The Case of the Dozing Decider: Tips for Dealing with a Napping Neutral

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Introduction

The ability to choose the arbitrator ranks high on the list of presumed advantages of arbitration over litigation.[1] So, it is not surprising that parties and their advocates devote significant time and effort to arbitrator selection.[2] Typically, parties choose arbitrators whom they regard as competent, conscientious, and impartial,[3] and whose knowledge and judgment they trust.[4] Perhaps the essential quality that parties seek when selecting an arbitrator is good judgment, which—according to Judge Richard Posner—is "an elusive faculty best understood as a compound of empathy, modesty, maturity, a sense of proportion, balance, a recognition of human limitations, sanity, prudence, a sense of reality, and common sense."[5] It should go without saying that parties also want an arbitrator who is awake, alert, and attentive.

In fact, however, decision makers sometimes fall asleep during trials and hearings. According to a 1995 study, sixty-nine percent of the trial judges surveyed reported seeing jurors sleeping, reflecting juror misconduct in more than 2300 trials.[6] Similarly, appellate courts have

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1. Stolt-Nielsen SA v. AnimalFeeds Int'l, 559 U.S. 662, 685 (2010).

2. Richard N. Block & Jack Stieber, *The Impact of Attorneys and Arbitrators on Arbitration Awards*, 40 Indus. & Lab. Rel. Rev. 543, 543 (1987).

3. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 634 (1985).

4. Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974).

5. Richard A. Posner, How Judges Think 117 (2008) (citing Michael Boudin, *Common Sense in Law Practice (or Was John Brown a Man of Sound Judgment?)*, Harv. L. Sch. Bull., Spring 1983, at 22).

6. Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796–1996*, 94 Mich. L. Rev. 2673, 2732 (1996).

repeatedly faced the question of whether a napping judge requires a new trial.[7] Arbitrators also sometimes fall asleep during hearings.

This article will consider the scope of the problem posed by sleeping arbitrators. Then, it will review how advocates have responded when an arbitrator has fallen asleep during a hearing and how courts have dealt with litigation seeking to vacate arbitration awards based on claims that the arbitrator slept through part of the hearing. The article will conclude with some suggested best practices for what arbitrators can do to avoid falling asleep and for how advocates should respond if they confront a sleeping arbitrator.

I. The Scope of the Problem

Considerable evidence shows that arbitrators sometimes doze off during hearings. Administrative agencies, such as the Financial Industry Regulatory Authority (FINRA) and the Federal Mediation & Conciliation Service (FMCS), receive and investigate complaints about arbitrator misconduct, including sleeping during hearings.[8] In at least a dozen decisions, furthermore, both federal and state courts have considered challenges to arbitration awards based at least in part on claims that an arbitrator misbehaved by sleeping through part of the hearing.[9] In addition, parties have filed and settled cases involving

7. *See, e.g.*, United States v. White, 589 F.2d 1283, 1289 (5th Cir. 1979) (judge sleeping during opening statements not prejudicial); People v. Sheley, 90 N.E.3d 493, 497 (Ill. App. Ct. 2017) (holding a trial judge falling asleep does not constitute per se reversible error); State v. Johnson, 453 P.3d 281, 288 (Kan. 2019) ("[T]he district court judge's admitted sleeping was misconduct but did not rise to the level of structural error.").

8. Linda Fienberg & Barbara Brady, *Removal of Arbitrators from FINRA's Neutral Roster*, THE NEUTRAL CORNER, vol. 4, 2012, at 2, 4 https://www.finra.org/sites/default/files/Publication/p197528.pdf [https://perma.cc/2UHJ-MMZC] (describing procedure for investigating and removing an arbitrator for sleeping during hearings); E-mail from Arthur Pearlstein, Dir. Arb. Servs., Fed. Mediation & Conciliation Serv. to author (Dec. 19, 2019) (on file with author) (FMCS receives occasional reports of arbitrators sleeping during hearings; Mr. Pearlstein contacts the arbitrators to discuss the issue and has found arbitrators to be cooperative in resolving the problem).

