GUIDELINES OF PROFESSIONAL RESPONSIBILITY
FOR ARBITRATORS OF EMPLOYMENT DISPUTES

Theodore J. St. Antoine
Degan Professor Emeritus of Law
University of Michigan

The National Academy of Arbitrators (NAA) has two separate sets of guidelines dealing with the professional responsibility or ethical obligations of arbitrators of employment (nonunion, i.e., between employee and employer) disputes, as distinct from labor (union and management) disputes. Both sets were in response to *Gilmer v. Interstate/Johnson Lane Corp.*, in which the Supreme Court held that employees could be required as a condition of employment to waive their right to sue their employer in court on employment claims, including statutory civil rights claims, and to agree instead to arbitration of such claims.

The first set of guidelines was initially preceded by an NAA Policy Statement taking strong issue with the *Gilmer* position. But the most recent version of those guidelines, dated May 20, 2009, adopts a more measured approach, merely stating a preference for voluntary agreements to arbitrate that are reached after a dispute has arisen. In any event the Academy recognized that following *Gilmer*, at least some of its members would be handling employment arbitrations and should be guided by the standards set forth by the NAA.

The second set of NAA guidelines, approved by the Board of Governors in May 2014, was originally drafted as a code of binding rules for employment arbitrators, paralleling the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes. The latter Code has been jointly adopted by the NAA, the American Arbitration Association, and the Federal Mediation and Conciliation Service. The Code is subject to enforcement in various ways, including reprimand, suspension, or expulsion by the Academy or suspension or disbarment from arbitration panels by the two designating or appointing agencies. The Academy’s enforcement body is the Committee on Professional Responsibility and Grievances.

After discussions with the NAA Board of Governors, however, it was decided for a variety of reasons to make the new proposed set of standards merely guidelines and not formally binding. For those Academy members who firmly believe that members handling employment arbitrations should be subject to sanctions for wrongdoing, there was comfort in the increasing recognition that both the history and express wording of the Code for labor arbitrators (see the “Foreword” &“Preamble – Background & Scope of Code”) support the notion that it is equally applicable to employment arbitrators. (The General Counsel of the AAA is dubious about that.)

---

1 Both sets are reproduced *infra* and are available on the Academy website at [http://naarb.org/due_process.asp](http://naarb.org/due_process.asp) (last visited Nov. 14, 2014).


I chaired the special committee of the NAA that produced the new 2014 Guidelines. But the real heavy lifting was performed by two drafting subcommittees chaired by Martin Malin of Chicago-Kent College of Law and Dennis Nolan, formerly of South Carolina School of Law and now a full-time arbitrator. California arbitrator and part-time academic Barry Winograd came up with some of the key ideas. He also worked vigorously to publicize the Guidelines and wrote a valuable study, “Developing Standards of Professional Responsibility for Arbitrators in Mandatory Arbitration,” 35 Berkeley J. Empl. & Lab. L. 61 (2014). Other committee members who participated in this two-year project, all of them most actively, were Jack Clarke, Sharon Henderson Ellis, George R. Fleischli, Edward B. Krinsky, Susan T. Mackenzie, John E. Sands, Susan L. Stewart, and Jeffrey B. Tener.

The texts of both sets of guidelines (which eventually should be merged or at least coordinated), as well as the critical sections on the coverage of the Code for labor arbitrators, appear immediately after this introductory and background material. The following are what appear to me as some of the most significant points about the new 2014 version of guidelines, some of which provide new and important protections for individual employees.

1. The original guidelines, last amended in May 2009, were clearly prompted by the Gilmer case, involving a mandatory arbitration arrangement. But their coverage definitely seems to extend to any employment arbitration, whether mandatory or not. Unlike that arrangement, some last-minute developments in an attempted compromise limited the application of the new 2014 Guidelines to cases where the arbitration agreement is mandatory, i.e., a condition of employment.

2. Arbitrators should pay special attention to mandatory arbitration systems and not accept appointments if there are provisions denying due process that are not remedied when deficiencies are pointed out.

3. Arbitrators should check the source of appointment and not accept a case where the panel was created by one party or the arbitrator was selected by one party. The first part of this could be controversial if the panel were all respected arbitrators (NAA members!), but the Sixth Circuit seems in accord. See McMullen v. Meijer, Inc., 355 F.3d 485, 487 (6th Cir. 2004).

4. Disclosure obligations are extensive, including past service as a neutral in ADR proceedings with any party or their representatives. A party is entitled to disqualify an arbitrator within a reasonable time after disclosure without any specific cause being shown. Disclosure obligations continue during the proceedings if new facts become known.

5. Cases with a pro se party require special care. Arbitrators should explain they are a neutral, not a representative of either party. They may explain the procedure but they must be careful to avoid taking or appearing to take sides.

6. Prehearing discovery must be full and fair under all the circumstances, including need to know on the one hand and maintenance of the expedited nature of arbitration on the other.
7. Arbitrators must make a reasonable effort to address applicable public law when it is at issue. I personally would let the parties narrow the issues and insist that I stick to interpreting and applying the contract; the parties could then have a court address legal issues if that is necessary. But increasingly, perhaps especially in public sector cases and certainly in federal cases, it is generally assumed that the parties intended the arbitrator to interpret the contract in light of public law.

