THE HUMAN CONDITION: ITS IMPACT ON ARBITRATOR SELECTION, DISCLOSURE AND ARBITRATOR BIAS

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I. Introduction

In May 2012 at its Annual Meeting Roberta Golick the then President of the National Academy of Arbitrators delivered an address entitled "The Human Condition: Its Impact on Arbitral Thinking." Her address began with a description of the debate that arose surrounding the 2009 nomination and eventual confirmation of Judge Sonya Sotomayor to the U.S. Supreme Court. In introducing Justice Sotomayor for nomination, President Obama stated that his administration was seeking a nominee that "possessed a quality of empathy, of understanding and indentifying with people's hopes and struggles as an essential ingredient for arriving at just decisions and outcomes."[1]

President Golick then went on to discuss how empathy impacts the decision making process. She acknowledged that the debate surrounding Justice Sotomayor's nomination concerned whether she could be impartial while having empathetic tendencies for parties that appear before her. In general she took up the question of what decision makers, judges and arbitrators alike bring of themselves to the process. She noted that in some circles the demonstration of empathy has been interpreted as an indication of bias and an interjection of one's personal values into the record of evidence. After discussing the varied interpretations of the term as reported in the media at that time, President Golick concluded the following:

> So, how do we achieve an appropriate separation between our life experience and our arbitral responsibilities? And how can the parties who select us for our good judgment be assured that the product be delivered as a just outcome based on the record presented? First we must all acknowledge the fundamental truth that we're not robots. Although my kids have suggested numerous times that I ought to get a life, most of us who arbitrate have been on

[1] Obama, Barack May 1, 2009.

> the planet for many decades and have witnessed and experienced a lot of life. We don't mechanically process testimony and documents, spit out an answer and reset it at zero for the next hearing. Some of us can identify with the downtrodden; some of us relate better to the business establishment, some of us have hated our bosses; some of us have been bosses; many of us have raised children, buried parents and friends and battled illnesses. We don't shed our identities at the hearing room door.[2]

In support of this reasoning President Golick cited the opinion of the Delaware Supreme Court in Delaware Transit Corporation v. Amalgamated Transit Union Local 842 and Harry Bruckner, 34 A3rd 1064, 2011 Del. LEXIS 627(2011). In that case, the Delaware Transit Corporation (DTC) appealed a petition seeking an order to vacate or modify an award issued by an arbitrator who reinstated the grievant Mr. Bruckner with back pay less interim earnings. The DTC argued that the decision should be vacated due to the appearance of bias or partiality on the part of the arbitrator.

In summary, the arbitration involved the termination of Mr. Bruckner who was a para-transit driver. The Company maintained an absence control program that imposed progressive discipline based upon the accumulation of countable absences within a rolling 12-month period. The program provided discipline after a certain number of occurrences beginning with warnings which then escalated in severity through suspension and then termination.

Mr. Bruckner worked a split shift from 7 a.m. to 10 a.m. and then from 2 p.m. to 6 p.m. He was married and living with his wife and four children. His wife was also employed where she had to work a midnight shift from approximately 11 p.m. to 7 a.m. Given their work schedules especially in the morning, the Bruckners were not able to be present for their children between the hours of 6 a.m. to 8 a.m. Prior to June 2008 Mr. and Mrs. Bruckner were able to have Ms. Bruckner's mother provide childcare during those two hours while residing in their

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[2] Roberta Golick, *Presidential Address: The Human Condition: Its Impact on Arbitral Thinking,* in ARBITRATION 2012: HOW THE EXTERNAL ENVIRONMENT IS SHAPING ARBITRATION, Proceedings of the 65th Annual Meeting, National Academy of Arbitrators (Nancy Kauffman & Matthew Franckiewicz eds., forthcoming 2013)

home. Beginning June 2008 Mr. Bruckner's mother-in-law began undergoing treatments for cancer while she continued to provide childcare. However, during that period of time Mr. Bruckner began incurring absences which resulted in him receiving discipline under the Company's absence control policy. By June 2008 Mr. Bruckner had incurred five absences which placed him on a "two day list status" and subject to progressive discipline by the Company. At approximately the same time Mr. Bruckner's mother-in-law became very ill and was suffering from the side effects of chemotherapy. She died in early July 2008.