9. Big-W Constr. Corp. v. Horowitz, 192 N.Y.S.2d 721, 729 (App. Div. 1959); Nat'l Post Off. Mailhandlers v. U.S. Postal Serv., 751 F.2d 834, 840 (6th Cir. 1985); Fort Wayne Cmty. Sch. v. Fort Wayne Educ. Ass'n, 490 N.E.2d 337, 338–40 (Ind. Ct. App. 1986); Flexible Mfg. Sys. Pty Ltd. v. Super Prods. Corp., 874 F. Supp. 247, 249 (E.D. Wis. 1994), *aff'd*, 86 F.3d 96, 101 (7th Cir. 1996); Ohio Patrolman's Benevolent Ass'n v. Cuyahoga Cnty. Sheriff, No. 75026, 1999 WL 1084258, at *2 (Ohio Ct. App. Dec. 2, 1999); Goldman v. Architectural Iron Co., No. 01 Civ. 8875(DLC), 2001 WL 1705117, at *4 n.5 (S.D.N.Y. Jan.15, 2001); Von Essen, Inc. v. Marnac, Inc., No. 00-MC-73-L, 2002 WL 35634037, at *2 (N.D. Tex. Apr. 8, 2002); Moran v. N.Y.C. Transit Auth., 846 N.Y.S.2d 162, 163 (App. Div. 2007); Baker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 108492/2011, 2012 N.Y. Misc. LEXIS 1123, at * 5–6 (Sup. Ct. Mar. 9, 2012); Dustex Corp. v. Bd. of Trs. of the Mun. Elec. Util. of Cedar Falls, No. 13-CV-2087-LRR, 2014 U.S. Dist. LEXIS 82842, at *39 (N.D. Iowa June 18, 2014); Herrington v. Waterstone Mortg. Corp., No. 11-cv-779-BBC, 2012 WL 1242318, at *7 (W.D. Wis. Dec. 4, 2012), *rev'd on other grounds*, 907 F.3d 502 (7th Cir. 2018); Hurn v. Macy's Inc., 728 F. App'x 598, 599 (7th Cir. 2018).

allegations that an arbitrator engaged in misconduct by sleeping during a hearing.[10]

Although newspaper reports suggest the problem may be more extensive than the litigation record would indicate,[11] it is difficult to determine how often arbitrators actually fall asleep. This is so for many reasons. For one thing, many arbitration advocates make a tactical choice to do nothing when they see an arbitrator snoozing, perhaps fearing that the arbitrator might not actually be asleep or might resent being accused of sleeping. In addition, as discussed below, courts have never found sleeping to be sufficient misconduct to overturn an arbitration award, and the enforcement mechanism for the ethical rules governing arbitrators is fragmented and informal.

II. Sleep, Sleep Disorders, and Cognitive Performance

Adequate sleep is essential to overall physical and mental health as well as to optimal cognitive performance.[12] "Healthy sleep requires adequate duration, good quality, appropriate timing and regularity, and the absence of sleep disturbances or disorders."[13] Experts recommend that adults sleep seven or more hours per night on a regular basis to maintain optimal health.[14]

Many people struggle to remain alert and attentive in the early afternoon.[15] In common parlance, people often describe this afternoon slump as drowsiness, languor, or fatigue, and an observer might describe a person exhibiting such daytime weariness as dozing, nodding off, bobbing his head, or appearing sluggish or heavy lidded.[16] As a solution to daytime sleepiness, a significant proportion of Americans

10. *See, e.g.*, Complaint, Richardson Milling, Inc. v. Bakery, Confectionery, Tobacco Workers & Grain Millers, Local Union 50G, No. 17-cv-00383 (D. Neb. filed Oct. 12, 2017); Joint Stipulation of Dismissal, *Richardson Milling, Inc.*, No. 17-cv-0383 (D. Neb. filed Dec. 7, 2017).

11. Jennifer Medina, *Arbitrator Said to Doze during Teacher's Hearing*, N.Y. Times, Nov. 12, 2009, at A28; Tony Scott, *Kendall County Officials Claim Arbitrator Fell Asleep on the Job*, Chi. Trib. (Apr. 8, 2016), https://www.chicagotribune.com/suburbs/aurora-beacon-news/ct-abn-kendall-sleeping-mediator-st-0410-20160408-story.html [https://perma.cc/7VAE-2MYN].

12. Kirsten L. Knutson et al., *The National Sleep Foundation's Sleep Health Index*, 3 Sleep Health 234, 234 (2017).

13. Nathaniel F. Watson et al., *Recommended Amount of Sleep for a Healthy Adult: A Joint Consensus Statement of the American Academy of Sleep Medicine and Sleep Research Society*, 11 J. Clinical Sleep Med. 591, 591 (2015).

14. *Id*. at 591–92.

15. Qingwei Chen, Taotao Ru, Minqi Yang, Pei Yan, Jinghua Li, Ying Yao, Xiaoran Li & Guofu Zhou, *Effects of Afternoon Nap Deprivation on Adult Habitual Nappers' Inhibition Functions*, 2018 BioMed Rsch. Int'l art. 5702646, at 1, https://downloads.hindawi.com/journals/bmri/2018/5702646.pdf.

16. J.F. Pagel, *Excessive Daytime Sleepiness*, 79 Am. Fam. Physician 391, 391 (2009).

take a short nap a couple of times per month.[17] Often such somnolence is benign, but it can also be a clinical symptom of a sleep disorder.