8. Advance deposits for arbitrator fees may be required as a condition of going forward with the arbitration. Deposits must be secured and set aside until the fees are earned.

9. Arbitrators must give notice to all parties, and an opportunity to respond, if they believe a case should be decided on a rationale not previously presented.

10. Consent awards are permitted if the arbitrator is satisfied that all parties knowingly agreed (and I would add “and seem fair to the arbitrator”). This does not apply to class actions.

11. Post-award clarification is not permitted unless all parties agree but an arbitrator can retain jurisdiction to clarify the interpretation or implementation of the remedy.

12. One party can be held wholly responsible for the arbitrator’s fees in accordance with applicable law, agency rules, or the agreement of the parties.

13. Ex parte communications are prohibited, even those regarding compensation, despite desires to spare one side embarrassment. (Would it make a difference if the arbitrator never tries to hold the other side responsible on a joint liability theory for the nonpaying side’s portion?)

14. Arbitrators may accept or even suggest mediation but they must be clear about the rules of the process, including ex parte communications, and the consequences of a failure in the mediation, including the subsequent role of the arbitrator.
It is the position of the National Academy of Arbitrators that voluntary arbitration is always preferable, and that it is desirable for employees to be allowed to opt freely, post-dispute, for either the courts and administrative tribunals or arbitration. We recognize, however, that the United States Supreme Court has extended the Federal Arbitration Act to most contracts of employment. As a result, employers may require their employees to arbitrate some or all future disputes, including statutory claims.

The abiding concern of the Academy is that all arbitration, including employment arbitration, be conducted in a manner that respects the rules of fundamental fairness essential to the integrity and credibility of the arbitration process. When serving in cases in which, as a condition of employment, an employee has signed an agreement that imposes arbitration as a substitute for direct access to either a judicial or administrative forum for the pursuit of statutory rights and judicially recognized claims for relief, arbitrators should be especially careful to ensure the fairness of any employment arbitration procedures in light of the Academy’s Guidelines for Employment Arbitration.

GUIDELINES FOR EMPLOYMENT ARBITRATION

INTRODUCTION

NAA members are now being called upon to arbitrate employment claims in the non-collective bargaining sector. Cases arising under an employer promulgated arbitration plan require particular vigilance on the part of arbitrators to ensure procedural fairness and to protect the integrity and reputation of workplace arbitration. These Guidelines, together with the Due Process Protocol endorsed by the Academy, the American Bar Association, the American Arbitration Association and other interested agencies, are intended to assist arbitrators in deciding whether to accept a case and to provide guidance as to how such a case might be fairly conducted and concluded. They supplement the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes. Members should also be alert to other applicable codes of ethics (e.g. code of Ethics for Arbitrators in
Commercial Disputes) federal and state statutes or regulations, or any other ethical code or rules adopted by the parties.

Employment arbitrations can result from post-dispute arrangements made by the agreement of the parties. Often, however, they arise as a condition of employment or "pre-dispute agreement" with terms that are established by the employer. Either may involve statutory claims, common law claims or contractual claims. Academy members who undertake such cases should do so with full assurances that their powers and the procedures to be followed are consistent with minimum standards of due process and fairness. In matters involving statutory claims, the arbitrator's jurisdiction and remedial authority should permit a hearing, rulings and decision fully consistent with the provisions of the statute itself, no less than would be the case before a court.

Members should recognize that in adjudicating statutory, common law or contractual claims they are acting as substitutes for a court. If the arbitration plan under which a member is appointed lacks fundamental due process, the arbitrator should insist upon an agreed correction as a condition of service and, failing agreement, should decline the appointment or withdraw from any further participation. The power to withdraw from a case in the face of policies, rules or procedures that are manifestly unfair or contrary to fundamental due process can carry considerable moral suasion. However, in assessing the fairness of a given system, the arbitrator should be mindful that the parties to a post-dispute agreement have much more latitude to vary from the procedural and substantive requirements of statutory systems than do parties to a pre-dispute agreement.

I. SHOULD YOU TAKE THE CASE?

1. Do you have past or present connections, interests or relationships that should be disclosed?

   Academy members are used to situations where disclosures are often unnecessary because the parties know them well and the labor-management universe is relatively small. In contrast, in the employment field the parties may not be familiar with one another or conversant with the arbitration process. Caution suggests detailed disclosure regarding any past or present involvement with or relationship with the parties, counsel or potential witnesses, and any similar considerations. It is important to proceed carefully and to err on the side of disclosure so there can be no question of impropriety or of your impartiality. State statutes, regulations, or rules of court on disclosure may be applicable, particularly where federal law is not controlling, and these should be fully complied with.
2. **Do the parties have adequate rights of representation?**

   At times, the parties in these cases, especially claimants, may not have experienced, professional representation. Arbitrators should exercise special care when accepting appointments or hearing cases where one party is not represented. Some members elect not to accept a case when the claimant is unrepresented.

