

CHAPTER 14

ETHICAL ISSUES AND DUE PROCESS

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This session examines several hypothetical scenarios raising ethical questions for arbitrators and advocates. Each scenario is presented, followed by comments from the panelists based on relevant Code of Professional Responsibility provisions and other ethical guidelines.

Landau: This is the session on ethical issues and due process. First, let me identify myself and introduce our panel. I'm Bob Landau. I'm an Academy member from Anchorage, Alaska. And we're fortunate to have three geographically diverse panel members today. On my immediate left is Luella Nelson, an Academy arbitrator from Portland, Oregon. Next to Luella is Jim Oakley, an Academy arbitrator from St. John's, Newfoundland. On the far end of the table is Marcia Greenbaum, an Academy arbitrator from Essex, Massachusetts.

Our purpose today is to discuss the intersection and interplay between some of the due process concerns that come up commonly in arbitration hearings and the ethical rules and guidelines that apply to labor management arbitrators and to those of you who are attorneys and appear in arbitration or serve as arbitrators.

The handout materials consist of scenarios, and they're followed by a short excerpt from the Canadian Bar Association Code of Professional Conduct, applicable to lawyers in Canada. That's followed by several pages from the American Bar Association Model Rules of Professional Conduct, which have been adopted in most or all states.

Let's turn to the first case. This case involves a grievant who is a 20-year employee, who was discharged for striking his supervisor during an argument in the break room. There were about 10 employees in the break room when the incident occurred. The supervisor was not disciplined. The union grieved the discharge, but the parties were unable to resolve informally and the matter was then scheduled for a 1-day arbitration hearing.

Now we go to the first question. At the outset of the hearing, the union for the first time makes the argument that the discharge is untimely because it was not issued within 10 days as required by the Agreement. The Agreement also says that the parties shall present insofar as possible all pertinent evidence and arguments during the initial steps of the grievance procedure. The employer objects, presenting a timeliness argument on grounds that the union failed to raise it prior to arbitration. The employer is not prepared to present witnesses or evidence on this issue. Is it a denial of due process or an ethical violation for the arbitrator to sustain the employer's objection and deny consideration of the union's timeliness argument on its merit?

Greenbaum: I think it's an important value of the grievance and arbitration process that disputes are resolved insofar as possible at the lowest level of the grievance procedure. I think there are two operative things in this case. One is that the contract language provides that parties shall present insofar as possible all pertinent evidence and arguments. And so I would at least allow a hearing on the precedent of whether or not it was possible for the union to have made this argument sooner. I certainly wouldn't just rule on the objection without having heard from the union as to why it didn't present this any earlier in the grievance procedure. But I also note something about this language, which was present in some other contracts. Some contracts actually provide that parties must raise an issue at the lower level of the grievance procedure in order for it to be able to raise that issue at the arbitration level. In other words, you can't bring anything up in arbitration that you didn't bring up earlier. And I don't see that language here. Nor is there language that says that if you don't bring it up earlier you will be barred from bringing it up in arbitration. So, I would be open to a hearing or a very brief statement from the parties as to whether or not there was, in fact, some reason for the union not to have done this. And I probably would allow it even if they had no reason for not having raised it a lower level. So I would say that

denial of due process would occur if the arbitrator did not allow the union's timeliness argument to be heard on merit.

Oakley: Good afternoon. Being one of the Canadian members of the Academy, I'm going to be presenting to some degree a Canadian perspective on some of these questions. And I think we'll find as we go along and from the difference of views here, there's often no one right or wrong answer to these questions. We'll see in some cases that there are some regional differences and the practice in Canada may differ from the practice in the United States.

So on this particular question, I would say that it would be a denial of due process not to fully hear the objection that's being made. There is not enough information that's been presented by simply just stating a position to make a decision. And I think, first of all, we need to ask "What is due process?," which is what the panel discussion is about. And there are different ways of looking at it. Some would call it the rules of natural justice. Some would call it procedural fairness. It's the sense of having a fair hearing or in some cases, the right to be heard.

