

CHAPTER 11

CROSSING THE LINE: ETHICS AND EMPATHY

The idea for this session came from an informal discussion at a National Academy of Arbitrators (NAA) Fall Education Conference where the importance of the intersection of ethics and empathy was recognized. Due to technical problems the session could not be transcribed. However, participants expressed concern as to how an arbitrator's neutrality or impartiality may be compromised by perceived inappropriate empathy or the appearance of it. The manner in which an arbitrator conducts him- or herself through the entire process, from selection to award, was open for discussion. This was a lively interactive session that addressed a topic on many people's minds but rarely formally discussed. The following papers are based on the annual meeting panel discussion and address the topics that were discussed by the panel and audience members. The Moderator was **Janice K. Frankman**, National Academy of Arbitrators, St. Paul, MN, and the panelists were **Sarah Lewerenz**, AFSCME, Duluth, MN; **Sherwood Malamud**, National Academy of Arbitrators, Madison, WI; **Marko Mrkonich**, Littler Mendelson, Minneapolis, MN; **Christine Ver Ploeg**, National Academy of Arbitrators, St. Paul, MN.

I. WHAT IS THE PLACE OF EMPATHY IN THE ARBITRAL PROCESS?

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Ethics

I start by defining the term “ethics” here, and “empathy” in the next section of this paper. Ethics: “the moral principles that govern or influence conduct”;² “the rules of conduct recognized in respect to a particular class of human actions or a particular group, culture, etc.: medical ethics; Christian ethics.”³

Conflicts of interest and perceived conflicts are common ethical issues that arbitrators face. The underlying concern is arbitral neutrality. The appearance of a conflict of interest undermines the parties’ expectation of neutrality. The parties have an expectation that the arbitrator will make the appropriate disclosures to address the ethical concern. In this regard, the parties might well expect that:

1. The arbitrator has no pecuniary stake in the outcome of the proceeding.
2. The arbitrator is not related to or friends with either the union or the employer principals or their representatives.
3. If it may appear that the arbitrator may have a stake in the outcome or some prior relationship exists between the arbitrator and any of the parties, the arbitrator will disclose it.
4. The arbitrator has the training to handle the dispute, for example, engineering or patent knowledge for a dispute that requires the application of that kind of expertise.

Frequently, ethical problems that arise out of a conflict of interest or perceived conflict may be resolved through disclosure. However, disclosure may impede an effective hearing and decision. If the matter disclosed is perceived by the parties as not worthy of disclosure, then the disclosure itself raises a concern where there was none before.

¹National Academy of Arbitrators, Madison, WI.

²Online Oxford Dictionary of the English Language.

³Dictionary.com (last visited Nov. 20, 2012).

The arbitrator's decision to disclose may result in recusal, which will usually mean additional delay and expense. The Code of Professional Responsibility for Arbitrators of Labor-Management Disputes warns against arbitral action that causes delay and that increases expense.⁴

How should an arbitrator address a request that the arbitrator recuse him- or herself? Should the arbitrator concern him- or herself with the underlying reason for a party's objection? Does the objection reflect a concern for arbitral bias or prejudgment of the issue, or is it voiced to cause delay and additional expense? Because ethical concerns are not the main focus of this paper, I raise, but do not answer, these questions that may arise under a myriad of circumstances. However, this analysis highlights the importance of arbitral introspection, that is, asking the necessary questions: is there a conflict or an appearance of a conflict of interest, what should the arbitrator do about it, and when?

What follows are some examples that help sharpen the analysis:

1. An arbitrator decides an issue between a company and one of its unions. Three years later, she arrives for a hearing between the same company and another union. When she is presented with the exhibits at the hearing, she believes the grievance raises the same issue as the case she determined three years earlier. Does she disclose? Does it make a difference if the company counsel is unaware of her decision? If asked how she ruled, does she tell? The company probably has access to her award (it is unpublished). If one party asks her to recuse herself, should she? Advisory Opinion 2 addresses some of these questions.⁵
2. A Union Business Representative calls to schedule a hearing. During the course of the conversation, he says this grievance is a loser. Should the arbitrator recuse himself? What if the conversation results from the arbitrator's and Business Representative's early arrival at the hearing. Who do you tell, if anyone? If the arbitrator recuses himself,

⁴See NATIONAL ACADEMY OF ARBITRATORS, AMERICAN ARBITRATION ASSOCIATION, & FEDERAL MEDIATION & CONCILIATION SERVICE, CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES 2J (as amended and in effect Sept. 2007), available at <http://www.naarb.org/code.html>.