3. **Were you selected in a fair manner?**

   When notified of selection, if you are not familiar with the parties' procedure, you should inquire as to how you were chosen. Did both parties have a meaningful selection opportunity? A negative answer to this question should cause you to decline the case, absent clear evidence that the selection process was fundamentally fair.

4. **Are you satisfied that you can serve in light of the documents creating and defining the scope of the arbitrator’s jurisdiction, including, where applicable, the following?**
   
   a. Arbitration agreement
   b. Employment contract
   c. Designating agency rules
   d. Court order
   e. Employer ADR plan or other policies
   f. Any restrictions on class or group actions to the extent these might hinder particular grievants in pursuing their claims, especially where the monetary amount of each individual claim is relatively small, or hinder the vindication of the public purpose served by the particular claim.

   Before agreeing to serve you should receive all of the documents defining your authority and scope of jurisdiction. If there are restrictions, particularly with respect to your remedial authority and your ability to control the proceeding, such as unfair limitations on discovery or on the production of documents or witnesses, you should make sure that you have the authority to make such directions as may be necessary to ensure procedural fairness. If the restrictions have previously been found unconscionable by a court, but the employer offers to waive those restrictions in this particular case, you should consider whether accepting the case is appropriate.

5. **Where a claim involves statutory or common law rights, are you authorized to provide adequate discovery and remedies fully consistent with any applicable statute or the common law?**

   In an employment relationship where arbitration is a condition of employment it is essential to ensure that your remedial authority is equal to that of a judge or jury under any statute or the common law applicable to the matter before
you. Different considerations may apply if the arbitration agreement is truly negotiated at arm's length or is a post-dispute agreement made between sophisticated parties. Similarly, if there are no provisions for discovery, you should make a determination about your authority. Unlike the collective bargaining setting, there is no administrative agency available to require discovery in the absence of agreement. If you believe that your remedial authority is unfairly restricted, you should consider carefully whether it is appropriate to serve.

6. Are there unfair restrictions on the date, time and location of the hearing?

Academy members should ensure that all aspects of the scheduling of the hearing are fair. The location should not be so distant that it causes cost problems for a party of limited means or be inconvenient to reach for a person with physical disabilities. The arbitrator should also consider the reasonableness of a party’s request for a “neutral” site. The dates of hearings should not be so soon as to prevent adequate preparation or so delayed as to prevent a timely remedy.

7. Are you satisfied that the arbitrator compensation arrangement is consistent with fairness and impartiality?

Compensation arrangements can take a number of forms, including employer pays in full or in substantial part, the parties share equally, or loser pays. You must decide whether the basic arbitrator compensation arrangement is consistent with fairness and applicable law. If there is a mandatory arbitration agreement executed as a condition of employment, and the claim is based on a statute or the common law, an arbitrator should consider whether fairness demands that the employee’s share of the arbitrator's fees and expenses be no greater than the filing fees for such a claim in the appropriate court.

II. PRE-HEARING CONSIDERATIONS

1. Employment cases require active management to ensure due process, fairness, and efficiency. At the outset of the case, the arbitrator should make clear the rules governing the proceeding and the full range of pre-hearing and remedial authority the arbitrator intends to exercise. Depending on the agreement and relevant statutory and case law, that authority may include sanctions, compensatory and punitive damages, interest, attorneys’ fees, and equitable relief.

2. If the agreement to arbitrate or the parties’ agreed-upon rules do not set forth the evidentiary standards to be followed at the hearing, the
arbtrator should make clear the standards he or she intends to apply.

3. Pre-hearing discovery is essential for adequate case preparation. In addressing discovery issues, the arbitrator must balance the parties’ need for sufficient information to ensure full and fair exploration of the issues and the expedited nature of arbitration. Fairness, efficiency, and due process should guide the arbitrator in managing discovery. Where the agreement is silent, the arbitrator should establish discovery rules in conjunction with the parties.

4. In establishing discovery rules the parties may choose state or federal rules because of familiarity with them. Arbitrators should have some familiarity with both sets of rules and tell the parties whether they will be applied literally.

5. The arbitrator and the parties must establish time limits for pre-hearing activities, which the arbitrator is authorized to enforce. The arbitrator should determine whether dispositive motions shall be permitted, with or without further leave of the arbitrator.

6. When both parties are represented by counsel, arbitrators should encourage voluntary resolution of discovery issues. When claimants appear pro se, arbitrators should ensure that they understand the issues being discussed and the discovery obligations they must meet. Arbitrators should be careful, however, to avoid acting as advocates for pro se claimants, and should scrupulously maintain both the reality and the appearance of impartiality.

III. THE HEARING

1. Certain issues that often arise at the hearing in a labor arbitration will have already been discussed and ruled upon by the arbitrator in the pre-hearing process.

2. At the hearing, the arbitrator should seek a comfortable balance between the traditional informality and efficiency of arbitration and court-like diligence in respecting and safeguarding the substantive statutory, common law, and contractual rights of the parties.

