

National Academy of Arbitrators

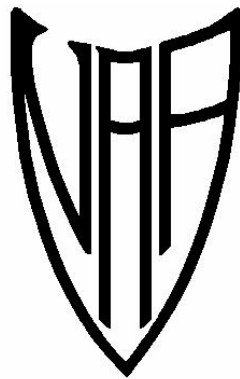
Formal Advisory Opinions

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Committee on Professional Responsibility and Grievances
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(1965 - 1975)

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(1947 - 1965)



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OPINION NO. 1

**Originally issued - May 1, 1953. Withdrawn, rewritten and reissued: July 12, 2019
Subject: Ethics of an Arbitrator's Conduct - Fees**

The Committee has been asked to give its opinion on whether an arbitrator's fee can be increased during the course of an ongoing case.

Part 2, Section K, of the Code states:

Fees and Expenses

An arbitrator occupies a position of trust in respect to the parties and the administrative agencies. In charging for services and expenses, the arbitrator must be governed by the same high standards of honor and integrity that apply to all other phases of arbitration work.

An arbitrator must endeavor to keep total charges for services and expenses reasonable and consistent with the nature of the case or cases decided.

Prior to appointment, the parties should be aware of or be able readily to determine all significant aspects of an arbitrator's bases for charges for fees and expenses

An arbitrator may indicate in his or her fee schedule that the fee schedule is periodically reviewed and that while the fee schedule in force at the time of appointment will apply to the date or dates initially scheduled, upon reasonable written notice of an updated fee schedule, future dates may be charged at a higher rate. If there is no such indication in the fee schedule in effect at the time of the original appointment an arbitrator is restricted to the rates contained in that fee schedule. As in all instances, the arbitrator is obliged to keep charges reasonable. As well, in all instances the arbitrator must comply with the policies and rules of an administrative agency in cases referred by that agency.

As an example, it would not be considered reasonable for an arbitrator to provide parties with a written notice of a fee increase after the record has been closed and prior to the issuance of an award.

CPRG NOTE (July 2019): The withdrawal and replacement of Opinion No. 1 is undertaken to provide modern, practical guidance. It is not to be interpreted as endorsement of the conduct prohibited in the withdrawn Opinion.

(Reprinted 6/96)

OPINION NO.2

February 17, 1955

Subject: Ethical Obligations of an Arbitrator (Similar Disputes).

The Committee has been asked to give its opinion on the ethical obligations of an arbitrator under the following circumstances:

An arbitrator served in dispute # 1 between a national company and a local union in one of its plants. So far as he knew, his award in that case was not published. Subsequently, he was asked to serve as arbitrator in dispute #2 between the same company and another local union affiliated with another international in a different plant. After accepting the appointment, he learned that the issue to be arbitrated appeared to be identical with that in dispute # 1, and that the union apparently did not know of his participation as arbitrator in the earlier case.

- (a) Under these circumstances, was the arbitrator under an ethical obligation to disclose to the union the facts concerning dispute # 1?
- (b) Would a different ethical standard apply if the award in dispute #1 had been published, or if the local involved in dispute #2 was affiliated with the same international as the local involved in dispute #1?

Canon 3 of the Code of Ethics makes it "incumbent upon the arbitrator at the time of his selection to disclose to the parties any circumstances, associations or relationships that might reasonably raise any doubt as to his impartiality or his technical qualifications for the particular case." Thus, the question presented is whether the circumstances related above "might reasonably raise" a doubt as to the arbitrator's impartiality. In the judgment of the Committee they do not.

It should be noted, initially, that is virtually impossible for an arbitrator to know, prior to the actual submission of a case, whether it is in fact identical with one he has previously decided. Even when an issue is fundamentally the same as others he has determined before, the arbitrator usually finds that each new case has some unique, distinguishing feature that requires special consideration.

In any event, the fact that an arbitrator has issued a prior decision on a similar or identical case has by itself no necessary significance. The decisive ethical question for the arbitrator is not whether he has considered a similar issue before, but whether he is still open to persuasion either way. If the arbitrator feels free to revise his prior decision, no disclosure would seem necessary; but, if for any reason the arbitrator feels bound by a prior decision, then he should certainly disclose that fact.

In conclusion, it may be stated that parties to an arbitration are entitled to an honest, rather than an uninformed, decision. A contrary conclusion would lead to the disqualification of arbitrators solely on the basis of their experience.

CPRG NOTE (June 1996): Decided under the superseded 1951 Code. Decisions and rationale are consistent with Part2B of the current Code.

Opinion22 should be consulted about disclosures of past or present service as an arbitrator. Further, laws requiring disclosure in applicable jurisdictions should also be consulted. Arbitrators considering accepting arbitration assignments other than collective bargaining arbitration should review the Due Process Protocol and applicable rules and law regarding arbitrator selection and arbitrator disclosures.

(Reprinted 05/07)

OPINION NO. 3

Rescinded

OPINION NO. 4

Rescinded

OPINION NO. 5

Rescinded

OPINION NO. 6

Originally issued - June 10, 1980. Withdrawn, rewritten and reissued:

October 23, 2015

Subject: Arbitrator's Duty Regarding Union Representative's Off-the-Record Remark Prejudicial to Grievant in a Discharge Case

[Note of the CPRG: The rewriting and narrowing of Opinion No. 6 is undertaken to produce a more practical and helpful Opinion. It should not be viewed as taking a substantive position on any of the withdrawn portions.]

Facts: Prior to the start of a discharge hearing, the Union representative approached the arbitrator out of hearing of the Company representative, and said, "I've got a loser. I don't expect to win this one."

Issue: What is the arbitrator's duty under the Code in these circumstances, with respect to required disclosures and/or withdrawal from the case?

Opinion: In Paragraph 1.A.1 of the Code "honesty, integrity and impartiality" are included among the essential personal qualifications of an arbitrator. Further, an arbitrator "must demonstrate ability to exercise these personal qualities faithfully and with good judgment, both in procedural matters and in substantive decisions." Paragraph 1.C.1 requires that an arbitrator "uphold the dignity and integrity of the office and endeavor to provide effective service to the parties." Section 2.A.2 provides that an arbitrator has a "responsibility to seek to discern and refuse to lend approval or consent to any collusive attempt by the parties to use arbitration for an improper purpose." At the same time, under Section 2. I.1, if an arbitrator "believes that a suggested award is proper, fair, sound and lawful, it is consistent with professional responsibility to adopt it."

Remarks like those made by the Union representative to the arbitrator are inappropriate. However, they may or may not reflect an effort by the Union to induce the arbitrator to sustain a discharge. The arbitrator may tell the Union representative that the arbitrator will disregard the Union's statement and make a decision based solely upon the record developed at the hearing. If the arbitrator believes that he or she can effectively disregard the remarks in weighing the evidence and continue to an impartial decision in the case, the arbitrator may go forward. The fact that the remarks were made does not, in and of itself, require withdrawal or disclosure of the remarks.

However, if the Union's remarks are or become, in the arbitrator's view, a genuine attempt to induce the arbitrator to rule against the Grievant, the arbitrator has an obligation to inform the Company of the communication and to recuse from the case. Notice to the Company is required because of the ex parte nature of the comments, and the arbitrator's conclusion that they are substantive. Recusal is required because it is, practically speaking, impossible to issue an Award that upholds the dignity and integrity of the office, and is consistent with the essential personal qualifications of honesty and integrity required by the Code. Any Award in favor of the Company would reasonably be viewed as the result of improper pressure from the Union, and any Award in favor of the Grievant might reasonably be viewed as an effort by the arbitrator to demonstrate his or her independence or otherwise prove a point. Either way, it creates an unavoidable appearance that the Award was based on considerations other than the merits of the case.