As a result of the mother-in-law's death, the Bruckners were unable to secure dependable childcare for a period of time. When no one was able to be present for the children, Mr. Bruckner would have to remain with them until his wife returned from work. Consequently, he incurred additional absences in July and August, 2008. Prior to incurring his eighth occurrence Mr. Bruckner attempted to contact management in order to avoid termination. According to the evidence presented he contacted his supervisor and first asked for retroactive leave under the Family Medical Leave Act. He was not eligible because the FLRA did not provide coverage for the illness or death of an in-law. He subsequently asked for a leave of absence which was also denied. Finally, the grievant asked to have his start time changed to an uncovered para-transit run that optimally fit his childcare needs. Management without consulting the Union denied that request because it unilaterally concluded that such action would constitute a violation of the Collective Bargaining Agreement. A grievance was subsequently filed.

The matter was brought to arbitration on November 9, 2009. On January 5, 2010 the Arbitrator issued an opinion and award sustaining the grievance and reinstating the grievant with back pay less any interim earnings. In the opinion, the arbitrator relied upon several provisions of the Collective Bargaining Agreement and concluded that the employer's failure to consider

the option of allowing Mr. Bruckner to switch runs was arbitrary and constituted disparate treatment. This was especially significant in light of the Union's testimony that it would have tried to reach an accommodation with management but was not consulted.

The Delaware Transit Corporation filed a complaint seeking to vacate the award. The Union filed a motion for summary judgment which was granted by the Delaware Court of Chancery. The matter was appealed to the Delaware Supreme Court. The Company argued that the award should be vacated "on the grounds that the integrity of the arbitration was compromised because the arbitrator failed to disclose to the parties that his wife had died of cancer a few months before the arbitration hearing. According to the DTC, this created the appearance of bias or partiality because Bruckner argued that he failed to arrive at work in a timely fashion after his mother-in-law who had provided daycare for his children died of cancer."[3]

In summary, the Delaware Supreme Court relied on the U.S. Supreme Court's decision in Commonwealth Coatings Corp. v. Continental Casualty Co. et. al.[4] and Court concluded that the personal life experience of the arbitrator in that case did not support the conclusion that there was evident partiality under that standard and therefore granted the Union's motion for summary judgment and dismissed the complaint. Specifically, the Court stated that "we hold that arbitrators are not disqualified because of their shared life experience with a party or a party's agent and that the disclosure of a shared life experience is not mandatory. In this case, the arbitrator had no obligation to disclose that his wife had recently died from cancer."[5]

President Golick concluded that the extensive legal analysis presented by the Delaware Supreme Court only supported a conclusion based on common sense. President Golick

[3] *Id.* 34 A3rd 1064 at 1067
[4] *393 U.S. 145, 89 S.Ct. 337, 21 L. Ed.2d 301 (1968)*
[5] 34 A3rd 1064 at 1073

concluded that "we come to cases not merely with experience but with our private thoughts as well: our political beliefs, our pet peeves, our opinions, our sensibilities." Thus according to President Golick, "if we were obligated to disclose every element in our life experience or world view that related on some level to a case we were hearing, the arbitration process would come to a screeching halt."

This case specifically caught my attention because I was the arbitrator in the underlying matter. My wife succumbed to cancer on July 25, 2009, less than four months before the hearing. I immediately began wondering how the DTC obtained this information. I know that I did not disclose this to either party. My wife's obituary appeared in the Philadelphia newspapers and a number of people from the local labor-management community appeared at the memorial service. The potential resemblance between the grievant's family situation and my own never crossed my mind. More importantly, the case itself did not turn on the impact of the death of the grievant's mother-in-law. Rather the case turned on management's unilateral decision to terminate the grievant and not consult with the Union to determine if an accommodation could be made. Yet my thoughts returned to questions related to how the parties obtained this information and whether I somehow failed the process by not disclosing this at all.