3. While parties of equivalent capacity often object to what they consider excessive arbitrator intervention in their case presentations, arbitrators must exercise special care to ensure fundamental fairness when there is a pro se claimant. A frank statement to this effect at the beginning of a hearing may be helpful. Although an arbitrator should not take over the pro se claimant’s case as would an advocate, the arbitrator may appropriately point out the basic procedures to be
followed and the elements that must be proven to establish the claim. The arbitrator may also raise questions to clarify confusing testimony or argument.

4. If not following the formal rules of evidence, arbitrators should be mindful of issues of privilege and confidentiality, and instances where the application of an informal evidentiary approach might prejudice an underlying substantive right under a statute, the common law, or a contract.

5. Arbitrators should familiarize themselves with any legally established burdens of going forward and any legally established burdens of proof, including any shifting burdens of proof, that are applicable to the claim.

6. During the hearing the arbitrator should remain alert to any ongoing disclosure obligations not anticipated and dealt with at the pre-hearing consultation.

7. If the parties do not agree on having a transcript, the arbitrator may have to rule on what, if any, record of the proceedings will be required other than the arbitrator’s own opinion and award. In statutory cases, an appropriate record is necessary for a court to accord the arbitrator’s award full weight. But unless a case is unusually complicated or the evidence is highly controverted, a professional transcript could be unduly expensive and time-consuming. An audio recording or similar device controlled by the arbitrator may suffice.

IV. OPINION AND AWARD

1. The arbitrator should provide a written opinion and award.

2. The opinion should record the parties, the type of dispute, the issues to be decided, and the relief requested.

3. The opinion should recite the facts and the reasoning for any conclusions contained in the opinion and award. The arbitrator should identify and deal with all statutory, common law, or contractual issues raised, being mindful of the standards of judicial review which may apply. It is appropriate for the arbitrator to cite and rely on material supplied at the hearing, as well as on information in the public domain, including the jurisprudence of agencies and courts. In resolving public law claims the arbitrator is obligated to apply applicable statutory and case law.
4. Remedies should be consistent with the statutory, common law, or contractual rights being applied and with remedies a party would have received had the case been tried in court. These remedies may well exceed the traditional labor arbitration remedies of reinstatement and back pay and may include injunctive relief, compensatory and punitive damages, interest, and assignment of attorney's fees and costs.

5. The award should be signed by the arbitrator or by a majority of a panel of arbitrators. It should specifically cite the disposition of each claim and the damages and relief provided, if any.

PREAMBLE

Arbitration is commonly used to resolve employment disputes. Employment arbitration is a significant part of the system of justice on which our society relies for a fair determination of legal rights. All persons who act as employment arbitrators therefore undertake serious responsibilities to the public as well as to the parties. Those responsibilities include important ethical obligations. Arbitrators occupy a position of trust in relation both to the parties they serve and to the administrative agencies handling their cases.

SCOPE OF THE GUIDELINES

These Guidelines are a privately developed set of standards of professional conduct for arbitrators engaged in the resolution of disputes arising under an agreement to arbitrate pursuant to an employer-promulgated arbitration plan or procedure where the arbitration of employment-related disputes is a condition of employment.

The word “arbitrator” as used in the Guidelines applies to any individual, irrespective of specific title, who serves in an impartial capacity in a covered arbitration dispute procedure that confers authority to decide issues or to make formal recommendations. The Guidelines are not designed to apply to mediation, conciliation, or other procedures in which the third party is not authorized in advance to make decisions or recommendations, except as specifically provided for in Section 2.E. These Guidelines do not apply to partisan representatives on tripartite boards. The Guidelines do not supersede applicable laws or arbitration rules of an administrative agency to which the parties have agreed, and should be read in conjunction with other rules of ethics. They do not establish new or additional grounds for judicial review of arbitration awards. The Guidelines do not authorize or permit any organization adopting or applying the Guidelines, or any internal tribunal of such an organization, to review arbitration awards on their merits.

SECTION 1. ARBITRATOR’S QUALIFICATIONS AND RESPONSIBILITIES TO THE PROFESSION

A. General Qualifications

1. Essential personal qualifications of an arbitrator include honesty, integrity, impartiality, and general competence in employment law and management of employment arbitration issues.
a. An arbitrator must demonstrate ability to exercise these personal qualities faithfully and with good judgment at every stage of the arbitration process.

2. An arbitrator must be as ready to rule for one party as for the other on each issue in every case.

B. Qualifications for Special Cases

1. If a case requires specialized knowledge or expertise outside the arbitrator's competence, the arbitrator must decline appointment, withdraw, or seek and obtain approval for technical assistance.

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 must keep current with principles, practices, and developments that are relevant to the arbitrator's field of practice.

2. Arbitrators may disseminate truthful information about their experience and qualifications.

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

SECTION 2. RESPONSIBILITIES TO THE PARTIES


1. An arbitrator must try to understand and observe the terms of the arbitration agreement under which the arbitrator serves.

2. That understanding does not relieve an arbitrator from a corollary responsibility to try to discern any attempt by any party to use arbitration for an improper purpose. The arbitrator must not approve, consent to, or participate in any way in such an attempt.

   a. Cases arising under an employer-promulgated arbitration plan require particular vigilance to ensure procedural fairness and to protect the integrity and reputation of employment arbitration. Arbitrators who undertake such cases must be sure that their powers and the procedures to be followed satisfy minimum standards of due process and fairness.