Paragraph 2.A.2 is also specific regarding a mutual, and collusive, attempt by both Union and Management to improperly influence an arbitrator's decision. While the Union representative's remarks in this situation do not, of themselves, reveal collusion with management, the Arbitrator should remain alert to the possibility and recuse from the case if circumstances so warrant. The

Arbitrator should, however, be mindful of the fact that not all agreements are collusive, and that agreed upon terms may properly be adopted, so long as the Arbitrator “believes that a suggested award is proper, fair, sound, and lawful” per Paragraph 2.L.1.

OPINION NO. 7

June 10, 1980

Subject: Donation of Arbitration Files to Libraries

Facts: A member has inquired as to whether a donation of an arbitrator's complete arbitration files to a library may properly include files of cases in which the parties opposed publication.

Issue: Where an arbitrator is donating complete arbitration files to a library, may the donation properly include files of cases in which the parties opposed publication?

Opinion: Part 2-C of the Code contains provisions relating to the privacy of arbitration. Part 2-C-1, Paragraph 39 states the general principle that "All significant aspects of an arbitration proceeding must be treated by the arbitrator as confidential unless this requirement is waived by both parties or disclosure is required or permitted by law." Part C-1-c, Paragraph 44 amplifies this general principle by stating that "It is a violation of professional responsibility for an arbitrator to make public an award without the consent of the parties." The relationship of these general rules to donations of arbitration files to libraries of colleges, universities or similar institutions is specifically dealt with in Part C-1-d, Paragraph 46, as follows:

"It is not improper for an arbitrator to donate arbitration files to a library of a college, university or similar institution without prior consent of all the parties involved. When the circumstances permit, there should be deleted from such donations any cases concerning which one or both of the parties have expressed a desire for privacy. As an additional safeguard, an arbitrator may also decide to withhold recent cases or indicate to the donee a time interval before such cases can be made generally available."

In a case where both parties have consented to publication, or where neither party has expressed a desire that the award not be published, the arbitrator may properly include the arbitration file in that case in a donation to a library of a college, university or similar institution without prior consent of the parties. However, where a party has expressed to the arbitrator a desire that award not be published, it has "expressed a desire for privacy" within the meaning of Paragraph 46; in such a case, the arbitration file should be deleted from such donation, when "the circumstances permit."

Whether "the circumstances permit" such deletion, must necessarily be determined in the light of the particular facts of each individual situation, with special consideration being given to whether the case in which a party has opposed publication can be currently identified by the arbitrator without undue difficulty.

CPRG NOTE (June 1996): The references to paragraph 46 of the Code, regarding donations of an arbitrator's arbitrator's files to a library, has been renumbered as Paragraph 48, due to insertion of new material in Part 2-C-1-c by a 1985 Code Amendment.

(Reprinted 6/96)

OPINION NO. 8

May 16, 1981

Subject: Arbitrator's Duty with Respect to Late Post-hearing Brief

Facts: An arbitrator accepted an appointment to serve in a matter involving two grievances. The proceedings were not administered by an administrative agency. One of the grievances concerned a termination. The applicable collective bargaining agreement provided, in part, that "the Arbitrator shall render his Award, in writing, as quickly as possible," and that "All discharges or disciplinary cases shall be given precedence of disposition."

Hearings on both grievances were held on the same day. As to both grievances, it was agreed that post-hearing briefs would be mailed to the arbitrator on a specified date, and that the arbitrator would handle the brief exchange. The Union's brief was mailed on or before the agreed upon date. The Employer's brief was not mailed until almost five months after the agreed upon date. The arbitrator exchanged the briefs. The arbitrator considered both briefs.

It is not clear whether the arbitrator inquired about the lateness of the Employer's brief at any time prior to its filing. However, if there was such an inquiry by the arbitrator, it did not occur until more than three months after the agreed upon filing date.

At no time prior to issuance of the arbitration decision, did the Union protest the lateness of the Employer's brief or request that it not be considered by the arbitrator. After the issuance of the decision, the Union complained that the arbitrator had acted improperly in considering the Employer's late brief. The Union also complained that the arbitrator had been guilty of undue delay. (In part, the latter complaint was based on the time which elapsed between the filing of the Employer's brief and the issuance of the decision.)

Issues: (1) Did the arbitrator act improperly in considering Employer's late posthearing brief, after it was filed?

(2) Did the Arbitrator act improperly with respect to the Employer's late posthearing brief, before it was filed?

Opinion: Posthearing briefs and submissions are dealt with in Part 6-A of the Code of Professional Responsibility for Arbitrators. Part 6-A-I provides:

"1. An arbitrator must comply with mutual agreements in respect to the filing or non-filing of post hearing briefs or submissions.

"a. An arbitrator, in his or her discretion, may either suggest the filing of post hearing briefs or other submissions or suggest that none be filed.

"b. When the parties disagree as to the need for briefs, an arbitrator may permit filing but may determine a reasonable time limitation."

Avoidance of delay is dealt with in Part 2-J of the Code. Part 2-J-2 provides: "An arbitrator must cooperate with the parties and with any administrative agency involved in avoiding delays."

Where the parties agree to a certain date for the filing of posthearing briefs, and also agree that the arbitrator should not consider a posthearing brief filed after that date, Part 6-A-I precludes the arbitrator from considering a posthearing brief filed by a party after that date, without the consent of

the other party. However, where the parties agree only that posthearing briefs are to be filed by a certain date, without agreeing as to what the effect of a late filing is to be, Part 6-A-1 does not preclude the arbitrator from considering a posthearing brief filed after the agreed upon date.

An arbitrator does have Code responsibilities when a posthearing briefs not filed by an agreed upon date, even where the parties have made no agreement as to the effect of a late filing. These responsibilities arise primarily from the arbitrator's Part 2-J-2 duty to cooperate with the parties in avoiding delays. After a reasonable period (allowing for possibilities such as a delayed mail delivery or an unannounced agreement by the parties to an extension), the arbitrator should make appropriate inquiry and take appropriate action. At some point, it may become incumbent upon the arbitrator to give notice that the decision may be issued after a certain date whether or not the tardy brief has been received by that date.

In the instant case, the arbitrator did not violate Part 6-A-1 of the Code by considering the Employer's late brief. The arbitrator did, however, violate Part 2-J-2 of the Code by failing to make any inquiry or taking any action concerning the late brief until several months after the agreed upon filing date.

(Reprinted 6/96)

OPINION NO. 9

May 16, 1981

Subject: Duty of Disclosure

Facts: An arbitrator served in a case in which the employer was represented by a certain law firm. Subsequently, he accepted an appointment to serve in another case involving the same parties. After accepting the appointment, but prior to the hearing, he learned that his wife had contracted to act as a library consultant for the aforementioned law firm, which the arbitrator assumed would be representing the employer in the forthcoming arbitration. The consulting job was not to be of a continuing nature, but the possibility existed that the law firm might ask her to do additional work in the future. The arbitrator immediately informed the parties of the situation and advised them that, if either party believed it to be appropriate, he would be happy to withdraw from the case. The arbitrator seeks guidance as to whether such disclosure was required by the Code of Professional Responsibility for Arbitrators.

Issue: Did the arbitrator have a duty to disclosure in the situation above described?

Opinion: Part 2-B of the Code [Part 2-B-3 of the current Code] specifically mentions several circumstances which, if present, must be disclosed by an arbitrator prior to acceptance of an appointment. It goes on to state:

"Prior to acceptance of an appointment, an arbitrator must disclose to the parties or to the administrative agency involved any close personal relationship or other circumstance, in addition to those specifically mentioned earlier in this section, which might reasonably raise a question as to the arbitrator's impartiality." [Emphasis added.]