⁵NAA Advisory Op. 2, Ethical Obligations of an Arbitrator (Similar Disputes) (Feb. 17, 1955), available at <http://naarb.org/advisoryopinions.asp>.

does he say why, and to whom? Advisory Opinion 6 covers this case.⁶

Empathy

Dictionary.com defines “empathy” as: “[t]he intellectual identification with or vicarious experiencing of feelings, thoughts, or attitudes of another.”⁷

There is tension between the Code’s mandate for arbitral impartiality and an individual’s life experiences that inform arbitral empathy. When the term “empathy” is applied in the labor-management context, it stimulates questions concerning the parties’ expectations and the arbitrator’s understanding and response to those expectations regarding arbitral neutrality. The arbitrator demonstrates his or her understanding of the expectations of the parties through interactions with them and in the decision.

To what extent do the arbitrator’s thoughts and experiences lead him or her to identify with the matter at issue? Does empathic congruency with the gravamen of the case necessitate recusal?

Although bias and neutrality may be polar opposites, and empathy may morph into bias and lack of empathy may describe complete neutrality, a straight line continuum does not explain the relationship of the three. This analytical framework provides a context in which an arbitrator and the parties may consider the circumstances of each case.

If circumstances raise a challenge to an arbitrator’s ability to remain in a case, then to what extent should the parties know of the arbitrator’s concerns? Another consideration is what the parties know and need to know of the arbitrator’s knowledge and experience. The arbitrator in the course of personal introspection considers his or her *knowledge* of and *experience* with the gravamen or central issue of the dispute. Does that knowledge and experience establish a bias? If the bias is on a matter peripheral or tangential to the dispute, the arbitrator may give it little attention. It may be described as bringing life’s experiences to the dispute. On the other hand, if the arbitrator’s knowledge and experience may establish bias on a matter central to the dispute, what should the arbitrator do?

⁶NAA Advisory Op. 6, Arbitrator’s Duty Regarding Off the Record Union Representative’s Remarks Prejudicial to Grievant in Discharge Case (June 10, 1980), available at <http://naarb.org/advisoryopinions.asp>.

⁷Dictionary.com (last visited Nov. 21, 2012).

Most often an arbitrator comes to a hearing without any knowledge of the focus of the dispute. He or she knows the party representatives, where to report, and, perhaps, the name of the grievant. This cold neutrality provides the arbitrator with little insight into the tensions underlying the dispute.

Empathic Considerations

Does a particular life experience known only to the arbitrator indicate a bias or does it provide deeper understanding? Should an arbitrator who is a recovering alcoholic decide a grievance concerning the discharge of an alcoholic?

The tension here is between neutrality and bias. Examples within this category abound. What life experience would manifest greater understanding for the matter in dispute, and would either party be concerned with the knowledge the arbitrator brings to the dispute if it knew that he or she had such knowledge? Usually the parties would learn of the particular experience or relationship only through arbitral disclosure.

For example, an arbitrator is asked to determine whether a nursing home had just cause to discharge an aide for patient abuse. The arbitrator monitors the care of a parent in a nursing home and is familiar with nursing home protocols and procedures. Should the arbitrator disclose the source of his or her knowledge? This information may impact how the parties present the case. When does he or she make the disclosure?

To summarize, the parties have a reasonable expectation that the arbitrator has no bias for or against one of the parties, and that the arbitrator knows what he or she is doing. The purpose of the grievance and arbitration process is to bring the dispute to a resolution. An award should resolve the dispute, and it should be accepted by both winner and loser as the end of the dispute. How does the arbitrator meet these expectations? Does compliance with ethical rules meet these expectations?

What Does the Application of Empathy Require?