Regardless of the personal reaction engendered by the decision, President Golick's comments forced me to consider the impact of such experiences on my selection and my obligation to disclose this to the parties. Even though President Golick's remarks were focused on empathy as a part of the decision making process. I found that this consideration also had a unique impact on arbitrator selection and the obligation to disclose. Indeed unlike the confirmation process of Justice Sotomayor, every time arbitrators are considered for a case they undergo queries about their ability to issue a fair and reasonable decision. That query is subject

to a number of rules of disclosure ostensibly intended to detect any conflict of interest. Disclosure requirements are necessary in order to determine whether there is any evident partiality on the part of the decision maker. Nevertheless, there is a question concerning what is pertinent for disclosure especially given the availability of information pertaining to any decision maker. This paper is intended to discuss the current application of the evident partiality standard, what the current law and applicable appointing agency rules require by way of disclosure to avoid the appearance of bias and its impact on the arbitration process. Finally, to discern we can maintain the efficiency of the process without requiring arbitrators to disclose every potential life experience that may have an impact on their ability to decide.

This is important because there are elements of anyone's life experiences that are readily available to parties through electronic media. We as human beings engage in a number of community and family related activities that may be viewed by parties through a basic internet search. For example, it should not be surprising that a Google search of an arbitrator's name would disclose a list community or political activities not related to the arbitrator's ability to be impartial but may be indicia of the arbitrator's political leanings. In essence, the increased availability of information on an individual arbitrator clearly has an impact on the applicability of the evident partiality standard and the rules of disclosure. The question therefore becomes whether there are limits on the application of this information on the question of arbitrator partiality and whether there is an obligation to disclose such information prior to or during the arbitration hearing.

II. The Evident Partiality Standard

The evident partiality standard arose out of the Supreme Court's opinion in Commonwealth Coatings Corp. v. Continental Casualty Co. et. al.[6] In summary, the case arose out of a commercial arbitration of a dispute between a contractor and subcontractor for a painting assignment. The neutral arbitrator selected by the parties had previously served as an engineering consultant for the contractor on a number of projects including the one that was the subject of the case. The relationship was not disclosed until after an award was issued in favor of the contractor. The Court set aside the award because the United States Arbitration Act authorized vacation of an award where there was "evident partiality" on the part of the arbitrators.[7]

Justice Black issued the opinion on behalf of the plurality of the Court. He interpreted evident impartiality as meaning that an arbitrator must be unbiased and also must avoid even the appearance of bias. Justice Black found that arbitrators, like judges must avoid actions that "reasonably tend to awaken the suspicion that [one's] social or business relationships or friendships constitute an element in influencing his judicial conduct."[8] Justice Black further stated that even though there may not be evidence of an improper motive "a decision should be set aside where there is the 'slightest pecuniary interest' on the part of the judge."[9]

This was not the only interpretation of the standard articulated by the Court. Justice White in his concurrence proposed a narrower standard stating that arbitrators should not be held to the "standards of judicial decorum of Article III Judges" because they are "men of affairs, not apart from but of the market place." Justice White rejected an automatic disqualification where such information is either disclosed or the relationship is somehow trivial. Justice White found

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[6] *Supra*.
[7] 9 USCS Section 10 (a) (2)
[8] Commonwealth Coatings Corp., 393 U.S. at 150
[9] *Id.* at 148

that one should find evident partiality where the disclosure of the relationship presents a situation where a "reasonable person would…conclude that an arbitrator was partial."[10]

As a result there has not been a consensus on the application of the evident partiality standard to allegations of bias in arbitration awards. Some courts have applied the narrow standard articulated by Justice White where there is evidence of an actual conflict or where the failure to disclose would offend a reasonable person's view of impartiality[11]. For example, the Court of Appeals for the 2nd Circuit found that in order to meet a burden of showing evident partiality one has to prove more than a mere appearance of bias; noting that while this appearance may disqualify a judge, it would not disqualify an arbitrator.[12]

