

END NOTES: Potentially Applicable Code Provisions and Advisory Opinions

End Notes for Scenario 1: Can an arbitrator discuss an award with the press?

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

Code Provision 6. Post Hearing Conduct ***

D. Clarification or Interpretation of Awards

1. No clarification or interpretation of an award is permissible without the consent of both parties.

End Notes for Scenario 2: An Employer invites an arbitrator to discuss its performance.

Advisory Opinion #15, June 7, 1986, 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 2D1 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

“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 “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 nonmembers) 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.

End Notes for Scenario 3: An arbitrator would like to resign after scheduling a hearing.

Code Provision 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. ***
3. An arbitrator shall not engage in conduct that would compromise or appear to compromise the arbitrator’s impartiality. ***

Code Provision 2. Responsibilities to the Parties ***

J. Avoidance of Delay

1. It is a basic professional responsibility of an arbitrator to plan a work schedule so that present and future commitments will be fulfilled in a timely manner. ***
2. An arbitrator must cooperate with the parties and with any administrative agency involved in avoiding delays. ***
 - b. Requests for services, whether received directly or through an administrative agency, should be declined if the arbitrator is unable to schedule a hearing as soon as the parties wish. If the parties, nevertheless, jointly desire to obtain the services of the arbitrator and the arbitrator agrees, arrangements should be made by agreement that the arbitrator confidently expects to fulfill.
 - c. An arbitrator may properly seek to persuade the parties to alter or eliminate arbitration procedures or tactics that cause unnecessary delay. ***

Code Provision 4. Prehearing Conduct

1. All prehearing matters must be handled in a manner that fosters complete impartiality by the arbitrator.
 - a. 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. When an administrative agency handles some or all aspects of the arrangements prior to a hearing, the arbitrator will become involved only if differences of some substance arise.

b. Copies of any prehearing correspondence between the arbitrator and either party must be made available to both parties.

End Notes for Scenario 4: A new arbitrator drafts an award for experienced NAA member.

Code Provision 2. Responsibilities to the Parties ***

H. Use of Assistants

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 a 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.

Advisory Opinion #12, May 29, 1985, Arbitrator's Use of Assistants

Part 2 H of the Code of Professional Responsibility reads in Paragraphs 6264 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 longstanding 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)

End Notes for Scenario 5: A religious exception in scheduling a hearing.

Code Provision 2. Responsibilities to the Parties ***

J. Avoidance of Delay

1. It is a basic professional responsibility of an arbitrator to plan a work schedule so that present and future commitments will be fulfilled in a timely manner.

a. When planning is upset for reasons beyond the control of the arbitrator, every reasonable effort should nevertheless be exerted to fulfill all commitments. If this is not possible, prompt notice at the arbitrator's initiative should be given to all parties affected. Such notices should include reasonably accurate estimates of any additional time required. To the extent possible, priority should be given to cases in process so that other parties may make alternative arbitration arrangements.

2. An arbitrator must cooperate with the parties and with any administrative agency involved in avoiding delays.

a. An arbitrator on the active roster of an administrative agency must take the initiative in advising the agency of any scheduling difficulties that can be foreseen.

b. Requests for services, whether received directly or through an administrative agency, should be declined if the arbitrator is unable to schedule a hearing as soon as the parties wish. If the parties, nevertheless, jointly desire to obtain the services of the arbitrator and the arbitrator agrees, arrangements should be made by agreement that the arbitrator confidently expects to fulfill.

c. An arbitrator may properly seek to persuade the parties to alter or eliminate arbitration procedures or tactics that cause unnecessary delay. ***

End Notes for Scenario 6: Delayed payment to an Arbitrator.

Code Provision 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. ***

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