About twenty percent of adults report that daytime drowsiness interferes with their daily activities.[18] Such excessive daytime sleepiness (EDS) is a very common symptom of sleep disorders, and the most common causes of EDS are sleep deprivation, medication effects, illicit substance abuse, and obstructive sleep apnea (OSA).[19] OSA affects nine percent of women and twenty-four percent of men, and EDS is its most common symptom.[20] Insufficient sleep is associated with EDS, decreased neurocognitive performance, and increased risk of occupational and motor vehicle accidents.[21] OSA is associated with attention, memory, and executive function impairments.[22] Specifically, one comprehensive study found as follows:

> [P]atients with OSA have specific difficulties in assimilating and recalling information presented verbally, whereas their ability to process visual information remains intact. The memory deficits were present across the spectrum of disease severity, and even patients with mild disease were affected. . . . We suggest that such memory impairments have significant detrimental effects on daytime functional performance in patients with OSA.[23]

III. The Typical Case, and How Advocates Respond

Court cases involving allegations of a sleeping arbitrator show remarkable factual similarities. Typically, the parties request a list of qualified arbitrators from the FMCS, the American Arbitration Association (AAA), or a similar entity, from which they jointly select an arbitrator to preside over the case. Then, they notify the arbitrator of his or her selection and set a date, time, and place for the hearing.

On the agreed-upon date, the parties and their representatives appear before the arbitrator, make opening statements, call various witnesses to testify, and offer documentary evidence. During the hearing, the arbitrator repeatedly nods off during important witness

17. Catherine E. Milner & Kimberly A. Cote, *Benefits of Napping in Healthy Adults: Impact of Nap Length, Time of Day, Age, and Experience with Napping*, 18 J. SLEEP RSCH. 272, 272 (2008).

18. Pagel, *supra* note 16, at 391.

19. *Id*.

20. *Id*. at 393.

21. Jennifer M. Cori et al., *The Differential Effects of Regular Shift Work and Obstructive Sleep Apnea on Sleepiness, Mood and Neurocognitive Function*, 14 J. CLINICAL SLEEP MED. 941, 941 (2018).

22. *Id*. at 942.

23. Gillian L. Twigg, Ioannis Papaioannou, Melinda Jackson, Ramesh Ghiassi, Zarrin Shaikh, Jay Jaye, Kim S. Graham, Anita K. Simonds & Mary J. Morrell, *Obstructive Sleep Apnea Syndrome Is Associated with Deficits in Verbal but Not Visual Memory*, 182 AM. J. RESPIRATORY & CRITICAL CARE MED. 98, 102 (2010).

testimony, occasionally for a couple of minutes or longer.[24] Although people in the room notice that the arbitrator has fallen asleep, no one objects.[25] In addition, the advocates do not discuss the arbitrator's sleeping, either on the record or during a break in the proceedings. The transcript of the hearing shows the arbitrator occasionally ruling on objections, granting motions for the admission of exhibits, directing the advocates to call their next witness, calling for breaks, and asking questions of one or two witnesses.[26]

The hearing concludes, and the parties submit briefs thirty days later. A couple of months after the hearing, the arbitrator issues a short opinion and award, which contains a half-page recitation of the facts but does not mention the testimony of the losing party's key witness, who testified during one of the arbitrator's naps. The award rejects all of the losing party's arguments, and the arbitrator rules entirely in favor of the other side.

After receiving the award, the loser sues to vacate the award on the claim that the arbitrator committed misconduct when he or she slept repeatedly during the hearing. In opposing the motion to vacate, the winner submits affidavits averring that the arbitrator never fell asleep during the hearing and pointing out that the transcript shows the arbitrator participating actively in the hearing by ruling on objections and asking questions of witnesses.[27]

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24. *See, e.g.*, Big-W Constr. Corp. v. Horowitz, 192 N.Y.S.2d 721, 729 (Sup. Ct. 1959) (noting that arbitrator allegedly "regularly went to sleep, in the morning or afternoon, sometimes both, and usually longer after lunch"); Nat'l Post Off. Mailhandlers v. U.S. Postal Serv., 751 F.2d 834, 840 (6th Cir. 1985) (arbitrator allegedly "dozed off at more than one point while the Union presented its case"); Fort Wayne Cmty. Schs. v. Fort Wayne Educ. Ass'n, 490 N.E.2d 337, 338 (Ind. Ct. App. 1986) ("Several witnesses claimed the arbitrator slept when Dr. Welch testified about class size adjustment."); Moran v. N.Y.C. Transit Auth., 846 N.Y.S.2d 162, 162 (App. Div. 2007) (petitioner alleged that "arbitrator fell asleep during critical portions of the proceeding"); Dustex Corp. v. Bd. of Trs. of the Mun. Elec. Util. of Cedar Falls, No. 13-CV-2087-LRR, 2014 U.S. Dist. LEXIS 82842, at *24 (noting that arbitrator allegedly "would sleep during the arbitration hearings . . . 'primarily during the late mornings and late afternoons . . . [and once] appeared to be unresponsive for approximately twenty minutes'").