In support of this reasoning, courts have recognized that arbitrators are retained because of a certain expertise with respect to the issue or issues to be decided. Thus it may be reasonably anticipated that there may be a certain amount of "overlapping" between the arbitrator's experience and either the parties involved in the case or the issues concerned. Thus, the issue of partiality will depend on a reasonable connection between the outcome of the case and the arbitrator's experience. As a result the determination of evident partiality has depended almost exclusively on the facts of the particular case and the nature of the undisclosed information to the issue to be decided.[13]

As this rule applies to an arbitrator's life experiences, the Delaware Supreme Court succinctly summed up its views. It stated that:

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[10] *Id.* at 150

[11] See e.g. Gianelli Money Purchase Plan & Trust v. ADM Investor Servs. Inc., 146 F.3d 1309, 1312 (11th Cir. 1998)

[12] See *Int'l Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548, 551 (2d Cir. 1981) and *Health Svcs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1264 (7th Cir. 1992)

[13] For a thorough discussion of the application of the evident partiality standard in arbitration see: Merrick T. Rossein and Jennifer Hope, *Symposium: Transatlantic Perspectives on Alternative Dispute Resolution: Disclosure and Disqualification Standards for Neutral Arbitrators: How Far to Cast the Net and What is Sufficient to Vacate Award,* 81 St. John's L. Rev. 203

> "[L]ifetime experiences good or bad are something all judges bring with them to the bench, and only in unusual circumstances should a judge be required to recuse because of a shared life experience. Obviously a judge is not disqualified from presiding at an automobile accident trial merely because he was once himself in an automobile accident. Nor is a judge disqualified for trying a divorce case either because he is himself married or divorced, or from trying a contested adoption case because he has either natural children or adopted children."[14]

In conclusion, the Delaware Supreme Court stated that "to set aside an award for evident partiality, the moving party must identify an *undisclosed relationship* between the arbitrator and a party or the party's agent that is 'so intimate - personally, socially, professionally or financially - as to cast serious doubt on the arbitrator's impartiality."[15] The Delaware Supreme Court adopted the more narrow application of the evident partiality standard than what was applied by Justice Black.

III. Evident Partiality and Disclosure Requirements under Statute and Appointing Agency Rules.

As indicated above, the Supreme Court in Commonwealth Coating interpreted Section 10 of the Federal Arbitration Act[16] that provides that a court may make an order vacating an award upon the application of any party to the arbitration where there is "evident partiality" or corruption in the arbitrators or either of them. The Count itself did not come to a consensus on the strictness of its interpretation. Justice Black held that a court should vacate an award if there is even the impression of undisclosed bias. A portion of the Court would find as stated by Justice White that the mere appearance of bias does not necessarily rise to a finding of evident partiality. Rather, the award should be vacated when it is established that the undisclosed relationship would lead a reasonable person to conclude that the arbitrator actually lacked partiality.

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[14] Supra. 34 A3rd 1064 at 1072
[15] *Id.* at 1073
[16] Supra.

While this standard served as the basis for the Delaware Supreme Court's analysis, it is important to note that the FAA explicitly excludes controversies arising out of Collective Bargaining Agreements from its coverage.[17] The FAA and other similar statues and certain appointing agency rules have specifically sought to insure fairness in commercial, consumer, and non-union employment arbitration. Therefore, theoretically, the Delaware Supreme Court could have decided not to use this standard based upon this exception. Nevertheless despite the specific exclusion of Collective Bargaining Arbitration from the FAA and other statutory enforcement of arbitrator fairness, participants in both employment and labor arbitration have recognized a certain amount of blending of standards between the two areas. More and more, many arbitrators, especially those with experience in collective bargaining, and advocates have had to recognize that an understanding of the disclosure requirements in both union and non-union settings are essential to insuring fairness in the arbitration process. Indeed many have argued that the more stringent disclosure requirements in non-collective bargaining arbitration have enveloped the arbitration process in collective bargaining thereby making it less efficient.