It further states:

"4. If the circumstances requiring disclosure are not known to the arbitrator prior to acceptance of appointment, disclosure must be made when such circumstances become known to the arbitrator."

"5. The burden of disclosure rests on the arbitrator. After appropriate disclosure, the arbitrator may serve if both parties so desire. If the arbitrator believes or perceives that there is a clear conflict of interest, he or she should withdraw, irrespective of the expressed desires of the parties."

The Committee is of the opinion that the here considered situation presented a "circumstance... which might reasonably raise a question as to the arbitrator's impartiality." When the circumstance became known to the Arbitrator, he was required to disclose it. After disclosure, he could not properly continue to serve if either party desired that he not serve. The arbitrator's communication to the parties correctly reflected the requirements of the Code.

(Reprinted 6/96)

OPINION NO 10

Rescinded

OPINION NO. 11

Rescinded

OPINION NO. 12

May 29, 1985

Subject: Arbitrator's Use of Assistants

Part 2 H of the Code of Professional Responsibility reads in Paragraphs 62-64 as follows:

"1. An arbitrator must not delegate any decision-making function to another person without consent of the parties.

"a. Without prior consent of the parties, an arbitrator may use the services of an assistant for research, clerical duties, or preliminary drafting under the direction of the arbitrator, which does not involve the delegation of any decision-making function.

"b. If an arbitrator is unable, because of time limitations or other reasons, to handle all decision-making aspects of the case, it is not a violation of professional responsibility to suggest to the parties an allocation of responsibility between the arbitrator and an assistant or associate. The arbitrator must not exert pressure on the parties to accept such a suggestion."

A member asks for an opinion on whether an arbitrator who has employed an assistant is required by the Code to obtain the parties' consent for any or all of these uses of that assistant.

A. The arbitrator hands the case file to the assistant with the instruction to write up an opinion and award (and there is no further discussion), when

- (1) the assistant has attended the hearing,
- (2) the assistant has not attended the hearing but a transcript is available.

B. The arbitrator hands the case file to the assistant with only the instruction as to which side is to prevail, when:

- (1) the assistant has attended the hearing,
- (2) the assistant has not attended the hearing but a transcript is available.

C. The arbitrator hands the case file to the assistant and briefly discusses the case, giving the assistant an analysis of the issues and a statement as to how they are to be resolved, when

- (1) the assistant has attended the hearing,
- (2) the assistant has not attended the hearing but a transcript is available.

It is assumed in each of the examples that the arbitrator reviews the assistant's work and (1) if he approves the opinion and award, he signs and mails them to the parties, and (2) if he disapproves, he directs the assistant to do the necessary rewriting.

We would like to emphasize, at the outset, that these questions cannot be answered by any simple rules. The key factor in every case is the arbitrator's own sense of ethics and responsibility. Even in

situations covered by Example C, for instance, real questions may arise. Thus, it might be easy to discuss a case with an assistant, analyze the issues and state how they are to be resolved if the case is fairly simple and was recently heard and if the arbitrator has confidence in his recollection and his notes. But what if the case was heard several weeks before any discussion with the assistant could be held? Or suppose it presents complicated issues of fact and contract interpretation? Does not the process of examining the evidence and the writing itself help determine the outcome?

Other questions which might be asked: Does it make a difference whether there is or is not a transcript? Does it make a further difference whether or not the parties filed briefs? Is the assistant a neophyte or a person of experience already hearing and deciding cases on his or her own? Or suppose the assistant, on studying the case, sees a point he thinks the arbitrator has overlooked and which might influence the reasoning and even the ultimate decision? If he brings the point to the arbitrator's attention is he influencing the decision? Should not the arbitrator want - and indeed instruct - the assistant to do just that if error is to be avoided? On the other hand, is there not a point at which an assistant's suggestions to correct errors and omissions become in effect an effort to influence the arbitrator's judgment?

We will not attempt, here, to give any general answers to these questions or to the many possible variations. Each arbitrator must answer them for him or herself. We do stress, however, that working effectively and efficiently with an assistant without, in effect, delegating the decision-making function can be extremely difficult and the arbitrator must always be on guard to see that he is fulfilling his responsibilities to the parties.

This having been said, we think that in the Example C situation, it is possible to use an assistant effectively and properly without first seeking the parties' consent. The reason, simply, is that he (or she) has not delegated any decision-making function. He has decided, independently, how the dispute is to be resolved and the reasoning is his. Moreover, if the assistant's translation of the arbitrator's directives into opinion form is in any way defective, the arbitrator will make or direct the necessary corrections. If the "style" of the ultimate opinion is not that of the arbitrator, however, discerning parties may harbor doubts as to the extent of the assistant's participation in the decision-making process. Such doubts, even if unfounded, could be harmful to the arbitrator and to the process itself.

In Examples A and B, in the Committee's view, the arbitrator is required by the Code to obtain the parties' consent. We would, however, distinguish the situation where - as in some of the steel umpireships - the parties approve the hiring of assistants and, in fact, pay their salaries. In virtually all other circumstances the arbitrator would, in effect, be delegating the decision-making function. Even though a review process takes place, an assistant's initial draft of award and opinion could easily influence the arbitrator's decision in a manner not contemplated by the Code. This is particularly true where there is a long record and the assistant may be winnowing out facts which the arbitrator may not recall.

It is essential to remember that decision-making starts with fact finding. The parties rely on the arbitrator to determine what the facts are (credibility) and which ones are important (weight). He should not delegate those functions without their knowledge.

The Committee recognizes that there may be some long-standing arbitrator/assistant relationships in which less arbitrator direction is required. But as a matter of general practice, if an assistant is to be used for anything more than research, clerical duties, or preliminary drafting under the direction of the arbitrator (as in Example C), the parties are entitled to be told and to be asked for their consent.

The Board of Governors, at its recent meeting, asked the Committee on Professional Responsibility and Grievances whether the findings in Opinion #12 on assistants also applied to interns.

The Committee has responded as follows:

The precepts of Opinion #12 apply to interns who perform the same functions as assistants as those functions are described in the Opinion.

(Reprinted 6/96)

OPINION NO. 13

June 7, 1986

Subject: Ex Parte Hearings

Issue: Was the arbitrator's conduct, in the circumstances set forth below, in violation of any of these Code provisions:

Part 5-A-I:

"A. General Principles

- "I. An arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument."

Part 5-C-I :

"C. Ex Parte Hearings

- "1. In determining whether to conduct an ex parte hearing, an arbitrator must consider relevant legal, contractual, and other pertinent circumstances.
- "2. An arbitrator must be certain, before proceeding ex parte, that the party refusing or failing to attend the hearing has been given adequate notice of the time, place, and purposes of the hearing."

Circumstances: An Employer denied a grievance on grounds of timeliness. It informed the Union that if the matter was submitted to arbitration the Employer would only be prepared to test the timeliness of the grievance and would not be prepared to try the merits of the grievance.

The Union filed a demand with the American Arbitration Association, an arbitrator was selected by the parties and a hearing was scheduled and then postponed for three months. Two weeks before the hearing date the Union notified the Employer that it intended to deal with the merits of the grievance at the arbitration hearing. A copy of the letter was sent to the American Arbitration Association which took no action on the matter. Neither did the Employer.