25. *Big-W Constr. Corp.*, 192 N.Y.S.2d at 729; *Nat'l Post Off. Mailhandlers*, 751 F.2d at 841; Ohio Patrolman's Benevolent Ass'n v. Cuyahoga Cnty. Sheriff, No. 75026, 1999 LEXIS 5681, at *15 (Ohio Ct. App. Dec. 2, 1999); Von Essen, Inc. v. Marnac, Inc., No. 00-MC-73-L, 2002 WL 35634037, at *2 (N.D. Tex. Apr. 8, 2002); *Moran*, 846 N.Y.S.2d at 162; Baker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 108492/2011, 2012 N.Y. Misc. LEXIS 1123 at *10.

26. *See, e.g.*, Goldman v. Architectural Iron Co., No. 01 Civ. 8875(DLC), 2001 WL 1705117, at *4 n.5 (transcript showing that arbitrator "frequently interjected comments and asked his own questions of witnesses").

27. *See, e.g.*, Nat'l Post Office Mailhandlers, 751 F.2d at 841 ("Witnesses for the Postal Service testified to the contrary: . . . Haber had been alert throughout the hearing."); *Moran*, 846 N.Y.S.2d at 162 ("[The] claim that the arbitrator fell asleep during critical portions of the proceeding was contradicted by respondent's counsel."); *Baker*, 2012 N.Y. Misc. LEXIS 1123 at *6 ("[P]etitioners assert that the [arbitration] Panel was alert, asked numerous questions, and thoroughly reviewed the evidence."). For a detailed look at the evidentiary conflicts between parties regarding whether or not an arbitrator

IV. Legal Standards for Vacating an Arbitrator's Award for Misconduct or Misbehavior

The scope of review of arbitration awards—especially labor and employment awards—is extremely narrow. Such deference to arbitration awards derives from public policies codified in the Federal Arbitration Act (FAA)[28] and various federal labor statutes.[29] Likewise, in the forty-nine states that have adopted either the Uniform Arbitration Act (UAA) or the Revised Uniform Arbitration Act (RUAA),[30] "[j]udicial review of an arbitration award is extremely narrow in scope."[31]

The Supreme Court has held that the FAA "embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts."[32] "Under the terms of § 9 [of the FAA], a court 'must' confirm an arbitration award 'unless' it is vacated, modified, or corrected 'as prescribed' in §§ 10 and 11. Section 10 lists grounds for vacating an award, while § 11 names those for modifying or correcting one."[33]

The FAA "permits vacatur of an arbitration award in only four specifically enumerated situations, all of which involve corruption, fraud, or some other impropriety on the part of the arbitrators."[34] Specifically, § 10(a) of the FAA permits federal district courts to order an arbitration award vacated:

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slept during the hearing, see Complaint, Richardson Milling, Inc. v. Bakery, Confectionery, Tobacco Workers & Grain Millers, Local Union 50G, No. 17-cv-00383 (D. Neb. filed Oct. 12, 2017); Petitioner's Memorandum in Support of Motion to Vacate the Arbitration Award, *Richardson Milling, Inc.*, No. 17-cv-00383 (D. Neb. filed Oct. 12, 2017); Respondent's Memorandum in Opposition to Motion to Vacate Arbitration Award and in Support of Respondent's Cross-Motion to Confirm Arbitration Award, *Richardson Milling, Inc.*, No. 17-cv-00383 (D. Neb. filed Nov. 3, 2017).

28. Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 232 (1987) ("[A]lthough judicial scrutiny of arbitration awards necessarily is limited [under the FAA], such review is sufficient to ensure that arbitrators comply with the requirements of the statute.").

29. Steelworkers v. Enter. Corp., 363 U.S. 593, 596 (1960) ("The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements."); Union Pac. R.R. Co. v. Sheehan, 439 U.S. 89, 91 (1978) (per curiam) (pursuant to the Railway Labor Act, "the scope of judicial review of Adjustment Board decisions is 'among the narrowest known to the law'").

30. By 2000, thirty-five states had adopted the UAA, and another fourteen states had adopted substantially similar laws. Bruce E. Myerson, *The Revised Uniform Arbitration Act: Fifteen Years Later*, 71 DISP. RES. J. 1, 2 n.3 (2016). By then end of 2018, twenty-two states had adopted the RUAA, and legislators in Vermont and Massachusetts had introduced the RUAA during the 2020 or 2021 legislative sessions. *Arbitration Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=a0ad71d6-085f-4648-857a-e9e893ae2736 [perma.cc 82TF-YEUU]; H. 59, 191st Gen. Ct. (Mass. 2020), https://malegislature.gov/Bills/191/H59.

31. Sch. City of E. Chi. v. Local 511, 622 N.E.2d 166, 168 (Ind. 1993); *see also, e.g.*, Marino v. Tagaris, 480 N.E.2d 186, 288 (Mass. 1985); Kline v. Berg Drywall, Inc., 685 N.W.2d 12, 30 (Minn. 2004).

32. Buckeye Check Cashing v. Cardegna, 546 U.S. 440, 443 (2006).

33. Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 582 (2008).

