

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)