When the arbitrator arrived at the hearing he had no prior knowledge that he would be confronted with a dispute over the scope of the hearing. The Union insisted that he rule that both the issue of timeliness and the issue on the merits be tried in a single hearing. The Employer insisted on its right to a hearing solely on the timeliness question and, depending on the outcome, a subsequent hearing on the merits. The Union argued that it had notified the Employer of its intention to deal with the merits, but the Employer responded that the Union had not "objected" to the Employer's position that it was prepared to try only the timeliness issue. The Employer further stated that it was unprepared to go forward in the hearing on the merits. Both parties insisted that the arbitrator rule on the scope of the hearing.

The arbitrator recessed the hearing for fifteen minutes and offered the Employer a two-hour adjournment in which to prepare its case on the merits or, in the alternative, a bifurcated hearing on condition that the Employer would pay the total cost of the second day of hearing which he estimated would amount to \$1000 for his services and expenses. The Employer refused both alternatives, claiming that it had a right to a bifurcated hearing because, prior to the hearing, the Union had never

"objected" to its insistence on so proceeding; that the time' was 4:30 p.m., that two hours was inadequate to prepare a case based on past practice; and that the agreement stated clearly that arbitration costs were to be shared equally by the parties.

The arbitrator, after hearing the timeliness question, ruled that he would hear the issue on the merits as an integral part of a single hearing.

Both parties participated fully in the hearing on the timeliness question. But, before the hearing on the merits, the Employer's attorney withdrew from the hearing, protesting that there was no way that he could prepare in two hours' time, and that the arbitrator's decision to continue ex parte was unfair to the Employer. Accordingly, only the Union's case on the merits was heard by the arbitrator. The arbitrator subsequently rendered his award which was favorable to the Union both on the question of timeliness and on the merits.

Opinion: It is clear that the arbitrator violated 5-A-1 of the Code by insisting that the Employer pay the full cost of his services and expenses for a second day of hearing as a condition for granting a bifurcated hearing. Instead of assuring "that both parties have sufficient opportunity to present their respective evidence and argument," the arbitrator was prepared to allow the Employer to have "a fair and adequate hearing" only if it was willing to renounce its right under the Agreement to have the costs of arbitration equally shared by the parties. He acted beyond his authority, in effect; conditioning the right to a fair hearing on the waiver of a contractual right. In giving greater weight to the alleged economic consequences of an additional \$500 in expenses, the arbitrator failed to assure the preeminent values of "sufficient opportunity" by the Employer to present its "evidence and argument." Part 5-A-1 requires the arbitrator to assure to both parties "sufficient opportunity to present their respective evidence and argument." Faced with the conflicting positions of the parties, the arbitrator had the responsibility to assure to both the essential due process values guaranteed by the Code.

The imposition of a two-hour preparation limit by the arbitrator also violated the Code. Part 5-A-1 requires the arbitrator to assure to both parties sufficient opportunity to present their respective evidence and argument. The arbitrator was informed by the Employer at the hearing that it was unprepared to present its case on the merits, that it was 4:30 on a Friday afternoon, and that it was impossible in two hours to interview witnesses, read through the minutes of various meetings going over a period of six or seven years and prepare its case on the merits. The arbitrator thought otherwise and thus failed to effectuate the mandate of 5-A-1. Whether the Employer could have prepared its affirmative case in two hours is debatable, but the arbitrator could not be certain that his estimate of the time needed was correct and therefore he should have resolved the doubt in favor of a continuance. That was the only way he could have complied with his responsibility to assure a fair and adequate hearing.

Moreover, the arbitrator failed to respect the mandate of 5-A-1-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." By imposing a two-hour limit, when the Employer had presented a plausible argument that preparation in two hours was not feasible, he did effectively prevent it from "putting forward its case fairly and adequately."

Finally, the arbitrator's justifications - that the Employer was unprepared because of its own fault and that it was unfair to impose an additional burden of cost on the Union--cannot be accepted if the result is to deny the paramount responsibility mandated by 5-A-1: assurance to both parties of a fair and adequate hearing. That guarantee should have been implemented by the arbitrator. As in the first question on how the costs of a second hearing day should be borne, the arbitrator had the duty to assure the integrity of the arbitration process. By imposing a two-hour limit, he failed in his duty.

The arbitrator, additionally, violated Part 5-C-1 and 2 of the Code by holding an ex parte hearing on the merits. The arbitrator did not have to hold the ex parte hearing just because the Employer elected to walk out. The failure of the Employer to remain did not relieve the arbitrator from his responsibility to follow 5-C-1 and 2. The Employer, from its perspective, had not been given "adequate notice of the purposes of the hearing." Since there was no joint submission of both issues, the Employer was not prepared to go forward on the merits, understanding that its sole responsibility was to prepare for the arbitrability issue, and that fact alone should have persuaded the arbitrator not to have held an ex parte hearing. Under 5-C-1, the most "pertinent circumstance," which for the arbitrator should have been decisive, was that an ex parte hearing involved the risk of an unjust result, because the Employer was unprepared to try the case on the merits and probably could not prepare in two hours.

(Reprinted 6/96)

OPINION NO. 14

Rescinded

OPINION NO. 15

June 7, 1986

Subject: Ex parte Consultation

Issue: Would an arbitrator's affirmative response, in the circumstances set forth below, be in violation of the Membership Policy or Section 2-D1 of the Code?

The Membership Policy includes these paragraphs:

"The Academy deems it inconsistent with continued membership in the Academy for any member who has been admitted to membership since the adoption of the foregoing restriction to undertake thereafter to serve partisan interests as advocate or consultant for Labor or Management in labor-management relations or to become associated with or to become a member of a firm which performs such advocate or consultant work.

"Because the foregoing restriction was not a condition for continued membership prior to April 20, 1976, it is the Academy's policy to exempt from the restriction members who were admitted prior thereto"

Part 2-D-1 of the Code reads in part:

"D. Personal Relationships with the Parties

"I. An arbitrator must make every reasonable effort to conform to arrangements required by an administrative agency or mutually desired by the parties regarding communications and personal relationships with the parties.

"a. Only an "arms-length" relationship may be acceptable to the parties in some arbitration arrangements or may be required by the rules of an administrative agency. The arbitrator should then have no contact of consequence with representatives of either party while handling a case without the other party's presence or consent.

"b. In other situations, both parties may want communications and personal relationships to be less formal. It is then appropriate for the arbitrator to respond accordingly."

Circumstances: A state teachers association, with the cooperation of the American Arbitration Association's regional office, has sent a form letter to arbitrators on the AAA panel (Academy members and non-members) specifying that its representatives "would like the benefit of feedback from the arbitrator who conducted a hearing where he/she was the advocate." This critique would be solely at the request of the association's representative and would be a private one-on-one session. The association would pay a reasonable fee for such a service. The arbitrators are asked to respond on an enclosed form as to their willingness to participate in this professional in-service program.

Opinion: There is no doubt that an ex parte, paid-for session with a labor (or management) advocate, after the issuance of an arbitration award, constitutes consultation within the meaning of the Membership Policy and the Code. Such activity is barred to any Academy member. If the parties jointly sought the arbitrator's views after the case, however, the restriction would not apply.

(Reprinted 6/96)

OPINION NO. 16

Rescinded

OPINION NO. 17

Rescinded

OPINION NO. 18

Rescinded

OPINION NO. 19

Rescinded

OPINION NO. 20

October 27, 1989

Subject: Correction of Evident Errors in an Arbitration Award

Issue: Can and should an arbitrator correct evident clerical mistakes or computational errors in an award upon request by one party or on the arbitrator's own initiative?

Code Provisions: Part 6-D-1: "No clarification or interpretation of an award is permissible without the consent of both parties."