One of the more cited examples concerns the extensive disclosure requirements in the State of California. These standards have been promulgated by the California Judicial Council under its Code of Civil Procedure Section 1281.85 which gives it the right to promulgate "ethics standards for neutral arbitrators in contractual arbitration." The standards are quite broad and apply to any arbitrator who serves impartially whether selected or appointed by party arbitrators, the courts or dispute resolution provider organizations. However, the standards state that they are intended apply to consumer, commercial and employment arbitration but specifically does not apply to arbitrators serving in *inter alia* "an arbitration conducted under or arising out of

[17] See 9 USCS Section 1 which states that "nothing herein contained shall apply to contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

public or private sector labor relations laws, regulations, charter provisions, ordinances, statutes or agreements."[18]

The State of California is the locale of a substantial number of arbitrations held pursuant to employment agreements. It is also true that active neutrals who are experienced in collective bargaining arbitration also have active practices serving as neutrals in employment arbitration. Thus, in attempting to avoid allegations of bias in the labor environment, these arbitrators have made sure that they comply with the broad disclosure requirements as they appear in the California Ethics Standards. The standards provide strict disclosure requirements which mandate *inter alia* that all potential conflicts be disclosed within ten calendar days after an arbitrator becomes aware of the reason for the disclosure and is continuing throughout the course of the appointment. The standards also set forth specific and required disclosures with detailed explanations. Failure to comply with these standards would result in the disqualification of the arbitrator.

One should pay particular attention to the required disclosure in instances where the arbitrator has decided prior matters for a party or a lawyer representing a party within the preceding five years, in such case, the arbitrator must provide detailed information describing each case in which the arbitrator previously presided including the names of the parties, who is involved and the results of the case. This is specifically intended to address the instances of "repeat players" and the potential appearance of partiality.

In this regard and as will be explained in more detail below, it is quite common in labor arbitration for a party or an advocate to appear before an arbitrator on multiple occasions. If labor arbitrators are required to make such discloses on each occasion, it would raise substantial barriers to the efficiency of the collective bargaining arbitration process. It would also raise an

[18] Ethics Standards for Neutral Arbitrators in Contractual Arbitration, Standard 3 (b) (2) (h).

onerous obligation on arbitrators to maintain extensive records of the cases to which they have been appointed. Even though an arbitrator may make such a disclosure, it is not unusual for employers and unions to disregard the disclosure as a bar to service.

Detailed discloses in non-collective bargaining arbitration are also required by the appointing agencies. For example, the American Arbitration Association, as part of its Employment Arbitration procedures, requests from the parties upon filing lists of the entities involved and individuals who may appear before the arbitrator as either advocates or witnesses. Once the arbitrator is appointed, the arbitrator is served with the list and an extensive conflict check list which must be completed before accepting the appointment. If such a conflict arises, it is the obligation of the arbitrator to provide a detailed disclosure to which the American Arbitration Association or the parties will determine whether there is any potential conflict which may preclude the arbitrator from serving.

IV. The Distinction Between Labor Arbitration Disclosure and Evident Partiality

By contrast, the requirement for disclosure with an appointment to arbitrate pursuant to a collective bargaining agreement is relatively limited. The first critical distinction has to do with the requirement that a labor arbitrator must be "qualified" in order to hear a labor-management dispute. In order to be part of the panel of one of the major appointing agencies or eventually a member of the National Academy of Arbitrators the arbitrator must demonstrate that he or she is neutral. The person wishing to serve as a labor arbitrator must discontinue all activity as an advocate or consultant on behalf labor or management. This includes not only representing or consulting with parties on labor matters but also serving as counsel or a consultant in non-labor areas such as matters involving *inter alia* discrimination, wage and hour, unemployment or workers compensation.

In addition, the person wishing to serve as a labor arbitrator must demonstrate "acceptability" by the parties. For example, to be eligible to serve on the American Arbitration Association or Federal Mediation and Conciliation panel, the arbitrator must apply and provide as many as twelve recommendations from parties both representing labor and management verifying the arbitrator's acceptability and ability to decide labor matters fairly.[19]

In order to become a member of the National Academy of Arbitrators the arbitrator must have practiced as a neutral a minimum of five years and then with an application must present to the membership committee a minimum of 50 opinions from a variety of industries certifying their qualification and acceptability as an arbitrator. The applicant must also provide recommendation letters from advocates and members testifying to their ability to serve fairly and ethically. The NAA Membership Committee vets this information and also solicits opinions from the membership prior to admission. Once this information is received, the candidate may be admitted to membership, deferred membership or rejected. This stringent requirement significantly insures the neutrality of the arbitrator and in my view serves to dispense with general questions of partiality.

