, why should an arbitrator be reticent about mentioning membership in the National Academy?

Labor arbitration is not unique. Other professions set standards of behavior. My comments may suggest that I view labor arbitration as a service rather than a learned profession. That should be expected. The mission of the American Arbitration Association is to serve the parties. The mission is twofold: to encourage the use of Alternative Dispute Resolution (ADR) through education, and to demonstrate that ADR can work by providing administrative services. In accordance with that mission, the Association is obliged to expand the supply of qualified neutrals, making labor arbitration conveniently available, reducing the transactional costs and systematic delays. Not for nothing does the Association's ancient seal contain the words "speed and economy."

I turn to another subject. What penalties should the AAA impose for violations of the Code? The Academy's Committee on Professional Responsibility and Grievances investigates vio-

lations and issues advisory opinions, some of which the AAA publishes in *Study Time*.[3] The Academy looks to the appointing agencies for enforcement.

Academy President Arvid Anderson asked me to describe AAA enforcement policies. Some aspects can be quickly stated. The AAA supports the Code. It welcomes the activities of your committee. The advisory opinions are useful. We are glad to receive information about poor performance by labor arbitrators. As most of you know, we send out questionnaires to the parties with each award, asking about our performance and about your performance. The AAA's primary obligation is to the parties, providing lists of competent arbitrators and appointing them to cases. We attempt to treat arbitrators fairly, but the quality of service is most important. Arbitrators who engage in improper or unethical behavior are listed less frequently or not at all. Usually, the arbitrator's failures are discussed when such action is taken, but not always. The AAA is not eager to be sued. Nor, to be candid, do we enjoy being harassed by arbitrators. Sometimes AAA regional staff are subjected to pressure by arbitrators who want to be listed more frequently. We resist that kind of pressure in the interests of the parties.

If we are unfair, tell us. Give us the facts, but maintain your dignity. Don't threaten us. Don't give us gifts. Don't manipulate us. Not that any of you ever would.

We recognize that some degree of subjective judgment is involved in listing arbitrators. The AAA administrators are expected to exercise good judgment. If we are showing favoritism, tell us. Tell the regional vice president; tell George Friedman, Vice President for Case Administration in New York; or tell me.

Among the actions that can reduce an arbitrator's listings are violations of the Code, late awards, actions that reflect upon the arbitrator's impartiality, or overcharging.

A few words about the AAA's arbitrator billing policies are in order. We believe that arbitrators have the right to set their own per diem rate and terms of compensation, but these should be described in advance in the biographical data distributed with the panel list. A day of hearing should represent a day of hearing. Study time should include actual time spent researching and

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[3]*Study Time*, a quarterly newsletter for labor arbitrators, published by the American Arbitration Association.

preparing the award and opinion. Expenses should reflect disbursements and should be reasonable. Practices as to cancellations should be described in the data sheet. Our administrators review bills before signing them and discuss problems with the arbitrator involved. Sometimes the AAA will recommend to an arbitrator that a bill be reduced. We try to be diplomatic. Sometimes a party will complain, and we attempt to mediate.

To summarize, I encourage arbitrators to be advocates of the process and advocates for themselves. Encouraging ADR gives you an opportunity to market yourself. The AAA welcomes information about arbitrator transgressions. We do not like being pressured by arbitrators but welcome factual information. We try to use objective criteria in listing arbitrators. We support the efforts of the National Academy of Arbitrators to bring high standards to the profession. The caseload of the AAA has been growing because the parties can obtain reliable arbitration service through the AAA's 33 offices. Ultimately it is you, the arbitrators, that they trust.

III.

JEWELL L. MYERS*

Before presenting my comments on the Code of Professional Responsibility for Arbitrators, I would like to extend Kay McMurray's regrets at not being with you. When he received the Academy's invitation to this panel discussion, he quickly accepted. He wanted to attend this meeting and to participate in the discussion of this important subject. In his haste to accept your invitation, however, he overlooked a prior commitment to speak at the Biennial Conference on Labor-Management Cooperation in Washington, sponsored by the Federal Mediation and Conciliation Service (FMCS). Kay is now very aware of the conflict in dates of these two meetings and intends to take steps to prevent such conflict in the future.

Personally, I'm delighted to be taking his place. I always look forward to spending a few days at the NAA Annual Meeting. Kay shares my interest in extending the use of the arbitrators' Code of Ethics.

