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

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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

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nevertheless be asked. What ethical requirements does the Code impose on us in conducting a hearing? What standards of good practice does the Code suggest we follow?

The answers are certainly not obvious from a cursory reading of Part 5, for the Code draftsmen were speaking in broad generalities. They recognized that arbitration is a many splendored thing, that arbitrators have adopted many different techniques for running a hearing. They recognized that there is no one correct method. Hence, they were concerned with creating certain minimal standards that every arbitration system should possess if the parties are to receive a "fair" hearing. It is those standards which my paper seeks to address.

One note of caution seems appropriate. I am not the correct person for this assignment. If we were discussing the Ten Commandments and Moses were still alive, he would be the one best suited to explain what each Commandment meant, assuming, of course, that God was not available to testify. The present Code is just 14 years old. The Code draftsmen, our several Moseses, are alive and well. They include the following Academy members who were also part of the Joint Steering Committee that wrote the Code—Chairman Bill Simkin, Academy representatives Ralph Seward and Syl Garrett, AAA representative Fred Bullen, and FMCS representative Larry Schultz. They are the people best suited for this textual exegesis. I shall try to imagine what they had in mind when they created Part 5.

A Fair and Adequate Hearing

Let me begin by reading the first of the general principles stated in Part 5:

> 1. An arbitrator *must provide a fair and adequate hearing* which assures that both parties have sufficient opportunity to present their respective evidence and argument. (emphasis added)

Although the Code does not define what is "fair and adequate," the essential ingredients of a fair hearing seem clear. Each of the parties has the right to make an opening statement, to call witnesses, to present evidence, to cross-examine opposing witnesses, and to offer a final argument. To deny labor or management any such right would be a violation of Part 5.

Most of the difficulties arise from arbitral impatience. The arbitrator cuts the parties short because of time constraints or

because of the view that some of the evidence or argument is unnecessary. This may often amount to nothing more than bad manners. But when the parties are denied the opportunity to call a witness or are forced to abbreviate their presentation because of the arbitrator's rulings, the arbitrator may be committing a Code violation. One can attempt to persuade the parties to refrain from introducing certain evidence. But if they insist on doing so and if what they seek to introduce has some relevancy, however slight, fair procedure ordinarily dictates that the parties be allowed to proceed.

The most common problem is relevancy. Consider the typical scenario. The union seeks to put certain testimony into the record; the employer objects on the ground that such testimony is not material to the issues in the case. If the objection is valid, the arbitrator should bar the testimony. However, if the arbitrator bars testimony that is indeed relevant, he may well have interfered with a fair hearing. Whether this mistake would be a Code violation is hard to say. I do not believe that Part 5 was intended to punish arbitrators for honest mistakes in judgment with respect to the admission of evidence. But if the mistake is so egregious as to suggest an arbitrary or capricious disregard of one party's rights, a Code violation may result.

Arbitrators respond to these uncertainties in a thoroughly predictable fashion. Our doubts about relevancy are almost always resolved in favor of admitting evidence. We would rather be guilty of allowing irrelevance into the record than denying someone a fair hearing. The former mistake is correctable. We simply ignore the irrelevant in making our decision. The latter mistake is not correctable. We shall never have the opportunity to consider a piece of relevant evidence improperly excluded.

There are sound practical reasons for our behavior. Arbitrators are usually given little, if any, information about a case before the hearing. We often do not know enough during the hearing to rule with confidence that something is irrelevant. Moreover, what seems irrelevant at one point in the hearing may later turn out to be relevant. Nor can one ignore the therapeutic aspects of the hearing, the parties' need to be heard in full. Perhaps most important of all, arbitrators are acutely sensitive to considerations of acceptability and hence do not wish to upset the parties by excluding their evidence. Factors such as these have led to a large presumption in favor of admissibility.

This does not mean that relevant evidence need be admitted in any and all circumstances. Even that which is relevant may sometimes be properly barred. Consider cumulative evidence in a discipline case. The union has 15 witnesses who are prepared to testify in detail that the discharged employee struck the supervisor only after he himself had been struck. All of this testimony concerns precisely the same fact. At some point, after a number of these witnesses have been heard, the arbitrator may properly suggest that the parties stipulate that the remaining witnesses would testify to the same effect. Assuming no stipulation is agreed to, the arbitrator may call a halt to such lengthy cumulative testimony. That would not deny anyone a fair hearing.[1] Or consider a similar situation where one party's counsel asks the same question over and over again on cross-examination. At some point, the arbitrator may legitimately intervene and instruct counsel to move to another subject. That would not deny anyone a fair hearing.