3. If the arbitration plan under which an arbitrator is appointed lacks
fundamental due process, the arbitrator must insist upon an agreed correction as a condition of service and, failing agreement, must decline the appointment and withdraw from any further participation.

4. One party may be made solely responsible for arbitrator fees pursuant to applicable law, agency rules, or agreement of the parties.

5. To ensure fundamental fairness, arbitrators must exercise special care when accepting appointments or hearing cases where one party is not represented.

   a. The arbitrator must inform unrepresented parties that the arbitrator is not representing either party and explain the difference between the arbitrator's role as a third-party neutral and a lawyer's or advocate's role as one who represents a client. While the arbitrator may not assist either party in the presentation of its case, the arbitrator may explain the arbitration process to an unrepresented party.

B. Disclosure

1. After being notified of an appointment, an arbitrator must disclose to the parties, or to an appointing agency administering the case, any facts or circumstances that might raise a reasonable doubt about the arbitrator's independence and impartiality. The arbitrator must also disclose any other matters required by law or by rules that are applicable to the proceeding.

2. The arbitrator must disclose all personal, social, professional, financial, or other interests related to a party, representative, known witness, and other arbitrators in the proceeding.

   a. This disclosure requirement applies to any past or present relationship, including appointment as an arbitrator or other dispute-resolution neutral.

   b. The arbitrator must disclose any continuing service as a representative of or consultant to employers, employees, unions, or organizations of employers or employees.

   c. If an attorney or consultant represents a party to the proceeding, the arbitrator must disclose any relationships with that attorney's or consultant’s firm.

   d. An arbitrator may establish social or professional relationships with others in the field, but must disclose any relationship with a representative or other arbitration participant that might raise a reasonable doubt about the arbitrator's impartiality.
e. The arbitrator must disclose any known or easily discoverable relationships that members of the arbitrator's family or household have with any participants.

f. Disclosure must include a description of the nature, frequency, and duration of the relationship.

3. An arbitrator must know or discover the source of the arbitrator's selection, and whether the arbitrator's selection was a joint appointment, an appointment by a neutral designating agency or government body, an appointment pursuant to a statute, an appointment in a compulsory arbitration arrangement from a panel unilaterally formed by one of the parties, or an appointment directly by one party. If the arbitrator discovers that the appointment was from a panel unilaterally formed by one of the parties in a compulsory arbitration arrangement, or from an appointment directly by one party, the arbitrator must decline the appointment.

4. After notice of selection to serve, the arbitrator must make required disclosures in writing to all representatives or to unrepresented parties, and must afford parties a reasonable period of time to object to the appointment before taking further action on the case.

a. If a conflict of interest exists, the arbitrator must decline an appointment, even if all parties waive objection.

b. An arbitrator must withdraw from service (1) if an objection by a party is made within the time provided for an objection after the disclosure, without need for a party to provide a reason, or (2) if, at any time during the proceeding, all parties request an arbitrator to withdraw.

5. After the arbitrator has made initial disclosures, the duty to disclose continues throughout the arbitration proceeding if new facts or circumstances, including selection to serve as an arbitrator in another case with one of the parties or representatives, come to the attention or recollection of the arbitrator.

a. The arbitrator must make subsequent disclosures in writing as soon as practicable.

b. An arbitrator must not delay a pending proceeding beyond the time reasonably required to receive any objection and to determine whether the facts and circumstances compel the arbitrator's withdrawal from further service.

6. An arbitrator must respond to a motion by a party during a proceeding for arbitrator recusal or removal. Applicable law or procedures for treating arbitrator challenges established by an administrative agency handling the case must be followed. Otherwise, the arbitrator must grant the motion if there is sufficient evidence of a lack of independence or impartiality, or other
reasonable grounds to require withdrawal.

C. Privacy of Proceedings and Publication of Awards

1. The arbitrator must treat all significant aspects of an arbitration proceeding as confidential unless all parties waive this requirement or applicable law permits or requires disclosure.
   a. An arbitrator may only permit attendance by persons other than the parties or their representatives when the parties agree or when an applicable law requires or permits.

b. An arbitrator may not discuss the case at any time with persons not directly involved unless the arbitrator first obtains the consent of all parties or unless the identity of the parties and details of the case are sufficiently obscured to eliminate any realistic probability of identification. An arbitrator need not obtain advance consent when discussing with another arbitrator issues arising in a case. The arbitrator acting in the case retains sole responsibility for the decision and the discussion must remain confidential. Similarly, an arbitrator who teaches arbitration in a college or university or in a continuing education program need not obtain advance consent to discuss issues arising in a case provided the arbitrator does not disclose any identifying information.

c. An arbitrator may not publish an award without the consent of the parties. An arbitrator may ask the parties for consent to publish only at or after the time the award is issued. The arbitrator may state in writing to each party that failure to answer the inquiry within 30 days will be considered an implied consent to publish the award with all identifying information redacted.

d. Applicable laws, regulations, or practices of the parties may permit or even require exceptions to the above noted principles of privacy.