So I think that in this case, there could be witnesses called on the preliminary issue to explain, for example, why the issue wasn't raised in the grievance procedure and to hear legal argument presented on the interpretation of the contract. I think that's all part of due process, to give it a fair and full hearing.

Nelson: I come out in much the same place as Marcia as far as ultimately allowing the union's timeliness argument to go forward. But there's a second due process problem here, which is the employer's argument that it's not ready to go forward on the timeliness issue because it didn't get notice. I would attempt to accommodate that by offering a continuance if they needed to secure witnesses or look at documents or whatever. But, ultimately, the union would get to present its timeliness issue.

Landau: Marcia, would your answer be any different if the contract said that the parties must present all of their issues during the initial settlement proceedings?

Greenbaum: I think so, provided that the other side of that coin was also there and that is that failure to do so is a bar from bringing it up in arbitration. I think it's a two-sided coin there. Otherwise, I think the arbitrator has much more leeway in deciding whether or not that's something that should be decided by the arbitrator and heard by the arbitrator. So if it says if you didn't

bring it up on the beginning, then you can't bring it up in the arbitration procedure, I would say yes.

Oakley: I'd look to see whether the parties intended time limits to be mandatory, meaning that it would be fatal if they weren't complied with, or time limits that should be followed but wouldn't have a fatal consequence to the argument being raised. That's a kind of issue that I'd want to hear full argument on from the parties before finding one way or the other on it.

Landau: I'd also note the distinction between the due process violation on the one hand, and an ethical violation on the other. In this session we're trying to focus on whether these might be ethical problems for the arbitrator under the Code. I think you can have many situations where the arbitrator makes a mistake on the due process issue and that can be addressed separately. But on the question of whether this is an ethical violation, the Code is very general in requiring arbitrators to run fair and adequate hearings providing due process. The fact that the arbitrator will make a mistake on the due process does not necessarily rise to the level of an ethical question.

The union's primary defense on the merits of this discharge is that the grievant was provoked because the supervisor hit him first. The supervisor denies hitting the grievant first. The union offers eight employee witnesses who were in the break room to testify that the supervisor did strike the grievant first. After four of these witnesses have testified, the employer objects to the testimony of the remaining witnesses on the grounds that it was late in the day. This is a 1-day arbitration hearing. And their testimonies were cumulative. Should the arbitrator sustain the objection and limit the addition of witness testimony? And if the arbitrator permits the addition of witness testimony, may the arbitrator put a time limit on each witness testimony?

Nelson: On the first question, my answer would be that the arbitrator should not sustain the objection and limit the additional witness testimony. I think that we might as well start looking at some of the Code provisions. Under 5, A-1, the arbitrator has an obligation to provide a fair and adequate hearing, giving sufficient opportunity to present evidence and argument. I think that limiting the number of witnesses that the union can put on—just by itself—would certainly impinge on that. What I would probably do as a realistic matter is I would ask the employer whether it wanted to stipulate that the other four witnesses would say the same thing and ask the union if that does it for them. Often all

that the union needs is to know that eight people will say that the supervisor struck the first blow. And that would obviate the due process problem at the same time.

Oakley: Yes, I think from the point of view of fairness, it's often better to err on the side of hearing too much evidence, than to not hear the evidence at all. So for that reason I wouldn't limit the number of witnesses. There may be ways of suggesting that the process be speeded up because everyone is concerned about cost and the length of the hearing. I think that the fairness principle has to govern, and the fairness principle as expressed in the Code. I also think that there would be an unfairness to set time limits partway through the evidence so that a time limit applied to the later witnesses that didn't apply to the earlier witnesses.

Greenbaum: I think there's a difference when the witness is testifying to something that is very key in the case, and an arbitrator is being called upon to make a credibility determination. Something that is not a credibility question as to whether cumulative evidence should be allowed. I think in this case that I would allow it unless the parties stipulated that the next four witnesses would testify to the same set of facts that the four witnesses testified to and that's sufficient.