The point is that the right to a fair hearing does not give the parties a license to do whatever they wish. Fairness suggests that a hearing have reasonable dimensions. When one party behaves in a way that unduly and unnecessarily lengthens the hearing, the arbitrator is free to resist this behavior. Such arbitral intervention is not without dangers. But it does not violate Part 5 and it does serve in this type of situation to promote certain goals of arbitration, namely, speedy resolution of disputes at a reasonable cost. This problem may not arise often, but when it does arbitrators should not hesitate to use their authority to prevent abuses at the hearing.

Desires of the Parties

I turn now to the second general principle in Part 5:

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[1]When cumulative evidence involves the same purpose, but not the same fact, the analysis is quite different. Suppose that a discharge case turns on credibility—the grievant's word against the foreman's word. The union has 15 witnesses, each of whom is prepared to testify about different incidents which reveal some character flaw in the foreman. The employer has 10 witnesses prepared to do the same thing to the grievant. Such evidence is cumulative in the sense that it is directed to the same purpose, namely, impugning someone's integrity. But it is not cumulative with respect to the facts, each witness intending to describe a separate incident. Under these circumstances, it is impossible to know in advance what impact any of the testimony may have on the credibility question. To exclude anything may well interfere with a fair hearing and thus run afoul of Part 5. The arbitrator can only sit back and say to himself, "Let the character assassination proceed."

a. Within the limits of this responsibility [to provide a fair and adequate hearing], an arbitrator *should conform to* the various types of *hearing procedures desired by the parties*. (emphasis added)

The typical collective bargaining contract says nothing about how the arbitrator is to conduct a hearing. Nor do the parties ordinarily agree, outside of their contract, to some specific form of hearing procedure. They leave these matters to the arbitrator's judgment. When they do indicate a preferred procedure, they are probably explaining what they have become accustomed to rather than what they have deliberately chosen through an analysis of various alternatives.

In any event, arbitrators cannot "conform" to the parties' "desire[s]" unless they have had a chance to read the contract. It follows that they should, as a matter of good practice, routinely request a copy of the contract in advance and read the grievance and arbitration clauses before getting to the hearing.[2] If these clauses embrace a formal or informal procedure, arbitrators should conduct themselves accordingly. If these clauses call for some specific action on their part, arbitrators should obey the command. Failure to conform to such directions may or may not be a Code violation, depending on intent. When arbitrators disregard the agreed-upon procedure out of ignorance, no Part 5 violation is likely to be found. But when the disregard is willful, stemming perhaps from a belief in the superior wisdom of their own familiar hearing procedure, a Part 5 violation would appear to have occurred.

Arbitral Initiatives

The third general principle in Part 5 deals with the question of arbitral initiatives. It reads:

b. An arbitrator *may*: *encourage stipulations* of fact; *restate* the substance of *issues* or *arguments* to promote or verify understanding; *question* the parties' *representatives* or *witnesses*, when necessary or advisable, to obtain additional pertinent information; and *request* that the parties submit *additional evidence*, either at the hearing or by subsequent filing. (emphasis added)[3]

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[2]If this is not possible (for instance, an AAA-administered case where the contract language in question is not in the AAA's possession), then the arbitrator should take time at the start of the hearing to read the grievance and arbitration clauses.

[3]The Voluntary Labor Arbitration Rules of the AAA similarly state that "the parties . . . shall produce such additional evidence as the arbitrator *may* deem necessary to an understanding and determination of the dispute." (emphasis added)

To state what arbitrators "may" choose to do is to imply what they also may choose not to do. The Code permits the arbitrator to determine whether to take any of these initiatives. Part 5 is not violated by questioning witnesses, requesting additional information, and so on. Nor is Part 5 violated by refusing to intervene in this fashion.

Obviously, the Code draftsmen meant to permit arbitrators to be as active or as passive as they wish. One mode is not favored over the other. Nevertheless, the very fact that these initiatives may be invoked suggests that there may be occasions when they should be invoked. This Part 5 language envisions that arbitrators exercise their discretion in determining whether or not to employ any of these initiatives. The arbitrator is expected, in short, to consider the possibility of intervention. That is a form of good practice implicit in this Code provision. An arbitrator who refuses to consider these initiatives, who rejects the idea out of hand, does not violate any Code rule, but, in my opinion, is ignoring precepts of good practice.

Permit me a brief digression from the Code at this point. I believe arbitrators ignore these initiatives—requesting additional information, restating issues, and so on—because their energies at the hearing are focused primarily on understanding what they are being told. There is no need then to take the further step and think about a decision or, more precisely, whether they have all the information they require to render a sound decision. Consequently, they are less likely to identify the missing pieces. That means they are less likely to intervene and ask for what is missing. My suspicion is that a larger consciousness at the hearing, the ability to listen for the purpose both of understanding and deciding, would cause us to make greater use of the initiatives stated in Part 5. The wise exercise of this kind of discretion demands the greatest possible understanding of the dispute as it is being heard.