D. Jurisdiction

1. An arbitrator must observe faithfully both the limitations and inclusions of the jurisdiction conferred by an agreement, by any other submission under which the arbitrator serves, and by any settlement of some or all of the issues in a case at any stage of the proceedings.

E. Mediation by an Arbitrator

1. An arbitrator may accept or decline an invitation by the parties to mediate or engage in a mediation/arbitration process.

   a. An arbitrator may suggest mediation or any other dispute resolution process.
2. If an arbitrator serves as a mediator, the arbitrator is required to establish a clear understanding of

a. rules surrounding ex parte discussions and

b. the arbitrator's further participation in the matter in the event that the matter is not resolved.

F. Delegation and 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.

G. Consent Awards

1. Upon the request of all parties to the proceeding, an arbitrator may issue an award agreed to by the parties, provided that the arbitrator is satisfied that all parties knowingly agreed to its terms.

a. This section does not apply to awards in class action arbitrations.

H. Avoidance of Delay

1. An arbitrator must plan a work schedule so that present and future commitments will be fulfilled in a timely manner.

a. When planning is disrupted, the arbitrator must promptly notify the parties or any administrative agency and provide a reasonable estimate of any additional time required.

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

a. An arbitrator must decline any request for service if the arbitrator is unable to schedule a hearing as soon as the parties wish.

3. Once the case record has been closed, an arbitrator must adhere to the time limits for an award, as stipulated in the agreement of the parties, or as provided by regulation of an administrative agency, or as otherwise agreed.

a. If the arbitrator cannot render an award within the required time, the arbitrator must seek an extension of time from the parties.
I. Fees and Expenses

1. An arbitrator must try to keep total charges for services and expenses reasonable in light of the nature of the case.

2. An arbitrator must maintain adequate records to support charges for services and expenses and must make an accounting to the parties or to an involved administrative agency upon request.

3. At or before acceptance of an appointment, the arbitrator must establish in writing, with all parties and any administrative agency, the basis for any charges or expenses, including any cancellation fee, compensation in the event of withdrawal, and compensation for study and preparation time.

   a. In proceedings under the rules or administration of an administrative agency, the arbitrator must communicate about compensation through that agency. In proceedings without an administrative agency, the arbitrator must copy all parties on communications about compensation.

4. Arbitrators may charge per diem rates, hourly rates, or any other reasonable method of calculating the fee, or any combination thereof. The method for calculating the fee must be disclosed to the parties at or before acceptance of the appointment.

   a. Per diem charges for a hearing must not exceed actual time spent or allocated for the hearing. An arbitrator may specify a per diem for a hearing that applies regardless of the length of the hearing.

   b. Time charged for other than hearings, whether it be per diem, hourly, or other method, must not exceed actual time spent.

   c. Charges for expenses must not exceed actual and reasonable expenses incurred in the case. When time or expenses are involved for two or more sets of parties on the same day or trip, the arbitrator must prorate such time or expenses appropriately. An arbitrator may, without violating this provision, stipulate in advance a minimum charge for a hearing.

5. An arbitrator may require deposits of the estimated fees and expenses for the case as a condition of going forward with the arbitration. The arbitrator must safeguard the parties' deposits and use them only for legitimate fees and expenses.

J. External Law and Independent Research

1. An arbitrator must make a reasonable effort to address and follow public law
whenever public law is at issue in a case.

2. An arbitrator may conduct legal research independently and may decide the case without advising the parties about such research or the results of any such research, so long as the arbitrator does not decide the case on the basis of a rationale or position that no party has presented or argued.

a. If the arbitrator concludes the case should be decided on the basis of a rationale or position not presented or argued by any party, the arbitrator must first give all parties an opportunity to respond.

SECTION 3. RESPONSIBILITIES TO ADMINISTRATIVE AGENCIES

A. General Responsibilities

1. An arbitrator must be candid, accurate, and fully responsive to an administrative agency concerning qualifications, availability, and all other pertinent matters.

2. An arbitrator must observe policies and rules of an administrative agency in cases referred by that agency, provided such rules are consistent with due process and public law.

B. Improper Influence

1. An arbitrator must not seek to influence an administrative agency by any improper means, including gifts or other inducements to agency personnel.

SECTION 4. PREHEARING CONDUCT

A. General Principles

1. All prehearing matters must be handled with complete impartiality by the arbitrator.

a. The primary purpose of prehearing discussions involving the arbitrator is to determine procedural matters so that the hearing can proceed without unnecessary obstacles. When an administrative agency handles some or all aspects of the arrangements prior to a hearing, the arbitrator will only become involved as appropriate and necessary.

b. Copies of any prehearing correspondence between the arbitrator and any party must be made available to all parties.
B. Discovery

1. The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.

SECTION 5. HEARING CONDUCT

A. General Principles

1. An arbitrator must provide a fair and adequate hearing that ensures all parties a sufficient opportunity to present their evidence and arguments.

   a. Within the limits of this responsibility, an arbitrator must conform to the various types of hearing procedures desired by the parties.

   b. An arbitrator must not intrude into a party's presentation so as to prevent that party from putting forward its case fairly and adequately. An arbitrator may ask questions to clarify the record and may request further information when necessary to ensure the arbitrator’s understanding of the evidence.