Should the parties expect that the arbitrator's professional or life experience provide him or her with familiarity and understanding of the dispute? For example, should the employer expect that the arbitrator has worked as a supervisor and directed employees who do not take supervision well, are not energetic workers, and do not comport their conduct in a manner that reflects their

dedication to the employer's success? Should the union expect that the arbitrator has worked in a plant on a production line or in the setting of the dispute, in a school district as a teacher or in a coal mine as a miner? Is this a reasonable expectation? Frequently, organized college faculty require that only "professor arbitrators" hear a faculty member's grievance.

The examples below illustrate the generalities articulated above. In reviewing these examples the reader should consider: What is the perspective of a party? What questions should the arbitrator ask him- or herself?

1. A special education teacher, Sally Etta, is disciplined for failure to meet all requirements imposed by a student's Individualized Educational Plan (IEP). The arbitrator also mediates disputes between parents and school districts and facilitates IEP meetings. This information appears in his biography. Does he have any further duty to disclose? May the parties ask if, in serving as a mediator, he has encountered situations where teachers fail to carry out the IEP?
2. In 2010, Zomblot Motors hired a mechanic, Harry Fox, knowing that he is an observant Seventh Day Adventist. Zomblot employs 21 mechanics. They are represented by the Mechanics Union.

In 2012, Zomblot decides to keep its maintenance shop in operation on Saturday mornings. It seeks volunteers to staff the shop on Saturday mornings. The call for volunteers yields a staffing level that is one mechanic short of the staffing level that Zomblot wants to serve the public. Under the collective bargaining agreement, Zomblot treats this as forced overtime. It schedules in reverse order of seniority. Fox is the least senior. When Fox refuses to work the Saturday overtime, Zomblot discharges him.

The arbitrator, Fred Field, is of the Jewish faith and observes Saturday as his Sabbath. There is nothing in his biography that would indicate his religion or level of observance. Field learns of the substance of the grievance on his arrival at the hearing. The parties stipulate the issue is just cause.

Should Field disclose that he observes Saturday as his Sabbath? Should he recuse himself? What if Zomblot's counsel asks Field to recuse himself, once Field discloses that he observes Saturday as his Sabbath? Field flew from Madison, Wisconsin, to Seattle, Washington, to hear this case. Who should bear the expense, if the case does not go forward?

On the basis of the principles I developed earlier, let me suggest the following analysis of Example 2, the Zomblot Motors hypothetical. The gravamen of the case concerns the employer's assignment of Fox, the grievant, to work on his Sabbath. The empathic element is the conflict between Fox's religious observance and

the needs of his employment. Fox disclosed to the employer his need to remain off work on his Sabbath. The arbitrator, Field, has encountered the same conflicts between the demands of the workplace and the demands of his level of religious observance. Field's work experiences may duplicate those of Fox. Are those experiences co-extensive to the point of establishing a bias? Field may be sympathetic to Fox's predicament. However, the language of the agreement may well dictate the outcome. Is Field under an obligation to disclose? Recuse? Should he remain and decide the case?

These two examples set out the analytical tension an arbitrator may confront to determine the boundaries of his or her knowledge and experience and how they come to bear upon his or her ability to render a decision free of bias, one that conforms to the expectation of arbitral neutrality.

II. ETHICS AND EMPATHY: AN ARBITRATOR'S DILEMMA

JANICE K. FRANKMAN⁸

Arbitrator conduct is a frequent topic of discussion among neutrals and advocates. The conversation has expanded in recent years from discussing what we do and why we do it, in a procedural process sense, to a more holistic view of arbitrators as individuals; that is, who we are and what we uniquely bring to the table that may impact how the facts of a case, and the parties and their representatives, are viewed. There is greater interest in considering relational aspects of arbitration rather than focusing strictly on the transaction. Articles and books have been written, criteria for judicial selection have expanded, and professional continuing education courses are being offered that address topics that not long ago were regarded as "soft" and only mildly interesting or relevant. Examination of emotional intelligence, how decisions are made, and the use and impact of social media have resulted in greater attention to how we conduct ourselves. We are encouraged to reflect upon who we are in terms of genetic make-up, personality profile, family background and upbringing, education,

⁸National Academy of Arbitrators, Minneapolis/St. Paul, MN.