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By way of preface to my remarks, I want to say that the composition of this panel with representatives of the Academy, the American Arbitration Association, and FMCS is appropriate. These three organizations were the drafters of the original Code and its revision in 1972, and they are the organizations that can best improve their activities through the dissemination and enforcement of the Code.

Need for the Code

Even though each of our three organizations is dedicated to the improvement of the arbitration process, our orientation and perspectives, while not inconsistent, are somewhat different. This may explain the differences in our approaches on this panel, the slight difference in our administration of the Code, and some of our differences in the administration of the process.

I think that this is a timely and important subject. I suggest that this panel discussion serve as the beginning of a dialogue among the three organizations about the dissemination and enforcement of the Code of Ethics; that it continue after this session in a series of meetings to find ways to advance the knowledge and use of the Code; and that at some point representatives of the parties be included in those discussions; all of which might be further discussed at the next meeting of the Academy. I would also suggest, for reasons which I will make clear in a moment, that the discussion be held during the public portion of the Academy meeting next year when representatives of the users of the arbitration process can participate. I believe that the subject of the Code is important to everyone concerned—our three organizations, the arbitrators, and the parties whom the process is intended to serve.

In a number of ways FMCS and its arbitration services differ from the other organizations represented on this panel. The FMCS was created by Congress to serve the collective bargaining needs of the parties. Our mandate at FMCS is to provide services that aid the parties to better use the bargaining process. To that end we maintain a roster of arbitrators and respond to requests from the parties for panels.

It is in this context that FMCS shares a concern for the capability and professional standards of arbitrators. In this sense we are pulling in the same direction as the other two organizations on this panel. Even with the interest in maintaining and

improving the qualifications of arbitrators, however, we ultimately focus on and serve the needs and interests of the parties.

I have stressed this initial item because other points I intend to make depend on that fundamental orientation of FMCS' arbitration services. It is our view that this Code of Ethics, as important as it is to the professional standards of arbitrators, was developed for the protection of the parties in their use of arbitration.

Use of the Code by FMCS

While FMCS spends a great deal of time determining the qualifications of those who apply for inclusion on the roster of arbitrators and monitoring the activities of arbitrators, we are created to serve the arbitration needs of the parties. As a result, we view knowledge and observance of the Code of Professional Responsibility as a qualification of arbitrators and as a protection for the parties.

That brings me to the matter of dissemination of the Code. It has been a long-standing practice of FMCS to transmit a copy of the Code to every arbitrator admitted to the FMCS roster as part of the package of acceptance documents. In our letter to newly admitted arbitrators, we cite the Code and encourage them to become thoroughly familiar with it.

Discussion of the Code and its implications for sound arbitration practice are frequently subjects covered at arbitration conferences conducted by the FMCS throughout the country. While we have not been sponsoring these conferences as often as in the past, a number of these activities are being held where arbitrators and practitioners have an opportunity to learn about and discuss the practical dimensions of the Code. Personally, whenever I speak to any group concerned with the arbitration process, whether arbitrators or practitioners, I frequently cover violations of the Code.

I have indicated that we have a special responsibility to the parties using arbitration. We try to make them aware of the existence and the content of the Code. Ideally, copies should be sent to the parties whenever they request arbitration assistance for the first time, but because of budget considerations, we have limited the distribution of the Code and FMCS regulations to parties who request copies or register a specific complaint. As a

result of this panel's focus on the Code, we are now thinking about ways to improve dissemination of the Code to the parties.

Sources of Complaints

When one or both parties involved in an arbitration case register a complaint about an arbitrator, we send them a copy of the Code and the FMCS regulations so that they can file a more specific complaint, citing the relevant section of the Code or regulations. Ordinarily communications from the parties are our main source of complaints, although complaints can come from other sources.

Once we receive specific complaints, we contact the arbitrators involved to discuss the matters with them and provide them an opportunity to respond to the allegations of misconduct. In many instances complaints from the parties center on delays in the issuance of awards. In most cases the arbitrator takes corrective action or provides information relating to the alleged delay. It is our current practice to maintain a log of actionable complaints in the arbitrator's file. When there is a pattern of delays in a relatively brief period of time, we place the arbitrator on the inactive list until his or her calendar is sufficiently clear to allow for the issuance of timely awards or until other problems have been cleared up. The FMCS regulations, of course, provide the right of appeal to the suspended arbitrator. While there are no public reports of these actions, this system has been operating for some time and has produced satisfactory results.