Circumstances: An arbitrator awards specific sums of back pay to designated employees as remedy for failure to assign them to particular overtime work and rejects the claims of certain other named employees. After the award issues, the Union informs the arbitrator that the award mistakenly identifies one of the employees entitled to back pay and that the amount of back pay awarded to another employee was incorrect due to an arithmetic miscalculation by the arbitrator. In both instances the cited errors are evident from the undisputed facts of the grievance set forth in the opinion accompanying the award. The Union asks for a corrected award. After determining that these errors were inadvertently made in the award, the arbitrator contacts the company, which says the award is final and binding and does not consent to the arbitrator issuing a corrected award. Alternatively, the arbitrator on his or her own initiative discovers these errors without hearing from either party.

Opinion: In these circumstances, correction of the identity of one of the employees entitled to back pay and of the arithmetic error in calculation of the back pay awarded, or other corrections of similar evident clerical mistakes or computational errors, would not constitute "clarification or interpretation of an award" within the meaning of Part 6-D-1.

The parties expect that the award they receive reflects the true intentions of the arbitrator. Where obvious clerical or computational mistakes have been made, they should be subject to correction. That kind of correction is not really "clarification or interpretation" but rather an attempt to rectify the arbitrator's carelessness in identifying grievants, making arithmetic calculations, or proofreading the typewritten award. To permit such obvious errors to be binding on the parties would impose unfair burdens on them, perhaps prompting court suits, and would be detrimental to the arbitration process. Of course, the arbitrator should insure each party the right to be heard before any such correction is made.

These observations are consistent with both common law and statutory law. There is general recognition that the common law rule of *functus officio* does not bar correction of clerical mistakes or obvious computational errors. Some state statutes, based on the Uniform Arbitration Act, also permit such corrections to be made on application of a party or by submission to the arbitrator by a court to whom a party has made such application. Such statutes speak of correcting "an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award."

Therefore, such corrections can and should be made by an arbitrator at the request of one party or on the arbitrator's own initiative provided that, in either event, the parties are given an opportunity to express their views before any correction is made.

(Reprinted 6/96)

OPINION NO. 21

Rescinded

OPINION NO. 22

May 26, 1991

Subject: Duty to Disclose

Issue: Would the arbitrator's conduct, in the circumstances set forth below, be in violation of any of these Code provisions: Part 2-B.3, 2-B.4, 2-B.5; Part 2-D. 1 and 2-D. 1 a.

B. Required Disclosures

3. ...Prior to acceptance of an appointment, an arbitrator must disclose to the parties or to the administrative agency involved any close personal relationship or other circumstance, in addition to those specifically mentioned earlier in this section, \ which might reasonably raise a question as to the arbitrator's impartiality.

4. If the circumstances requiring disclosure are not known to the arbitrator prior to acceptance of appointment, disclosure must be made when such circumstances become known to the arbitrator.

5. The burden of disclosure rests on the arbitrator. After appropriate disclosure, the arbitrator may serve if both parties so desire. If the arbitrator believes or perceives that there is a clear conflict of interest, he or she should withdraw, irrespective of the expressed desires of the parties.

* * *

D. Personal Relationships with the Parties

1. An arbitrator must make every reasonable effort to conform to arrangements required by an administrative agency or mutually desired by the parties regarding communications and personal relationships with the parties.

a. Only an arm's-length relationship may be acceptable to the parties in some arbitration arrangements or may be required by the rules of an administrative agency. The arbitrator should then have no contact of consequence with representatives of either party while handling a case without the other party's presence or consent.

Circumstances: An individual was appointed by one of the administrative agencies as an ad hoc arbitrator to hear a discharge case in which the parties were an Employer and Union A. Before and during the pendency of the discharge matter, the arbitrator regularly served as an expedited arbitrator in cases between this same Employer and Union B. The biographical material provided by the arbitrator to the administrative agency and by the agency to Union A did not refer to the arbitrator's position as a regular expedited arbitrator for the Employer and Union B. Nor did the arbitrator disclose this position to Union A at any time.

After the arbitration hearing and while the matter was still pending, the arbitrator received a telephone call from a clerk in the office of the Employer's Director of Labor Relations asking whether the arbitrator could meet with the Director on the next Friday (when an expedited hearing for the Employer and Union B would be conducted). The arbitrator asked what the meeting was about but the clerk did not know.

A meeting was held on the following Friday. Present were the Labor Relations Director, another representative of management, and the arbitrator. The arbitrator was told that he was under consideration for a position as an arbitrator under the regular arbitration procedure governing non expedited grievances between the Employer and Union B and asked if he was interested in being considered and available to serve. The remuneration for the arbitration work involved was said to run at a level of up to \$40,000 per year. The arbitrator replied that he would give the matter consideration and the meeting ended without any firm commitment having been made. The arbitrator did not disclose this discussion to Union A.

Approximately two weeks after this meeting, the arbitrator issued a decision upholding the discharge of the grievant involved in the case between the Employer and Union A. He accepted the regular assignment for the Employer and Union B subsequently.

Opinion: Previous or current service as a neutral arbitrator for a particular employer and/or union is not a relationship requiring disclosure under the Code. Absent some personal relationship or other special circumstance mandating disclosure, such service is not a "circumstance...which might reasonably raise a question as to the arbitrator's impartiality."

On the other hand, the arbitrator's meeting with Employer representatives to discuss an opening in a well-paid, regular, if part-time, position which entailed hearing and deciding disputes between that Employer and one Union, at a time when the arbitrator had under advisement a dispute between the same Employer and another Union, was a "circumstance" of the kind alluded to in Part 2-B.3 (marginal paragraph 35). It "might reasonably raise a question as to the arbitrator's impartiality", whether or not the offer of employment was accepted. Marginal paragraph 35 refers, of course, to disclosures prior to acceptance of an appointment. However, Part 2-B.4 (marginal paragraph 37) extends the same disclosure requirement to circumstances which become known to the arbitrator after acceptance of appointment.

Parties who regularly participate in ad hoc arbitration with a particular arbitrator often ask the arbitrator about future hearing dates, either in the course of an arbitration hearing or after that hearing has been concluded but before the decision has been issued. Such inquiries are usually made on behalf of both parties, however. While individual circumstances might dictate a contrary result, such inquiries about ad hoc hearing dates are not of sufficient consequence to constitute a "circumstance. . . which might reasonably raise a question as to the arbitrator's impartiality" and, hence, need not be disclosed by the arbitrator.

Given the nature of the employment opportunity involved herein, however, an outside party, such as Union A here, may well feel that the Employer who tenders information about retaining the arbitrator for very substantial arbitration work in the future is seeking to curry favor with him. It is a short step from there to a suspicion that the arbitrator's impartiality in deciding the pending case between the same Employer and Union A may, consciously or unconsciously, be compromised by the prospect of significant future employment with the Employer and another Union. It is thus a "circumstance ... which might reasonably raise a question as to the arbitrator's impartiality".

As to Part 2-D. 1 and 1 a, the arbitrator's innocence concerning the intended purpose of the meeting with the Employer representatives, together with the casual "drop-in-while-you're-in-the-building" nature of the gathering, saves the arbitrator from a violation of these provisions.

See also advisory Opinion No.5 and Advisory Opinion No. 18, paragraph 8.

CPRG NOTE (June 1996): Laws requiring disclosures in applicable jurisdictions also should be consulted.

(Reprinted 6/96)

OPINION NO. 23

May 21, 1997

Subject: Serving as an Expert Witness

Issue: Does a member of the Academy, who serves as an expert witness on behalf of Labor or Management, violate the membership policy set forth in Article VI, Section 6 of the Constitution and By-laws?

Circumstances: Article VI, Section 6 of the Academy's Constitution and By-Laws reads in relevant part as follows:

Section 6. (Added by Amendment April 21, 1976).