34. Duferco Int'l Steel v. T. Klaveness Shipping, 333 F.3d 383, 388 (2d Cir. 2003).

> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[35]

The Supreme Court has held that "§§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification."[36] "Under the FAA, the validity of an award is subject to attack only on those grounds listed in § 10, and the policy of the FAA requires that the award be enforced unless one of those grounds is affirmatively shown to exist." [37] Thus, the FAA creates a "strong presumption in favor of enforcing arbitration awards."[38] "The burden of proof is on the party seeking to vacate the award, and any doubts or uncertainties must be resolved in favor of upholding it."[39]

Section 23 of the RUAA provides a state law analog to § 10 of the FAA:

> (a) Upon [motion] to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:
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> (1) the award was procured by corruption, fraud, or other undue means;
>
> (2) there was:
>
> (A) evident partiality by an arbitrator appointed as a neutral arbitrator;
>
> (B) corruption by an arbitrator; or
>
> (C) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
>
> (3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 15, so as to prejudice substantially the rights of a party to the arbitration proceeding;
>
> (4) an arbitrator exceeded the arbitrator's powers;
>
> (5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under Section 15(c) not later than the beginning of the arbitration hearing; or

35. 9 U.S.C. § 10(a).
36. *Hall St. Assocs.*, 552 U.S. at 584.
37. Wall St. Assocs., L.P. v. Becker Paribas, 27 F.3d 845, 849 (2d Cir. 1994).
38. *Id.*
39. Cooper v. WestEnd Cap. Mgmt., L.L.C., 832 F.3d 534, 544 (5th Cir. 2016).

> (6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 9 so as to prejudice substantially the rights of a party to the arbitration proceeding.[40]

To obtain an order vacating an arbitration award on grounds of arbitrator misconduct or misbehavior under either the FAA or the RUAA, the moving party must show, first, that the arbitrator was guilty of the alleged misconduct or misbehavior and, second, that the party seeking vacatur was prejudiced by the misbehavior.[41] "There is a strong presumption in favor of confirming arbitration awards under the FAA, and any party seeking to overturn an arbitration award faces a 'heavy burden.'"[42]

Proving arbitrator misconduct or misbehavior is difficult. Although courts often treat "misconduct" and "misbehavior" interchangeably, § 10(a)(3) specifically defines "misconduct" as "refusing to postpone the hearing, upon sufficient cause shown, or . . . refusing to hear evidence pertinent and material to the controversy,"[43] while "misbehavior" seems to be a broader catchall term. Courts accord considerable deference to arbitral judgments regarding whether to postpone a hearing[44] and whether to admit or exclude specific evidence.[45] Courts have found that arbitrators engaged in "misbehavior" within the meaning of the FAA in cases where the arbitrator falsely claimed to be a lawyer and thus misrepresented his qualifications,[46] where the arbitrators contacted counsel for the claimant *ex parte* after the conclusion of the hearing and received from counsel evidence of the monetary value of claimant's damages,[47] and where—after the hearing—the arbitrator contacted

40. UNIF. ARB. ACT § 23, 7 U.L.A. 75–76 (2000).

41. 9 U.S.C. § 10(a)(3); REVISED UNIF. ARB. ACT, § 23(a)(1)(c) (requiring vacation of awards if there was "misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding"). RUAA § 23(A)(1)(c) is based on the original Uniform Arbitration Act, § 12(a)(2), which required a court to vacate an award if "[t]here was . . . misconduct prejudicing the rights of any party."

42. Williamson Farm v. Diversified Crop Ins. Servs., 917 F.3d 247, 253 (4th Cir. 2019).

43. 9 U.S.C. § 10(a)(3).

44. *Compare, e.g.*, Schmidt v. Finberg, 942 F.2d 1571, 1574–75 (11th Cir. 1991) (arbitrator's reasonable decision not to postpone hearing not ground to vacate award), *with* Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 21 (2d Cir. 1997) (arbitration panel's refusal to continue hearings to allow testimony by only witness with evidence of fraud not found from other sources was fundamental unfairness and misconduct sufficient to vacate the award).

45. Hoteles Condado Beach, La Concha & Convention Center v. Union De Tronquistas Local 901, 763 F.2d 34, 38 (1st Cir. 1985) ("An arbitrator enjoys wide latitude in conducting an arbitration hearing. Arbitration proceedings are not constrained by formal rules of procedure or evidence."). *But see* Iran Aircraft Indus. v. Avco Corp., 980 F.2d 141, 146 (2d Cir. 1992) (noting arbitration award vacated where tribunal changed evidentiary rules during the hearing thus preventing party from presenting its documentary evidence).