One final point on this subject. The temptation to intervene rises with the inadequacy of the parties' representatives or the imbalance in such representation. Consider the expert management lawyer matched against the newly elected president of a 30-member local union. Suppose it becomes apparent during the hearing that some critical piece of information has not been produced because of the ineptness of the local president. How many of you would intervene and request its production? Obviously, the answer depends on how you perceive the role of

the arbitrator. I believe good practice in these circumstances calls for the arbitrator to request the information, for one of our duties is to assure that we have been given the evidence we need to make a sound decision. This intervention can be accomplished without a "fishing expedition" and without changing either party's theory of the case. It does involve the risk of being viewed as having assisted one side or the other. But that risk comes with the job of being an arbitrator.

A Final Caution

The final "general principle" contains the following cautionary advice:

> c. An arbitrator *should not intrude* into a party's presentation so as to prevent that party from putting forward its case fairly and adequately. (emphasis added)

There is nothing more exasperating for the parties than an arbitrator who constantly interrupts their presentation with questions and comments or who literally takes the case away from them and becomes both judge and prosecutor. Such behavior, in its more aggravated forms, is a Code violation.

A limited intrusion, however, is often justified. Take the union representative who calls an employee as the first witness and simply says, "Joe, tell the arbitrator why you filed this grievance." Joe then launches into an extended soliloquy. He begins with references to "Bob" and "Sally" in the "widget" department, rambles on about past and present events, and fails to provide any clue as to what the dispute is about. At some point, the arbitrator may properly intervene and attempt to give the testimony some shape so as to obtain some inkling of what the problem is. That kind of intervention helps rather than hinders one party in "putting forward its case fairly and adequately." It is not a Code violation.

Other Matters

Another example of a permissible intrusion involves leading questions. Suppose the employer poses the following questions to a supervisor who denies provoking an employee who had verbally abused him: "Didn't you simply tell the grievant to go back to work?" "You didn't curse him, did you?" "You didn't put

your hand on him?" The supervisor's answers are predictable, a monosyllabic "yes" or "no." The arbitrator may properly advise the employer in this situation that leading a witness with respect to the crucial matters in dispute is not helpful and that allowing the witness to describe what happened in his own words is far more persuasive. That kind of intrusion assists the parties in setting forth their case "fairly and adequately" and assists the arbitrator in evaluating the testimony. It is not a Code violation.

Part 5 concerns other hearing problems as well.[4] It requires arbitrators to "respect" the parties' "mutual agreement" as to "use or non-use of a transcript." Arbitrators who insist on the use of a transcript where the parties agree not to have one are in violation of the Code. Where the parties disagree, arbitrators are free to handle the matter as they wish. They "may permit one party to take a transcript at its own cost," or may deny permission and insist that the hearing proceed without a transcript. The Code does not prohibit either course of action.

What constitutes good practice in this situation is difficult to say. A transcript customarily speeds up the hearing and provides a more reliable record of testimony than the arbitrator's notes.[5] Assuming that the arbitrator and the union will have access to the transcript and assuming further that the issuance of the award will not be unduly delayed by a transcript, then the employer should ordinarily be allowed to make a transcript. Absent these conditions, the employer should not be allowed to do so. This view seems sensible but only at first blush. There is a flaw. Surely, it would not be improper for the union or the employer to bring a secretary to the hearing to take shorthand notes of what the witnesses said. I have seen that happen many times. If that is permissible, why would it not be equally permissible for the secretary to take the notes on a stenotype machine? The tool used by the secretary should not affect our judgment on the propriety of the note-taking. Either party should be permitted to make its own entirely private record of the hearing as long as it is understood that the arbitrator's notes are the only official record.

The next point will come as a surprise to many of you. Part 5D states that where either party requests a "plant visit," the

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[4]It deals with "ex parte hearings" and "bench decisions." Such rare events need not be discussed here.

[5]Typically, it is the employer that desires a transcript and the union that objects.

arbitrator "should comply." Failure to comply, without some compelling excuse, is a Code violation. And I do not think the arbitrator's belief that the plant visit is unnecessary constitutes a compelling excuse.

Mediation by the Arbitrator

Other portions of the Code deal with the conduct of the hearing. Part 2F speaks of mediation by an arbitrator. Where the parties jointly ask for mediation, after appointment, the arbitrator "may either accept or decline a mediation role." Where one party requests mediation and the other objects, the arbitrator "should decline the request." It is proper for the arbitrator to suggest mediation although it should not be done "unless it can be discerned that both parties are likely to be receptive." Hence, good practice calls for the arbitrator to ask the parties whether they have any objection to an attempt to mediate their dispute. If either side is unreceptive, the arbitrator "should not . . . pursue . . ." the matter. Therefore, to proceed to mediate in face of such disapproval is a Code violation.