I'm always concerned about what's out there that I didn't hear. Suppose that six witnesses get together because they hate the supervisor and they want to testify that he hit the grievant first? And then there are two witnesses out there who weren't a party to that conspiracy? I'm not suggesting that's what happened here. But I think that there is always evidence out there that doesn't come to light and it's best to hear everyone who has a credibility determination to be made.

In terms of the second part of this hypothetical, no, I would not do that. But on things that are not critical, I would certainly encourage the lawyers to move on saying, "I already heard that. Thank you."

Landau: Now we have a variation of the previous question. Suppose there are no witnesses to the altercation and the case turns on credibility alone—the grievant's word against that of the supervisor. Both the employer and union offer multiple witnesses as to the credibility of each man. Does this change the arbitration analysis of that evidence for number of witnesses?

Oakley: Well, to me, it depends on what is the evidence of credibility. The practice in some areas may be to bring in evidence to attack the credibility of the character of the witness. If we're

talking about that kind of evidence, then I would have a problem with that. And if it's collateral evidence, that's not directly relevant to the main issue that's before the arbitrator, which is what happens in that event, in my practice there would be a big problem with bringing in that type of evidence. Because it would prolong the hearing and it's not directly relevant. I have a practice of not allowing evidence as to the bad character of the grievant, because that could be highly prejudicial, and it's generally not allowed. But as to credibility in the sense of what is most likely to have occurred on that occasion, that would be a different kind of evidence that would be allowed.

Nelson: It's important to make these kinds of rulings based on who the witnesses are and what the case is about. I'll use two quick examples. Let's say that the grievant in this case was retarded. And the people who were coming to testify to his ability to tell the truth may all be needed because they involve different instances. And there you would want to hear from each one as to the ability of this retarded person (1) to understand what truth is; and (2) to be able to tell it in all important instances. I think mental hospitals are another example where you may have a claim of patient abuse or even a patient attacking a worker in that institution. There's always a question of "Does this person know what the truth is? Can he or she tell it?" So in those kinds of cases, I would certainly allow this kind of cumulative evidence.

Greenbaum: I don't think I have anything to add to that.

Landau: Let's move on to number four.

Here's another procedural example. Several months prior to the arbitration hearing, the supervisor retired from the plant and moved to Mexico. The supervisor is willing to testify by telephone but is not willing to travel to the arbitration hearing to testify in person. Neither party has been able to serve a subpoena on the supervisor. The employer offers the supervisor to provide testimony. The union objects because it would not have the opportunity to personally confront him and cross-examine him about the underlying incident in the break room. Should the arbitrator allow the supervisor to provide telephonic testimony?

Nelson: I'm curious about whether those who would not allow it are from the "sweaty palm" school of credibility, that you think that you need to actually see the witness testify in order to make credibility resolutions. I've never been a believer in that.

Greenbaum: I think the classic reason for discounting the value of eyeballing the witness is the 1960 debates between Nixon

and Kennedy. Anybody who listened to that on radio apparently thought Nixon won the debate.

Nelson: That's interesting. A lot of the responses have been in terms of the arbitrator being able to eyeball the witness. But if you look at the objection that's set forth here, it's that, in fact, the grievant won't be able to confront his accuser. And that's a somewhat different reason for doing this. My own approach is a practical one. I would ask the parties and the supervisor if they have access to Skype or to video conferencing in Mexico and make arrangements for that if it was readily available and not very costly. I think that would be an appropriate arrangement here. Otherwise, the employer might never get this witness to come to the site of the hearing and testify unless this is a case in southern Texas, which might work.

Oakley: I don't place a lot weight on demeanor of the witness in assessing credibility. I look at what makes sense and what's most reasonably likely to have happened, when you weigh all the evidence, as to the facts. But I think in terms of fairness, it would be an unfairness to the grievant, or the union in this case, to allow it. Although there is discretion on the arbitrator to allow the testimony by teleconference, I think here, for all the reasons that have been stated on balance, I wouldn't allow it. Although, I would try to encourage a videoconference or some other means of allowing the employer to put the evidence forward.