46. Move, Inc. v. Citigroup Glob. Mkts., Inc., 840 F.3d 1152, 1159 (9th Cir. 2016).

47. Totem Marine Tug & Barge, Inc. v. N. Am. Towing, Inc., 607 F.2d 649, 653 (5th Cir. 1979).

and asked an outside expert about factual issues relevant to the merits of the case before the arbitrator.[48]

To obtain an order of vacatur based on proven arbitrator misbehavior, however, a party must also demonstrate that the "party to arbitration has been denied a fundamentally fair hearing."[49] "A hearing is fundamentally fair if it meets 'the minimal requirements of fairness'—adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator."[50] If the misconduct did not deny the challenger a fundamentally fair hearing, the reviewing court will confirm the award. For example, in *M & A Electric Power Co-op.*, the district court found that the arbitrator engaged in misbehavior when, after the conclusion of the hearing, he contacted a business agent of another union not involved in the case and asked that union official about crane safety, which was the key issue in the challenged arbitration award.[51] Nonetheless, the district court found and the Eighth Circuit agreed that the arbitrator's misbehavior did not deny the employer a fair hearing because "the source of the arbitrator's decision [was] based upon the testimony and other evidence presented at the hearing."[52] In contrast, in *Totem Marine Tug & Barge, Inc.*, the Fifth Circuit vacated the arbitration award because the arbitrators had based their damages award on the evidence they obtained in the *ex parte* proceedings, thus denying Totem its right to a fundamentally fair hearing.[53] In other words, to prevail, the party seeking to vacate an arbitration award must show that the arbitrator's misconduct actually affected the award.

48. M & A Elec. Power Co-op. v. Local Union No. 702, Int'l Brotherhood of Elec. Workers, AFL–CIO, 773 F. Supp. 1259, 1262 (E.D. Mo. 1991) ("It is clear that the arbitrator's post-hearing consultation [with an official of another union about crane safety practices] constituted misbehavior."), *aff'd*, 977 F.2d 1235, 1237–38 (8th Cir. 1992).

49. Nat'l Post Off. Mailhandlers v. U.S. Postal Serv., 751 F.2d 834, 841 (6th Cir. 1985); *see also* Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594, 599 (3d Cir. 1968) ("[S]uch an error must be one that is not simply an error of law, but which so affects the rights of a party that it may be said that he was deprived of a fair hearing."); Grahams Serv. Inc. v. Teamsters Local 975, 700 F. 2d 420, 422 (8th Cir. 1982) (same); Int'l Union, United Mine Workers v. Marrowbone Dev. Co., 232 F.3d 383, 390 (4th Cir. 2000) (same); Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997) (noting that misconduct must amount to denial of fundamental fairness of arbitration proceeding to justify vacating award); Forsythe Int'l, S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1020 (5th Cir. 1990) ("In reviewing the district court's vacatur, we [ask] whether the arbitration proceedings were fundamentally unfair.").

50. Sunshine Mining Co. v. United Steelworkers of Am., Local 5089, 823 F.2d 1289, 1295 (9th Cir. 1987).

51. *M & A Elec. Power Co-op.*, 773 F. Supp. at 1262.

52. *Id.* at 1263, *aff'd* 977 F.2d 1235, 1238 (noting that "the arbitrator's conduct neither deprived M & A of a fair hearing nor influenced the outcome of the arbitration").

53. Totem Marine Tug & Barge, Inc. v. N. Am. Towing, Inc., 607 F.2d 649, 653 (5th Cir. 1979).

V. Sleeping Arbitrator Cases in Court

Courts have analyzed sleeping arbitrator cases as claims of arbitral misbehavior under the FAA and the UAA/RUAA.[54] In *Hott v. Mazzocco*, the court indicated that "[m]isconduct sufficient to warrant vacating an award is something patently egregious, such as an arbitrator sleeping during testimony."[55] Unfortunately for parties seeking vacatur based on a napping neutral claim, the plaintiff in *Hott* challenged the award on the grounds that the arbitrators had improperly excluded certain evidence and that the panel chairman had improperly focused on contributory negligence.[56] Thus, *Hott* had nothing to do with dozing deciders, and the court's statement was pure *dictum*. In fact, no court has ever vacated an arbitration award based on a claim that the arbitrator slept during the hearing. This fact is rooted in the exceptionally broad deference that the law gives to the finality of arbitration awards and the great burdens that the FAA and the RUAA place on parties seeking to vacate an arbitration award based on a claim of arbitral misconduct or misbehavior.

What specific problems do litigants face in these sleeping arbitrator cases? First, courts may not even reach the merits of a sleeping-arbitrator case because arbitration advocates often fail to make a timely objection to the arbitrator's sleeping during the hearing. Although the failure to object or to make a record during the arbitration hearing probably reflects a strategic decision inspired by the fear that raising the issue will prejudice the arbitrator against the objector, courts are unsympathetic to this dilemma and routinely find that—by failing to object during the arbitration hearing—the party seeking vacatur has waived its claim of misbehavior based on an arbitrator's sleeping during the hearing. Writing in *Big-W Construction Corp. v. Horowitz*, Judge J. Irwin Shapiro explained why such sandbagging is so damaging to a party's case:

> Assuming, *arguendo,* that this claim is true and that Mr. D. did in fact sleep through part of the hearings, respondents could not permit this condition to continue over some 66 sessions, gamble on the outcome of the proceedings, and then protest when the award in arbitration turned out to be against them. It is obvious that the arbitrator's alleged "sleeping" would not have concerned them if the award had gone their way. A contention thus made *after* the rendition of the award does not commend itself. It seems to be a plea born of desperation.[57]

54. *See, e.g.*, Nat'l Post Off. Mailhandlers v. U.S. Postal Serv., 751 F.2d 834, 841 (6th Cir. 1985) (applying FAA); Fort Wayne Cmty. Schs. v. Fort Wayne Educ. Ass'n, 490 N.E.2d 337, 340 (Ind. Ct. App. 1986) (applying Indiana version of UAA).