In comparison, there are relatively few requirements which would qualify an individual to serve as an arbitrator of employment disputes. An individual does not have to be a certified as a neutral in order to arbitrate employment or commercial disputes. Individuals may serve as an advocate or consultant in one matter and also serve as a neutral in other matters. Therefore, there is a greater potential for a conflict of interest and the burden is greater on the arbitrator to disclose any prior relationships. Admittedly, this environment exists as a creature of the transactional nature of employment arbitration which is more closely aligned with commercial

[19] In order to qualify to serve on the panel of the FMCS, the arbitrator must submit five opinions to the agency.

disputes. For the most part the dispute arises with the eminent severance of the employment relationship.[20]

In collective bargaining arbitration, the parties own an ongoing process. The relationship is continuing. As a consequence it is not unusual for one arbitrator to have had a significant number of cases before one or two parties in a particular industry or a number of industries. In addition, historically and depending on the industry, arbitrators have been appointed as "permanent" under the collective bargaining agreement. In many instances, arbitrators serve on a rotating basis and are assigned disputes as they arise. As a result there is no or little need to disclose once the appointment is made because the arbitrator is recognized for his or her ability to be "fair" with no conflict of interest. More importantly, such a relationship tends to generate a certain amount of institutional knowledge in the arbitrator which allows the arbitrator to make decisions which not only resolve the specific issue, but also recognizes the impact of that issue on the continuing relationship between the parties.

In addition to the qualification of labor arbitrators, the labor-management community has addressed the issue of disclosure and arbitrator impartiality in a more concrete way. The Code of Professional Responsibility for Arbitrators of Labor Management disputes was been promulgated and has been applied by the National Academy of Arbitrators, the American Arbitration Association, and the Federal Mediation and Conciliation Services since 1951. It has been amended from time to time since then. The issue of required disclosures is controlled by Canon 2B of the Code. In general it requires that:

> "[B]efore accepting an appointment an arbitrator must disclose directly or through the administrative agency involved, any current or past managerial, representational, or consultative relationship with any company or union involved in a proceeding in which the arbitrator is being considered for appointment or has

[20] One may digress to a discussion of the distinction between the equality of bargaining power in the enforcement of arbitration in employment versus commercial transactions. But this is a subject of another debate.

> been tentatively designed to serve. Disclosure must also be made of any pertinent pecuniary interest."

In those instances in which there may appear to be a conflict of a personal nature, Canon 2B3 of the Code specifically states that an arbitrator "must not permit personal relationships to affect decision making." In its comment, the Code recognizes that as professionals engaged in Labor and Employment Alternative Dispute Resolution, arbitrators encounter advocates in a number of ways.[21] It states that:

> "[A]rbitrators 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."

It is my view that this comment is critical. It recognizes that neutrals active in the labor management community may come across advocates and others in a number of instances. This may include weddings, engagements, retirements and other activities as part of one's day to day life. It would be very difficult and quite cumbersome to have to disclose all such meetings unless one can determine that the relationship is detrimental to the particular case. Even so, the arbitrator must be careful. This is especially true given the size and scale of many employer entities and labor organizations. Even though most disputes are geographically local in scope, in any given case, it is not unusual for a party to have a representative or advocate who may come from an outside area and may not be familiar with the relationships of the local participants. Should this be the case, the arbitrator should bring such relationships to light as soon as possible before the parties.

Depending on the party and the case, such disclosure may lead to arbitrator disqualification. For example, many arbitrators and advocates working and living in the

[21] It should be noted that in order to maintain membership in the NAA, the member must abide by the Code of Professional Responsibility even though he or she may be serving as an employment arbitrator.

Philadelphia area have at one time or another been employed by Region 4 of the National Labor Relations Board. In one case, a number of arbitrators were disqualified from a matter because they happened to work for an advocate representing a major union in the area. The employer was represented by counsel from a national firm from another city. In that case, the American Arbitration Association specifically asked for such a disclosure. While in my opinion this may not have impacted the arbitrator's impartiality, it unfortunately delayed the appointment process for a substantial period of time.