Pursuant to the membership policy adopted on April 21, 1976, the Academy deems it inconsistent with continued membership in the Academy: a) for any member who has been admitted to membership since April 21, 1976, to undertake thereafter to serve partisan interests as advocate or consultant for Labor or Management in labor-management relations or to become associated with or to become a member of a firm which performs such advocate or consultant work; Any charges or complaints alleging a violation of either of these policy statements shall be referred to the Committee on Professional Responsibility and Grievances under Article IV, Section 2. (As amended May 20, 1991).

Before this provision was adopted, the only limitation on an arbitrator's service as an advocate or consultant to Labor or Management (other than those dealing with conflicts of interest) were found in the general provisions of the Code. For example, Part 1-A-I identifies "impartiality," and the ability to exercise that personal quality "faithfully and with good judgment," as an essential personal qualification of an arbitrator. Even in the absence of a demonstrable conflict of interest, an arbitrator who serves as an advocate or consultant for Labor or Management may in certain circumstances demonstrate a deficiency in this essential, personal qualification. If such an arbitrator were to represent one side exclusively and/or advance views and positions considered extreme or one-sided; it would, at a minimum, create the appearance of a lack of impartiality.

By adopting the membership policy set forth in Article VI, Section 6, the Academy has established a standard of conduct for its own members intended to eliminate all such conduct that might give rise to concerns about the appearance of a lack of impartiality. While the policy does not equate such conduct with a violation of the Code, it requires adherence to the policy as a condition of membership.

Pursuant to its original wording, responsibility for the enforcement of the policy expressed in Article VI, Section 6 was assigned to the Membership Committee. Even so, since its adoption this Committee has been asked on a number of occasions to render informal opinions concerning its proper interpretation and application in cases involving possible service as an expert witness. In 1991, the provision was amended to provide that charges or complaints alleging violations of its provisions should be referred to this committee. While the Committee has not been called upon to consider any charges or complaints since that change was adopted, it continues to receive occasional requests for advice about the proper interpretation and application of the provision in cases involving possible service as an expert witness.

Opinion: The policy refers to service as an "advocate or consultant." It does not specifically refer to service as an expert witness as such. Nevertheless, service as an expert witness unquestionably amounts to service as a consultant for the party calling the witness to advance its interest.

A member who serves as an expert witness would be expected to testify truthfully concerning matters falling within the member's expertise, for the purpose of assisting the decision-maker in arriving at a decision. For these reasons, it has been argued that the policy ought not be interpreted to preclude members of the Academy from serving as expert witnesses, thereby depriving decision-makers of access to the considerable expertise possessed by many Academy members. Such an interpretation would overlook the inevitable, partisan nature of service as an expert witness, when rendered on behalf of only one of two parties in a contested proceeding. Parties retain the services of expert witnesses to give testimony that supports their interests. This remains equally true no matter how valid or meritorious the position being advanced may be.

The conclusion that service as an expert witness for a party amounts to service as a consultant to that party does not, however, require the conclusion that such service always violates the policy expressed in Section 6. That policy refers only to undertaking to "serve partisan interests...for Labor or Management in labor-management relations." Where there is no conflict between the interests of Labor and Management, service as an expert witness for either would not constitute service of the "partisan interests" the policy is designed to prohibit.

Thus, in a suit brought by a third party against Labor and Management jointly, or even against either alone where there is no conflict of interest between them, service as an expert witness for the defendant or defendants would not constitute a violation of the policy. Nor, strictly speaking, would service as an expert witness for a plaintiff opposed to the interests of both Labor and Management although some members might, as a matter of preference, not wish to serve in such circumstances. If there is any question as to whether there is a conflict of interest between the parties, on matters to be testified about on behalf of one, the member should ask the other party if there is a conflict and decline to serve if one exists.

None of the conclusions contained in this opinion apply to members of the Academy admitted to membership prior to April 21, 1976. Nor do they apply to a member who is not called to testify by either Labor or Management but by the trial judge or other decision-maker.

The decision to serve as an expert witness, where permissible under the membership policy, is a personal one that must be made by each individual member. Members who elect to do so should be mindful of their responsibilities under the disclosure requirements of the Code.

OPINION NO. 24

May 24, 2006

Subject: Solicitation Impartialityⁱ

This Opinion is rendered based upon Part 1, Section C of the Code, amended June 2003, which states in relevant part:

1 ARBITRATOR'S QUALIFICATIONS AND RESPONSIBILITIES TO THE PROFESSION

C. Responsibilities To The Profession

1. An arbitrator must uphold the dignity and integrity of the office and endeavor to provide effective service to the parties.

a. To this end, an arbitrator should keep current with principles, practices and developments that are relevant to the arbitrator's field of practice.

2. An arbitrator shall not make false or deceptive representations in the advertising and/or solicitation of arbitration work.

3. An arbitrator shall not engage in conduct that would compromise or appear to compromise the arbitrator's impartiality.

a. Arbitrators may disseminate or transmit truthful information about themselves through brochures or letters, among other means, provided that such material and information is disclosed, disseminated or transmitted in good faith to representatives of both management and labor.

Opinion: Arbitrators may engage in truthful and non-deceptive solicitation, provided that this conduct does not compromise or appear to compromise their impartiality. Solicitations directed to representatives of only one side, labor or management, create an appearance of partiality and, therefore, are improper.ⁱⁱ

Solicitations that violate the Code of Professional Responsibility for Arbitrators of Labor Management Disputes include:

(1) *Disseminating or transmitting truthful information about the arbitrator's qualifications, attitudes toward arbitration, or willingness and availability to provide arbitral services to representatives of only one side, labor or management, rather than in good faith to representatives of both management and labor.*

(A) An arbitrator's letters, brochures and other forms of written solicitation must make it clear that the communications are being sent to both sides.

(B) It is not a violation to send a written solicitation to members of a bar association, a LERA chapter, or other similar groups whose members include representatives of both management and labor, as long as the communication indicates that it is being sent to the entire group.

- (C) **An arbitrator may respond to inquiries for biographical information from representatives of either labor or management.**
- (2) *Purchasing ads or tables at testimonial dinners and the like that honor representatives of only one side, labor or management .*
 - (A) **It is not a violation to accept an invitation to or to purchase tickets to such an event because doing so does not connote sponsorship or solicitation.**
 - (B) **It is not a violation to accept an invitation to a general meeting or social event such as a wedding, birthday, holiday or retirement party sponsored by a representative of labor or management.**
- (3) *Giving gifts to the parties in expectation of receiving work.*
 - (A) Gifts of nominal value that are furnished to representatives of labor and management are not prohibited.
- (4) *Furnishing gifts, meals, tickets for sporting events, concerts or other types of entertainment to representatives of only one side, labor or management, or accepting such favors from only one side or the other.*
 - (A) **Such one sided behavior constitutes implicit solicitation, which encourages expectations in the party who receives or furnishes the favor and, thus, undermines the appearance of arbitral impartiality.**
 - (B) **It is not a violation for an arbitrator to invite both parties to lunch or dinner and pay for the meal.**
- (5) *Participation in a private, one- sided interview about an arbitrator's qualifications, attitudes or practices, whether initiated by the arbitrator or by a representative of labor or management.*
 - (A) **A one-sided interview is permissible only after the arbitrator has confirmed that 1) the interview pertains to a specific appointment, and 2) the representatives of the absent party have given prior approval.**

Background Note, Committee of Professional Responsibility and Grievances (CPRG), October 21, 2004: Pursuant to a 2002 Consent Agreement and Order entered into between the Federal Trade Commission and the National Academy of Arbitrators(NAA), the NAA revised the Code of Professional Responsibility for Arbitrators of Labor Management Disputes. In addition, the NAA rescinded former Advisory Opinion Numbers 3, 4, 5, 14, 16, 17, 18, 19 and 21 that were initially issued under the unrevised Code. This opinion derives from the CPRG's reexamination of the solicitation aspects of the rescinded advisory opinions. Consequently, Advisory Opinion 24 is an omnibus opinion that was written under the revised Code and that conforms with the terms of the Consent Agreement and Order.ⁱⁱⁱ

Reasons Considered in Reaching this Opinion:

Even though truthful, non-deceptive solicitations are permitted, there are limitations. An arbitrator, in accord with Part 1, Section C. 3 of the Code, must not engage in conduct that would compromise or appear to compromise the arbitrator's impartiality. This means that any solicitation must be evenhanded and transparently so.