55. Hott v. Mazzocco, 916 F. Supp. 510, 517 (D. Md. 1996).

56. *Id.* at 515.

57. Big-W Constr. Corp. v. Horowitz, 192 N.Y.S.2d 721, 729 (Sup. Ct. 1959).

In many cases, waiver has thus posed an insurmountable procedural hurdle for parties seeking vacatur. [58]

Second, even when courts have reached the merits of a claim of arbitral misbehavior based on an allegation that the arbitrator fell asleep, the party contesting the award has confronted a brutal burden. Although courts "do not condone the alleged sleeping of the arbitrator," a party "must not only show the action of the arbitrator constituted misconduct, they must further show prejudice resulting from the misconduct."[59] Both of these elements have derailed court challenges to arbitration awards.

Courts have frequently found that the challenger failed to shoulder its burden of proving misconduct, specifically that the arbitrator was asleep during the hearing. Proving that the arbitrator was actually asleep is difficult because—by definition—sleeping people are silent and inactive. Thus, absent an objection, a proffer on the record, or a cell phone video showing the arbitrator snoring, the record of the hearing will lack affirmative evidence to support the claimed misconduct. In these cases, moreover, respondents usually introduce testimony and other evidence showing that the arbitrator was not sleeping during the hearing.[60] This proof often includes transcripts showing the arbitrator participating in the hearing by ruling on objections and asking questions of witnesses.[61] Faced with such "conflicts in the testimony regarding the factual allegations of misconduct," trial courts often find as a factual matter that the arbitrator did not doze off.[62] Such evidence is fatal to claims that the arbitrator misbehaved by sleeping during the presentation of evidence.

Even when a court finds that the arbitrator nodded off during the hearing, claims of arbitral misconduct founder on the prejudice prong of the challenger's burden. In such cases, courts may assume *arguendo*

58. Ohio Patrolman's Benevolent Ass'n v. Cuyahoga Cnty. Sheriff, No. 75026, 1999 WL 1084258, at *5 (Ohio Ct. App. Dec. 2, 1999); Goldman v. Architectural Iron Co., No. 01 Civ. 8875(DLC), 2001 WL 1705117, at *4 n.5 (S.D.N.Y. Jan.15, 2001); Von Essen, Inc. v. Marnac, Inc., No. 3:00-MC-73-L, 2002 WL 35634037, at *3 (N.D. Tex. Jan. 2, 2002); Moran v. N.Y.C. Transit Auth., 846 N.Y.S.2d 162, 163 (App. Div. 2007); Baker v. Merrill Lynch, Pierce, Fenner & Smith, No. 108492/2011, 2012 N.Y. Misc. LEXIS 1123, at *5–6 (Sup. Ct. Mar. 9, 2012); Dustex Corp. v. Bd. of Trs. of the Mun. Elec. Util. of Cedar Falls, No. 13-CV-2087-LRR, 2014 U.S. Dist. LEXIS 82842, at *41 (N.D. Iowa June 18, 2014); Herrington v. Waterstone Mortg. Corp., No. 11-cv-779-bbc, 2017 WL 6001866, at *5 (W.D. Wis. Dec. 4, 2017), *rev'd on other grounds*, 907 F.3d 502 (7th Cir. 2018); Hurn v. Macy's Inc., 728 F. App'x 598, 599 (7th Cir. 2018).

59. Fort Wayne Cmty. Schs., 490 N.E.2d at 340.

60. *Goldman*, 2001 WL 1705117, at *4 n.5 ("There is no indication in the transcript of the hearings that the Arbitrator was less than attentive during the proceedings. He frequently interjected comments and asked his own questions of witnesses."); *Baker*, 2012 N.Y. Misc. LEXIS 1123, at *6 (party opposing motion to vacate "assert[ed] that the Panel was alert, asked numerous questions, and thoroughly reviewed the evidence").