The Service has been developing an automated system to assist with the administration of the arbitration process. Thus far we have implemented the first three stages of the system: arbitrators' biographical sketches, panel selection, and appointments of arbitrators. For the purposes of this discussion we are about to implement the important final phase—the case tracking portion of the system. Case tracking will allow us to identify delays in rendering awards based on information provided by the arbitrator and the parties. This system will provide us with information on specific activities, allowing FMCS, for the first time, to respond to situations without requiring the parties to register complaints. In those cases where arbitrators are not issuing timely awards, we intend to apply FMCS regulations concerning the suspension or removal of arbitrators from the roster.

Concerning complaints about the quality of arbitrator awards, our regulations do not provide for review of arbitrator awards by the Service. Our regulations also specifically preclude our resolution of disputes between the parties and the arbitrator over fees and costs. The Service issues annual statistics of average charges by the arbitrators which are published in the FMCS Annual Report to provide guidance to arbitrators and practitioners.

In cases of unethical practices beyond lateness of awards, there is a formal procedure providing due process. In a recent case involving a serious complaint, the arbitrator was provided an opportunity to respond to the complaint. The matter was then reviewed by the FMCS Arbitrator Review Board. After the review an FMCS attorney was appointed to gather the facts and the matter was placed before an outside hearing officer. The hearing resulted in a recommendation that the arbitrator be removed from the roster. That recommendation was given to the Director of the Service and the arbitrator was removed.

In another case responding to a complaint, the arbitrator was notified of the matter and was asked to respond. When the arbitrator failed to answer the FMCS request after several inquiries, the arbitrator was removed from the roster after due notice of that impending action.

While an argument can be made that these complaints and their resolution are a common concern to the Academy, the AAA, and the Service and should be subject to joint consultation and action, we at FMCS feel that infractions of the Code or our regulations in FMCS arbitration cases should be administered solely by the Service. We do not believe that these complaints should be investigated or acted upon by any group outside the Service. Further, we do not believe any actions taken by the Service, even removal of an arbitrator from the FMCS roster, should be published by the Service. While we agree in the use of a common standard in the form of the Code, we do not believe that anyone other than the Service should be involved in actions taken concerning FMCS cases. We believe that our administration of the Code and regulations has been sufficiently consistent and thorough to meet our objective of protecting the interests of the parties.

Dissemination of the Code

A matter of concern at FMCS is informing the parties of the existence and meaning of the Code and of their rights under the

Code. This is a subject that the three organizations represented on this panel might discuss. Discussion of dissemination of these standards might include exploration of means to ensure the knowledge of the Code by arbitrators. For example, should appointing agencies require some form of certified training on the Code of Professional Responsibility before new arbitrators are admitted to the roster? Should experienced arbitrators be required to periodically review the Code to maintain their membership on various appointing agency rosters or in the Academy? These and other matters might be the subject of continued consultation by the three organizations during the next year, with additional discussion among arbitrators and practitioners.

As a final comment, I would like to say that while over the years FMCS may not have spoken about our use and application of the Code in the administration of FMCS arbitration cases, the fact is that we rely on that document and use it frequently. We expect to be using it even more after the completion of our computerized system. At the same time, we are open to suggestions to make the Code better known by both arbitrators and the users of arbitration. Ultimately we think that it is the responsibility of the parties to become aware of the standards to which arbitrators are held and to be prepared to file complaints when deemed appropriate. The various agencies should be prepared to receive those complaints and to deal with them expeditiously. This is the approach we think will achieve the desired maintenance and improvement of ethical standards of arbitrators and, ultimately, will produce more timely and appropriate awards.

IV. A CODE COMMENTARY—CONDUCT OF THE HEARING

RICHARD MITTENTHAL*

My assignment today, the analysis of Part 5 of the Code of Professional Responsibility, is not unlike what scholars must endure in their exegesis of the Bible or the Talmud. One is presented with a list of behavioral norms, "dos" and "don'ts," and "maybes." There are few helpful examples in the text. There is no legislative history to consult. The questions must

*Past President; member, National Academy of Arbitrators, Birmingham, Michigan. This presentation was made during the Annual Fall Continuing Education Conference of the Academy, October 31, 1987, Cincinnati, Ohio.