B. 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. Before proceeding ex parte, an arbitrator must try to determine whether the absent party has been given adequate notice of the time, place, and purposes of the hearing, and must try to contact the missing party.

3. An arbitrator must consider requests to reopen the record upon a showing by the absent party of good cause for failure to appear.

C. Bench Decisions; Full or Summary Awards and Opinions

1. When an arbitrator understands, before accepting an appointment, that the parties expect a bench decision at the conclusion of the hearing, the arbitrator must comply with that understanding unless all parties agree otherwise.

   a. If the parties do not notify the arbitrator before the arbitrator’s acceptance of the appointment of their desire for a bench decision, the arbitrator may decline to issue a bench decision.

   b. If any party objects, the arbitrator must not render a bench decision except
in extraordinary circumstances.

2. If the parties inform the arbitrator before acceptance of the appointment of their desire for either a full written award and opinion or a summary written award and opinion within a stated time period, the arbitrator must comply with the understanding unless all parties agree otherwise.

SECTION 6. POST-HEARING CONDUCT

A. Post-Hearing Briefs and Submissions

1. An arbitrator must comply with mutual agreements regarding the filing or nonfiling of post-hearing briefs or submissions.

2. An arbitrator must not consider a post-hearing brief or submission that has not been provided to the other party or parties.

B. Award; Disclosure of Terms

1. An arbitrator must ensure that any final award is based on as complete a factual and legal record as is feasible.

2. An arbitrator must not disclose a prospective award to any party prior to its simultaneous issuance to all parties. An arbitrator must not explore possible alternative awards unilaterally with one party, unless all parties so agree.

SECTION 7. POST-AWARD CONDUCT

A. Clarification or Interpretation of Awards

1. An arbitrator must not clarify or interpret a final award without the consent of all parties. When all parties consent to a clarification or interpretation, the arbitrator must afford all parties an opportunity to be heard.

a. An arbitrator may correct typographical errors, an evident material miscalculation of figures, an evident material mistake in the description of any person, thing, or property referred to in the award, or an imperfection in a matter of form not affecting the merits of the controversy, and may make corrections required by law, provided all parties have an opportunity to be heard.

B. Retaining Remedial Jurisdiction

1. An arbitrator may retain remedial jurisdiction in an award to resolve any questions that may arise over the interpretation, application, or implementation of a remedy. Such retained jurisdiction does not extend to any other part of the
award. Any party may request exercise of such retained jurisdiction.

C. Enforcement of Award

1. The arbitrator’s responsibility does not extend to the enforcement of an award.

2. An arbitrator must not voluntarily participate in legal enforcement proceedings.
CODE

OF PROFESSIONAL RESPONSIBILITY
FOR ARBITRATORS OF LABOR-MANAGEMENT
DISPUTES

OF THE
NATIONAL ACADEMY OF ARBITRATORS
AMERICAN ARBITRATION ASSOCIATION
FEDERAL MEDIATION AND CONCILIATION SERVICE

As amended and in effect September 2007

FOREWORD


Revision of the 1951 Code was initiated officially by the same three groups in October, 1972. The following members of a Joint Steering Committee were designated to draft a proposal:

Chair
William E. Simkin

Representing American Arbitration Association
Frederick H. Bullen
Donald B. Straus

Representing Federal Mediation and Conciliation Service
Lawrence B. Babcock, Jr.
L. Lawrence Schultz

Representing National Academy of Arbitrators
Sylvester Garrett
Ralph T. Seward

The proposal of the Joint Steering Committee was issued on November 30, 1974, and thereafter adopted by all three sponsoring organizations. Reasons for Code revision should be noted briefly. Ethical considerations and procedural standards were deemed to be sufficiently intertwined to warrant combining the subject matter of Parts I and II of the
1951 Code under the caption of "Professional Responsibility." It also seemed advisable to eliminate admonitions to the parties (Part III of the 1951 Code) except as they appear incidentally in connection with matters primarily involving responsibilities of arbitrators. The substantial growth of third-party participation in dispute resolution in the public sector required consideration, as did the fact that the arbitration of new contract terms had become more significant. Finally, during the interval of more than two decades, new problems had emerged as private sector grievance arbitration matured and became more diversified.

In 1985, the provisions of 2 C. 1. c. were amended to specify certain procedures, deemed proper, which could be followed by an arbitrator seeking to determine if the parties are willing to consent to publication of an award.

In 1996, the wording of the Preamble was amended to reflect the intent that the provisions of the Code apply to covered arbitrators who agree to serve as impartial third parties in certain arbitration and related procedures, dealing with the rights and interests of employees in connection with their employment and/or representation by a union. Simultaneously, the provisions of 2 A. 3. were amended to make clear that an arbitrator has no obligation to accept an appointment to arbitrate under dispute procedures adopted unilaterally by an employer or union and to identify additional disclosure responsibilities for arbitrators who agree to serve under such procedures.