Landau: During the hearing the employer requests that the arbitrator visit the break room and view the area where the altercation took place. The parties were ready to offer substantial testimony, photos, and diagrams of the area requested. The union objects that this is unnecessary and a waste of time. Should the arbitrator grant the employer's request?

Greenbaum: I think you all have copies in the back of the hand-out of the Code of Professional Responsibility. If you'd turn to page 15 and look at D, just below the middle of the page, I think the question is answered. It says, "An arbitrator should comply with the request of any party, that the arbitrator visit a work area pertinent to the dispute prior to, during or after a hearing. An arbitrator may also initiate such a request." There's no way that pictures or testimony can equal seeing it face to face, face to plant.

Oakley: Yeah. I think the Code deals with this. It's also worth having a look at the collective agreement. I've seen some contracts that specifically address this issue of allowing arbitrators and the parties to visit the plant.

Greenbaum: The somewhat amusing thing about the Code is that it says the procedures to such visits should be agreed by the parties in consultation with the arbitrator, but doesn't say what happens if they aren't going to agree to it happening at all.

Landau: To the next one. Number six. Case number one. At the close of the evidence, the parties disagree about the format for presenting closing arguments. The union wants to make an oral closing argument, while the employer wants to submit a written brief. The arbitrator believes that the only dispute at issue is factual and that written briefs are unnecessary. May the arbitrator require both parties to present oral closing argument instead of briefs?

Oakley: The practice for closing argument is different, I think, in Canada than in the United States. The practice in Canada is almost exclusively oral argument. One of the reasons is that it's almost unheard of to have transcripts or court reporters, so written briefs are very rare and counsel generally doesn't want to do written briefs because from their point of view it's more work and more time consuming. But the point of fairness to the hearing could arise in the context of counsel or an advocate who wants more time to prepare. I think that's the issue that's being raised here. And I would typically grant the request to counsel who wanted more time to prepare a closing argument. In fairness, I would usually grant that kind of a request.

Nelson: The third alternative, if you have a court reporter, is that both opposing counsel and the arbitrator leave and basically the person dictates their closing argument to the court reporter. The court reporters hate it. But the arbitrator loves it because you get to leave a half an hour earlier.

Landau: Move to case number two. The grievant is a school bus driver who operated a bus loaded with students and narrowly avoided a collision. There were no injuries, but some students were disturbed about the incident and told their parents. The parents complained to the employer. The employer discharged the grievant for careless operation of a school bus.

The first question is: At the arbitration hearing, about 25 parents, members of the group "Parents for School Bus Safety," arrive with a lawyer. The lawyer asks that the group be allowed to attend the hearing and make a submission. Union counsel objects. Should the arbitrator direct the parent group to leave the hearing?

Greenbaum: The facts of this case don't tell us in what state this case arises. And it also doesn't tell us if this is a private sector or

public sector event. If this was a public sector case in Florida, then the Sunshine Law would apply and the arbitrator would have to have those people present. The different question is to whether they participate and make submissions. But truly, under Florida Sunshine Law the arbitrator would be in some trouble if he or she refused to allow them to be present.

My view is, if I'm not in Florida or some other Sunshine state, I would have them leave because this is a private process. And unless both parties agree that they should be present, I see no reason that they should be there.

Nelson: And you won't be surprised to discover that the Code actually addresses this. In 2C-1A it says that you're to treat all aspects of an arbitration as confidential unless it's waived by both parties or disclosure is required or permitted by law. And then, Paragraph A goes on to address attendance by non-parties.