Strangely enough, Part 2F does not explain what is meant by "mediation." This term usually describes a neutral's effort to get the parties to resolve their differences through some compromise or settlement formula. To perform that task, the arbitrator ordinarily must determine the parties' "bottom line" positions, their last offers in the grievance procedure. If such mediation fails, the arbitrator must then decide the dispute. But the information thus elicited, once heard, cannot be erased. It must inevitably affect the award.[6] This is precisely why evidence of "offers of compromise" is always excluded from the arbitration hearing.

Thus full-bore mediation may pose both a serious impediment to the independent judgment of the arbitrator and real risks for the parties. The arbitrator who mediates in this fashion does not violate the Code. But I question whether such mediation is normally good practice. There are sensible alternatives. Suppose the arbitrator is convinced that there is a solution to the grievance, one that cannot be justified strictly by the facts or the

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[6]For example, if an arbitrator mediates a discharge case and learns that the employer was willing to reinstate without back pay, that fact may prevent the arbitrator from finding that discharge was a reasonable penalty.

contract, or one which stresses practical considerations that could not be taken into account in rendering an award. This solution and the reasons therefor can be offered to the parties without getting into their "bottom line" positions. Or the parties can simply be urged to settle for a particular reason without the arbitrator's offering a specific solution. This kind of limited mediation encourages the parties to resolve their dispute without undermining the arbitrator's ability to decide fairly in the event mediation is unsuccessful. This is good practice under Part 2F.

Consent Awards

Part 2I relates to the extremely sensitive issue of "consent awards." It provides that "the parties may jointly request the arbitrator to include in the award certain agreements between them, concerning some or all of the issues," a request generally made at the hearing or shortly thereafter. Arbitrators may comply with the request and issue a consent award provided the parties' proposal is "proper, fair, sound, and lawful." In these cases arbitrators must be certain that they "understand[] the suggested settlement adequately." They should take the "initiative" to secure more information whenever they believe they do not understand some aspect of the settlement. Assuming these conditions are met, arbitrators may embrace the consent award without violating the Code. They are also free to reject the consent award without violating the Code. The matter is left to the arbitrator's discretion. The difficult question, nowhere addressed in the Code, is to determine how to exercise this discretion wisely. The answer depends on such factors as the nature of the particular collective bargaining relationship, the practices of the parties, the people involved, the reason for their preference of a consent award over their own settlement, and the presence or absence of some felt improper purpose.

Another question unanswered by the Code concerns the form of the consent award. Assume the arbitrator acts properly in complying with a request for a consent award. Should the award indicate that the decision is the result, at least in part, of the parties' wishes, or should the award be issued without mention of the parties' involvement? The problem arises where the

parties do not wish to have their involvement noted.[7] The Code provides no guidance. Perhaps this is one of the factors the arbitrator should consider in determining whether to adopt the parties' suggested settlement. It can be argued that the failure to mention the consensual nature of the award is a possible fraud on a grievant who is unaware of these arrangements. The grievant has been led to believe that the case has been decided independently by the arbitrator when it has not. However, it can be argued with equal force that as long as arbitrators are assured that the suggested settlements are factually and contractually correct, they have truly decided the case. It should be remembered that arbitrators routinely accept the parties' stipulations on critical fact or contract questions that sometimes dictate the outcome of the dispute. The acceptance of such stipulations is much the same as the acceptance of the parties' proposed settlement except that in the latter situation the arbitrator has a far greater opportunity to insist on fact and contract fidelity.

Conclusion

This Code analysis serves to confirm my belief that the difficulty of the arbitrator's job varies in inverse proportion to the guidance offered by the collective bargaining contract. The toughest cases are spawned by the vaguest contract language. The same thing is true of the Code. The toughest ethical or good practice issues are a product of the vaguest Code prescriptions. Those who drafted the Code were, like other negotiators, required to strike a balance between strongly competing views. Their compromises were really an attempt to make legitimate the broadest possible range of arbitral behavior. Nowhere can this be more clearly seen than in the Code's provisions on the conduct of the hearing. The Code attempts to steer an impartial course between passive and active arbitrators, between silence and intervention, and between the strict quasi-judicial form that keeps the parties at arm's length and the flexible collective bargaining form that embraces the possibility of mediation and consent awards. Both these models have their place. The wise arbitrator is the one who knows when and where to assume these very different roles.

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[7]This is the normal state of affairs.