A communication or other form of solicitation addressed to either management or labor alone, without the knowledge of the other, creates the appearance of partiality. A party who receives such a solicitation and responds favorably may conclude that the arbitrator, if selected, might be predisposed to rule in its favor. Further, the non-solicited party also might question the arbitrator's impartiality if it learned about the one sided solicitation. To avoid these outcomes, all solicitations must involve representatives of both management and labor. Thus, where the same solicitation is sent separately to each party, the text of the solicitation should state that the identical communication also is being sent to the other side.

Other forms of solicitation may also violate Part 1, Section C. 3 of the Code. Gifts from an arbitrator to either management or labor alone suffer from the same defect as one-sided communication. A recipient could understandably believe that the arbitrator might be predisposed to rule in its favor if chosen for an arbitration case. If gifts are given to both parties, they should be roughly comparable in nature and of limited value. An arbitrator should reject gifts or other favors offered by only one party.

Entertainment and gift giving are analogous forms of conduct. However, there is nothing improper with the arbitrator inviting both parties to lunch or dinner and paying for the meal.

Arbitrators having established relationships with parties to a collective bargaining relationship properly may exercise greater flexibility, so long as all dealings are transparent to both sides. For example, arbitrators who work with the same parties over a period of years may receive invitations to social events such as birthday parties, weddings or retirement banquets. Accepting such invitations is permissible and carries no connotation of solicitation or *quid pro quo*. Such attendance, however, should be disclosed to the other side if that party's representatives are not also present at the event.

Sometimes the situation is reversed and the arbitrator is solicited by only one side, labor or management. For instance, if one party invites an arbitrator to be interviewed to determine his or her suitability for a particular assignment, it would be improper for the arbitrator to agree to the interview without the consent of the other party. Such a one-sided discussion about the arbitrator's practices and beliefs puts the absent party at a disadvantage and compromises the appearance of impartiality.

Invited talks to a separate management or labor group, where no specific arbitral assignment is at stake, are not improper.

It also should be noted that Part 1, Section C.1 of the Code requires the arbitrator to uphold the dignity and integrity of the office.

ⁱ *This Opinion deals with solicitation, as opposed to advertising, and the adverse impact of improper solicitation on an Arbitrator's impartiality or appearance of impartiality.*

ⁱⁱ *Representatives are defined as any person working in the interests of labor or management, including, but not limited to, attorneys, law firms and union or management officials.*

ⁱⁱⁱ *Part II of the FTC Order orders the NAA to cease and desist from:*

B. Regulating, restricting, impeding, declaring unethical, interfering with, or advising against any solicitation of arbitration work, through advertising or other means, by any Arbitrator or by any organization with which Arbitrators are affiliated

PROVIDED THAT nothing contained in this Part shall prohibit Respondent from formulating, adopting, disseminating to its members, and enforcing reasonable ethics guidelines governing the conduct of its members with respect to representations that Respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, and

PROVIDED FURTHER THAT nothing contained in this Part shall prohibit Respondent from formulating, adopting, disseminating to its members, and enforcing reasonable ethics guidelines governing conduct that Respondent reasonably believes would compromise or appear to compromise the impartiality of Arbitrators. Such guidelines shall not prevent Arbitrators from disseminating or transmitting truthful information about themselves through brochures and letters, among other means; provided farther, however, that in the event that the NAA determines that the dissemination or transmission of such material may create an appearance of partiality, the NAA may promulgate reasonable guidelines that require, in a manner that is not unduly burdensome, that such material and information be disseminated or transmitted in good faith to representatives of both management and labor.

Thus, the NAA may permissibly regulate solicitation provided that the NAA determines that the "dissemination or transmission of such material may create an appearance of partiality." For the reasons explained in this opinion, the CPRG has made that determination and, therefore, is here promulgating guidelines as permitted by the FTC Order.

OPINION NO. 25

May 20, 2014

**Subject: Duty of Disclosure
(Ancillary Professional Relationships)**

Issues:

What duty of disclosure, if any, exists where the arbitrator requests and/or grants favors to a party or advocate in the context of participation in the activities of a professional organization?

What duty of disclosure, if any, exists where the arbitrator has, or has had, a student-teacher relationship with an advocate or a party?

Code Provisions:

1. Arbitrator' Qualifications and Responsibilities to the Profession

C. Responsibilities to the Profession

1. An arbitrator must uphold the dignity and integrity of the office and endeavor to provide effective service to the parties.

2. Responsibilities to the Parties.

B. Required Disclosures

3. An arbitrator must not permit personal relationships to affect decision-making. Prior to acceptance of an appointment, an arbitrator must disclose to the parties or to the administrative agency involved any close personal relationship or other circumstance, in addition to those specifically mentioned earlier in this section, which might reasonable raise a question as to the arbitrator's impartiality.

a) Arbitrators establish personal relationships with many company and union representatives, with fellow arbitrators, and with fellow members of various professional associations. There should be no attempt to be secretive about such friendships or acquaintances but disclosure is not necessary unless some feature of a particular relationship might reasonably appear to impair impartiality.

D. Personal Relationships with the Parties

1. An arbitrator must make every reasonable effort to conform to arrangements required by an administrative agency or mutually desired by the parties regarding communications and personal relationships with the parties.

a) Only an 'arm's length' relationship may be acceptable to the parties in some arbitration arrangements or may be required by the rules of an administrative agency. The arbitrator should then have no contact of consequence with representatives of either party while handling a case without the other party's presence or consent.

Circumstances:

A) Requests made or granted in the context of the activities of a professional organization.

There is a reasonable expectation that arbitrators will be active in bona fide professional organizations with advocates also actively participating. Examples include the various state, provincial and national bar associations, LERA, the College of Labor and Employment Lawyers, and Canadian Industrial Relations Association. The activities of these organizations may include committee work, seminars, meetings and conferences as well as cocktail receptions, dinners and other socially oriented events. Participation in such activities can lead to a variety of relationships between arbitrators and advocates as well as to increased visibility and employment opportunities. Arbitrators may want to or be asked to sponsor a particular advocate for membership, or may seek a reference from an advocate to be accepted as a member of an organization. Arbitrators may also want to speak or request advocates to speak on unpopular subjects or to take on difficult organizational tasks. In such contexts, the argument could be made that the arbitrator is seeking or granting favors leading to indebtedness or the appearance of partiality.

Opinion:

A) Requests or solicitations for speakers, referrals, nominations or responsibility within a professional organization are not solicitations for arbitration work and therefore are not covered in Advisory Opinion 24. Providing service to and participating in the activities of a professional organization fall within the Code Section 1C(1). This provision recognizes the duty to uphold the dignity and integrity of the office. Many professional organizations affirmatively promote such dignity and integrity. As a result, participation generally falls within the scope of Code Section 1C(1) and should be encouraged. Stated differently, such organizations and their positive impact would suffer should arbitrators decline membership in order to avoid a perennial duty of disclosure. In the Committee's view, the Code should not be interpreted to negatively impact professional organizations.