Oakley: The point I would make about the Code provision is that it sets out the guiding principle that the hearing is private. But it's also subject to agreement of the parties or what applicable law requires. So the point from the Canadian perspective is that hearings are considered to be public, generally because arbitration hearings are considered to be statutory tribunals; like other tribunals or the courts, they are generally open to the public, although they're subject to discretion to exclude the public in a compelling circumstance.

So that would be an example of where the local law might provide otherwise. I would allow the group to remain, but the subsidiary question there is whether they are allowed to make submissions. I would not allow the group to make submissions. They're not a party. They don't have a legal interest to be protected. So I would allow them to remain. And also I think I want to be vigilant over how this group behaved at the hearing, to ensure that there is a proper decorum and there is no kind of interference by this group or anyone from outside in the proper conduct of the hearing.

Nelson: I've had similar a situation where it was a police officer and the law required that I allow the press to be present. And I did allow them to be present. But I told them that they had to be potted plants. And I also made the beginning part of the hearing as tedious and slow as I could make it, so that they thought about leaving before anything substantive happened.

Landau: Let's move on to the next one. Number two in case two. This is one that comes up quite regularly. The students on

the school bus are called as witnesses and describe the location of the near-collision. The arbitrator is familiar with that location and believes some of the witnesses are mistaken in their description. Should the arbitrator inform the parties about his or her personal knowledge?

Greenbaum: I think it's always something to talk about, when you know something that is contrary to what witnesses are telling you. There is another way out of this one, though, and that is to request a site visit. And then everyone can go to the site and see whether the witnesses are telling the truth. I would request a site visit.

Oakley: I think it should be disclosed. Just from basic principles of due process, if there's any chance that the decision could be based on some fact that the arbitrator has acquired from outside the hearing room, then it would be unfair and a denial of due process to make a decision based on something that the parties haven't had an opportunity to make a submission to the arbitrator about on that point.

Nelson: I have disclosed in somewhat similar circumstances. I had a case in Oakland where a Comcast installer was accused of not being where he was supposed be. And it was partly based on the time it took him to get between places. I disclosed at the hearing that I had lived, walked, jogged, or run in all of the neighborhoods that they were talking about over the past 15 years, so I was very familiar with those locations. I thought that it was appropriate for them to know that going in, so that they would know that I was viewing that through the filter of being familiar with the area. But they knew I had lived in Oakland.

Landau: Moving on now to hypothetical number three and we're still on case number two. There's a break in the hearing during the grievant's testimony on cross-examination. After the break, the employer's counsel complains that union counsel talked to the grievant outside the hearing room during the break. Employer counsel objects that union counsel is interfering with the process and asks that the grievant's testimony be struck from the record.

First question. Should the arbitrator allow the objection? That is, striking the grievant's testimony from the record?

Next question. What if the union counsel conferred with the grievant during the break in direct examination?

Greenbaum: It's one thing to be sanctioned but it's another thing to strike a grievant's testimony. Because that's already come in before whatever interference happens.

Nelson: That is the admonition that I don't always remember to make. But when I'm being really good, I remember to admonish people during breaks not to talk about their testimony.

Oakley: I don't strike the testimony, but it could affect your view of the credibility of the grievant's testimony, if the witness changed his or her story some after discussion with counsel. So that's the real danger of that kind of practice. But from an ethical point of view, it's perhaps more of an ethical issue for counsel than it is for the arbitrator. So that raises the question of to what extent would the arbitrator have any responsibility for the ethical behavior of counsel? But that's pointed out in the Bar Association principles, where it could be an ethical issue for counsel who is a lawyer.

Nelson: I think that a distinction can be made here. And that has to do with the testimony that went before whatever point in the hearing it happened, before there was this conversation between the grievant and counsel. I have no problem with that testimony whatsoever. And I've never struck it. The question is what do you do with the testimony after that conversation? And there, I wouldn't strike it either, but I might give it more scrutiny and look at it more carefully to see if the story changed after that discussion took place. And for all I know, they're just talking about where they're going to have lunch.

Landau: That brings us to the close of the time we have for this session. Thank you again. Enjoy the day.