In 2001, the provisions of 1 C. were amended to eliminate the general prohibition of advertising, along with certain qualifying statements added in 1996, and replace them with a provision that permits advertising except that which is false or deceptive.

In 2003, 1 C. was amended further to reflect that the same standard applies to written solicitations of arbitration work, but that care must be taken to avoid compromising or giving the appearance of compromising the arbitrator's neutrality.

In 2007, a new 6 E. was added and the previous 6 E. was redesignated 6 F. The purpose of the revision was to make clear that an arbitrator does not violate the Code by retaining jurisdiction in an award over application or interpretation of a remedy.

NOTE: From time to time, the Committee on Professional Responsibility and Grievances of the National Academy of Arbitrators prepares Advisory Opinions relating to issues arising under the Code which are adopted upon approval by the Academy’s Board of Governors. These Advisory Opinions can be found on the Academy’s website: naarb.org.

TABLE OF CONTENTS

FOREWORD .................................................................
TABLE OF CONTENTS
PREAMBLE ........................................................................
1. ARBITRATOR'S QUALIFICATIONS AND RESPONSIBILITIES TO THE PROFESSION ..................................................
   A. General Qualifications..............................................
   B. Qualification for Special Cases.................................
   C. Responsibilities to the Profession.............................
2. RESPONSIBILITIES TO THE PARTIES ...................................
   A. Recognition of Diversity in Arbitration Arrangements ...
   B. Required Disclosures............................................... 
   C. Privacy of Arbitration..............................................
   D. Personal Relationships with the Parties......................
Background

The provisions of this Code deal with the voluntary arbitration of labor-management disputes and certain other arbitration and related procedures which have developed or become more common since it was first adopted.

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. No two voluntary systems, therefore, are likely to be identical in practice. Words used to describe arbitrators (Arbitrator, Umpire, Impartial Chair, Chair of Arbitration Board, etc.) may suggest typical approaches, but actual differences within any general type of arrangement may be as great as distinctions often made among the several types.

Arbitrators of labor-management disputes are sometimes asked to serve as impartial third parties under a variety of arbitration and related procedures dealing with the rights and interests of employees in connection with their employment and/or representation by a union. In some cases these procedures may not be the product of voluntary agreement between management and labor. They may be established by statute or ordinance, ad hoc agreement, individual employment contract, or through procedures unilaterally adopted by employers and unions. Some of the procedures may be designed to resolve disputes over new or revised contract terms, where the arbitrator may be referred to as a Fact Finder or a member of an Impasse Panel or Board of Inquiry, or the like. Others may be designed to resolve disputes over wrongful termination or other employment issues arising under the law, an implied or explicit individual employment contract, or an agreement to resolve a lawsuit. In some such cases the arbitrator may be referred to as an Appeal Examiner, Hearing Officer, Referee, or other like titles. Finally, some procedures may be established by employers to resolve employment disputes under personnel
policies and handbooks or established by unions to resolve disputes with represented employees in agency shop or fair share cases. The standards of professional responsibility set forth in this Code are intended to guide the impartial third party serving in all of these diverse procedures.

Scope of Code

This Code is a privately developed set of standards of professional behavior for arbitrators who are subject to its provisions. It applies to voluntary arbitration of labor-management disputes and the other arbitration and related procedures described in the Preamble, hereinafter referred to as "covered arbitration dispute procedures."

The word "arbitrator," as used hereinafter in the Code, is intended to apply to any impartial person, irrespective of specific title, who serves in a covered arbitration dispute procedure in which there is conferred authority to decide issues or to make formal recommendations.

The Code is not designed to apply to mediation or conciliation, as distinguished from arbitration, nor to other procedures in which the third party is not authorized in advance to make decisions or recommendations. It does not apply to partisan representatives on tripartite boards. It does not apply to commercial arbitration or to uses of arbitration other than a covered arbitration dispute procedure as defined above.

Format of Code

**Bold Face** type, sometimes including explanatory material, is used to set forth general principles. *Italics* are used for amplification of general principles. Ordinary type is used primarily for illustrative or explanatory comment.

Application of Code

Faithful adherence by an arbitrator to this Code is basic to professional responsibility. The National Academy of Arbitrators will expect its members to be governed in their professional conduct by this Code and stands ready, through its Committee on Professional Responsibility and Grievances, to advise its members as to the Code's interpretation. The American Arbitration Association and the Federal Mediation and Conciliation Service will apply the Code to the arbitrators on their rosters in cases handled under their respective appointment or referral procedures. Other arbitrators and administrative agencies may, of course, voluntarily adopt the Code and be governed by it.

In interpreting the Code and applying it to charges of professional misconduct, under existing or revised procedures of the National Academy of Arbitrators and of the administrative agencies, it should be recognized that while some of its standards express ethical principles basic to the arbitration profession, others rest less on ethics than on considerations of good practice. Experience has shown the difficulty of drawing rigid lines of distinction between ethics and good practice, and this Code does not attempt to do so. Rather, it leaves the gravity of alleged misconduct and the extent to which ethical standards have been violated to be assessed in the light of the facts and circumstances of each particular case.

****