Participation in bona fide professional organizations is neutral by nature and, by definition, does not create the appearance of partiality. This includes setting up and speaking on panels, working with advocates in the context of committees, teams or projects, asking for and responding to requests for membership references, as well as other activities inherent in the life of an organization.

There are instances, however, where the particular circumstances may create the appearance of partiality. Factors to consider in determining the need for disclosure include, but are not limited to: the nature of the relationship with the advocate; the duration of the relationship and whether it is current or past; the degree to which it is socially oriented as opposed to stemming from the business of the organization; and the expressed preferences of parties to any on-going arbitration arrangement (per Section 2D.1(a)).

If the relationship with an advocate or party exists outside the professional organization, the duty of disclosure is covered by Code Section 2B.

The arbitrator should recognize that any feature of a relationship that might reasonably appear to impair impartiality should be disclosed under Code Section 2B(3).

Circumstances:

B) Student-teacher relationship.

It is entirely foreseeable and common in the course of a student-teacher relationship for the student to request the teacher to provide a recommendation for admission into a program or for employment, and such opportunities can often be with a party for whom the arbitrator is called on to serve as a neutral. In addition, after such a recommendation, the student may be accepted for employment and appear before the teacher as an advocate, or as an employee of a party to the dispute. Professors and teachers can accumulate hundreds if not thousands of past students over the course of a career, so that in some cases the past student is not recognized in any way by the arbitrator. By the same token, some relationships originating in the teaching environment last for years if not a lifetime.

Opinion:

B) The existence of a student-teacher relationship, standing alone, does not create a duty of disclosure. Parties are aware when they have selected an arbitrator who is engaged in the teaching profession. It is expected within student-teacher relationships that the teacher will issue recommendations for his/her students to be accepted into programs and/or employment positions which may advocate for either management or labor. Such recommendations may have occurred years earlier or be routine. Routine student-teacher relationships and recommendations do not warrant disclosure. By contrast, for example, in the case of a protégé, the appearance of partiality may exist. The best practice is for the arbitrator to disclose the student-teacher relationship (if the arbitrator remembers it), and in all cases to follow the tenets of Code Section 2B3 and determine whether some feature of the student-teacher relationship might reasonably appear to impair impartiality.

OPINION NO. 26

April 1, 2020

Subject: Video Hearing

Issue:

Can an arbitrator order that a matter proceed by way of a video hearing at the request of one party over the objection of the other party to the arbitration?

Opinion:

This advisory opinion is provided in the context of the world-wide COVID-19 pandemic of 2019-20. However, this opinion's analysis of video hearings may have broader application in other circumstances. The reader also is referred to Advisory Opinion No. 13 on the subject of *ex parte* hearings for helpful insights relevant to the question considered in this opinion.

The Code, in its preamble, states that, "Voluntary arbitration rests upon the mutual desire of management and labor in each collective bargaining relationship to develop procedures for dispute settlement which meet their own particular needs and obligations." The principle of mutual consent is of fundamental importance to the Academy, and is reflected in the Code, in advisory opinions, and in arbitrator practice. This opinion concerns a possible exception to the principle of mutual consent.

In Section 5.A, the Code offers general guidance regarding hearing conduct: "An arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument." In addition to this obligation, an arbitrator has an obligation pursuant to Section 1.C of the Code to "endeavor to provide effective service to the parties."

In the absence of a collective bargaining agreement or an ad hoc agreement of the parties prohibiting such an arrangement, an arbitrator in exceptional circumstances, without violating the Code, may order that a matter proceed by way of video hearing in whole or in part without mutual consent and over the objection of a party. In doing so, the arbitrator must determine that a video hearing is necessary in order to provide a fair and effective hearing. In making that determination, the arbitrator must weigh the obligation to "conscientiously endeavor to understand and observe, to the extent consistent with professional responsibility, the significant principles governing each arbitration system in which the arbitrator serves" under Section 2.A of the Code, and to "conform to the various types of hearing procedures desired by the parties" under Section 5.A(a) of the Code.

When the issue arises, the arbitrator's first recourse should be to assist the parties in reaching a mutually acceptable resolution in the prehearing process. As noted in Section 4.A of the Code: "The primary purpose of prehearing discussions involving the arbitrator is to obtain agreement on procedural matters so that the hearing can proceed without unnecessary obstacles. If differences of opinion should arise during such discussions and, particularly, if such differences appear to impinge on substantive matters, the circumstances will suggest whether the matter can be resolved informally or may require a prehearing conference or, more rarely, a formal preliminary hearing."

If agreement is not reached and it is necessary for the arbitrator to decide the issue of whether a matter will proceed by way of a video hearing over an objection, the arbitrator must consider the applicable circumstances and context of the request. Where, for example, a global pandemic makes it virtually impossible for an in-person hearing to be safely conducted, that factor may weigh in favor of the video hearing option, particularly if the hearing has been postponed previously, a party in

opposition is non-responsive or declines to provide a reasonable explanation, and/or the case involves continuing liability or time sensitive matters, such as an emergency health and safety issue. Government travel restrictions and family and health considerations of counsel or witnesses may also weigh in the arbitrator's decision to order or not order a video hearing. The factors favoring a video hearing may, in the arbitrator's judgment, be offset by countervailing factors, such as a party's lack of necessary equipment, difficulty in preparing and marshaling witnesses, or other limiting considerations. Further, the substance of the grievance might suggest to the arbitrator that a delay to allow for an in-person hearing does not seriously prejudice the rights of the parties.

As with all procedural issues that an arbitrator must decide, this issue will need to be addressed in a prehearing process that gives the parties an opportunity to make submissions and/or arguments. The arbitrator will decide whether the matter will proceed by video hearing based upon the arbitrator's judgment on whether the circumstances are so compelling as to override the usual presumption in favor of consensual scheduling practices. (An arbitrator also might consider a telephone conference hearing, applying factors addressed in this opinion if the arbitrator views that as a more workable or acceptable alternative.) Nothing in this opinion imposes an affirmative obligation to order a video hearing absent the agreement of the parties.

In order to provide an "adequate hearing" by way of video, the arbitrator must be familiar with the platform offered to the parties, and must be confident that the parties have such familiarity as well, or have reasonable access to an effective alternative platform.¹ As well, the arbitrator will be required to address prehearing matters such as the delivery of documents and how evidence is to be offered and admitted at the hearing, including restrictions on remote witnesses to ensure the reliability of the witness's testimony. A prehearing conference also can anticipate how to proceed, if at all, if there are interruptions in the effective use of video technology.

Adherence to the foregoing will allow an arbitrator to provide "effective service" in "a fair and adequate hearing" when proceeding by way of a video hearing.

1. Section 1.B of the Code requires that "When an arbitrator decides that a case requires specialized knowledge beyond the arbitrator's competence, the arbitrator must decline appointment, withdraw, or request technical assistance." In the context of a video hearing, this would obligate the arbitrator to ensure that he or she is sufficiently familiar with the operation of the platform to be able to conduct and control the hearing, and advise the parties how to effectively make use of the process. Technical assistance may be obtained through a video conference service provider. The corollary point is that if the parties have requested a video hearing, and the arbitrator does not wish to undertake such a proceeding or does not feel competent to proceed in that manner, the arbitrator must so advise the parties. If the parties still wish to proceed by way of a video hearing rather than in an alternative manner, the arbitrator will withdraw from the matter.