The Code is interpreted by the National Academy of Arbitrator's Committee on Professional Responsibility and Grievances. As part of its responsibility the CPRG issues Advisory Opinions interpreting selected provisions of the Code issues of disclosure and partiality. In Opinion #22 which was issued on May 26, 1991 the CPRG addressed issues arising when there has been a relationship between the arbitrator and an advocate. In that Opinion the committee advised that:

> "[O]nly 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."[22]

V. Human Experience and Evident Partiality: Maintaining the Efficiency of the Process.

There is no question that arbitrators, like all humans, are products of their life experiences. These in general affect our decision making and admittedly may lead to an impression of bias even though that experience may not indicate that the arbitrator is partial in a particular case. In addition, this issue arises in a time when information on an individual arbitrator is more available through electronic media. Yet in acknowledgement of President Golick's statement, to disclose each and every potential question of conflict would bring the

[22] See www.NAARB.ORG, Code of Professional Responsibility and Advisory Opinions.

process to a screeching halt. How may the process insure impartiality without unduly impeding its efficiency?

Currently, I would describe the efforts to resolve this question to be vexing especially given the apparent overlap of standards between labor and employment arbitration. One solution would be to pre-certify arbitrators as neutral thus limiting the need for extensive disclosure to avoid the appearance of bias. This position has been asserted by many members of the National Academy. However, one must consider the negative impact of such a requirement on the availability of arbitrators. Indeed just because the arbitrator my serve as an advocate in other matters does not in and of itself serve as indicator of partiality. Appointing Agencies, notably the AAA require continuing education to insure that its panel of arbitrators understands the ethical considerations inherent in maintaining arbitrator impartiality.

This however does not reduce the potential for the review of adverse awards to court just because the losing party did not like the award and wants to assert after the fact that the arbitrator's conclusion reflected bias or where an arbitrator may act in a partial manner during a proceeding. After all, given the availability of information on an arbitrator, anyone could find a basis for making such an argument.

It has been recognized that a party may not raise the issue of bias if it came upon the information before the conclusion of the case even though it was not disclosed by the arbitrator. For example, in the case of Merrill Lynch v. Smolochek the U.S. District Court for the Southern District of Florida held that an individual may not appeal an adverse award based upon the presence of evident partiality when the moving party became aware of a discloseable item before the rendering of the decision and failed to raise it in a timely manner. In essence, the court held

that by failing to disclose its knowledge of such a potential conflict, the party was deemed to have waived its right to appeal based upon a claim of evident partiality.[23]

Nevertheless, this in and of itself will not deter efforts to overturn awards founded on claims of bias based on undisclosed information acquired after the award is issued. In recognition of a long-held belief in legal practice, one cannot keep a person from going to court; one can only make it difficult for one to succeed. The Courts must strongly enforce the finality of arbitration awards especially when the court finds that the agreement to arbitrate is fair and enforceable. Courts must not only place the burden of showing evident partiality on the appealing party, that burden must be substantial. Not only must the undisclosed information be directly related to the issue presented for arbitration, there must be a direct connection between the information and any evident partiality on the part of the arbitrator. Otherwise the parties must live with the decision of the person they selected.

In addition, there must be an obligation on the part of the practicing community to abide by the agreement to engage in final and binding arbitration and to refrain from seeking to vacate every adverse decision. After all, the efficiency of the process must come down to those who engage in it. Indeed, without such self-restraint, arbitration will become too burdensome, expensive, and inconclusive to serve its participants; as President Golick put it, the process will come to a screeching halt.

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[23] *2012 U.S. Dist. LEXIS 134089.* In another example of the overlap between labor and employment arbitration, the District Court relied on the reasoning in Bianci v. Roadway Express and Teamsters Local 390, 441 F.3d 1278 (11th Cir. 2006) which was a hybrid duty of fair representation/Section 301 action brought by a disgruntled employee/grievant after he lost a labor arbitration.