61. Nat'l Post Off. Mailhandlers v. U.S. Postal Serv., 751 F.2d 834, 841 (6th Cir. 1985).

62. *Id*.

that the arbitrator fell asleep but ultimately rule that "such incidents . . . were minor and insufficient to demonstrate deprivation of a fair hearing."[63] Some of these cases have failed because the challenger could not prove that the sleeping arbitrator missed any evidence.[64] Moreover, specific facts can further undermine claims of prejudice. Where the underlying arbitration case was heard by a panel of arbitrators but only one arbitrator allegedly fell asleep, for instance, courts have held that the panel's unanimous ruling in favor of the prevailing party cleanses the arbitration award of any prejudicial taint where a majority of the arbitrators remained alert during the hearing.[65]

As noted earlier, courts have only vacated arbitration awards based on arbitral misbehavior where the arbitrators have engaged in positive misconduct that deprived the challenging party of a fair hearing, such as where the arbitrators based the award on evidence solicited and accepted during a post-hearing, *ex parte* proceeding.[66] In contrast, courts have not found the passive misbehavior of a sleeping arbitrator sufficient to prove a denial of a fair hearing.

Such holdings regarding prejudice are consistent with rulings in which courts have rejected appeals in civil cases based on claims that the judge fell asleep during trial. In a representative opinion, a panel of the Tenth Circuit held as follows:

> [W]hile the district court judge admitted he nodded off at times, he asserted that such instances could not have been for more than a minute at a time, he did not think he missed anything, and even if something was initially missed, no prejudice occurred because he had access to a transcript. . . . But neither the motion before the trial court, the affidavits that supported that motion, nor Gallatin's appellate brief contain any precise allegations as to how long the judge slept or the nature of the testimony missed during those periods of time. Consequently, Gallatin is arguing, without supporting authority, that "judicial somnolence" of any duration necessarily requires a mistrial. We are not prepared to take such an extreme position. While a judge falling asleep for any period of time is unfortunate, a mistrial requires at least some showing of harm.[67]

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63. *Id*.

64. Herrington v. Waterstone Mortg. Corp., No. 11-cv-779-bbc, 2017 WL 6001866, at *5 (W.D. Wis. Dec. 4, 2017), *rev'd on other grounds*, 907 F.3d 502 (7th Cir. 2018); *see also* Hurn v. Macy's Inc., 728 F. App'x 598, 599 (7th Cir. 2018) (plaintiff awakened arbitrator before presenting his evidence).

65. Flexible Mfg. Sys. Pty Ltd. v. Super Products Corp., 874 F. Supp. 247, 249 n.2 (E.D. Wis. 1994) (one of three arbitrators alleged to be sleeping), *aff'd*, 86 F.3d 96 (7th Cir. 1996); Dustex Corp. v. Bd. of Trs. of the Mun. Elec. Util. of Cedar Falls, No. 13-CV-2087-LRR, 2014 U.S. Dist. LEXIS 82842, at *38–39 (N.D. Iowa June 18, 2014).

66. Totem Marine Tug & Barge, Inc. v. N. Am. Towing, Inc., 607 F.2d 649, 653 (7th Cir. 1979).

67. Burlington N. Santa Fe Ry. Co. v. A 50-foot Wide Easement Consisting of 6.99 Acres More or Less, 346 F. App'x 297, 302 (10th Cir. 2009).

Despite the strict standard that courts have applied in weighing the prejudice factor, litigants may want to argue that a sleeping arbitrator merits a relaxed test of prejudice. In the realm of judges sleeping during civil trials, there is some support for the notion that "only a slight showing of prejudice would be necessary to authorize a reversal."[68] More importantly, applying a relaxed prejudice standard in cases involving sleeping arbitrators would seem particularly just "since [arbitrators, unlike judges,] have completely free rein to decide the law as well as the facts and are not subject to appellate review."[69] Courts have conceded that sleeping by an arbitrator is problematic, both in terms of perceptions and fair decision-making.[70] Thus, in light of the essentially unreviewable discretion arbitrators have, it may make sense for advocates to argue for a relaxation of the prejudice standard in cases in which arbitrators fall asleep during a hearing.

VI. Courts, Sleeping Decision Makers, and the Science of Sleep

It appears that very few courts have held evidentiary hearings on the issue of whether a judge or arbitrator actually fell asleep during a trial or hearing or on the effect of falling asleep or dozing during a proceeding. In *National Post Office Mailhandlers v. United States Postal Service*, the district court held a full evidentiary hearing on the union's claim that the arbitrator dozed off during the hearing but concluded that "any 'momentary "lapses," if in fact such lapses occurred,' did not deprive the Union of a fair hearing."[71] Although the district court took evidence on whether the arbitrator fell asleep, there is no indication that the court heard expert testimony about the effect of "momentary lapses" on the arbitrator's decision-making. In concluding that "momentary lapses" did not deprive the union of a fair hearing, the court seems to have presumed that brief periods of sleep or inattention have no effect on decision-making.

In criminal cases, courts have had to confront the issue of sleeping judges more directly because the issue has arisen more often. In those cases, courts have frequently assumed that brief periods of sleep are distinguishable from and less problematic than periods of prolonged sleep. A recent decision by the Kansas Supreme Court is representative of this view:

> This case does not present us with facts indicating a judge who slipped into any of the deeper phases of sleep. There is no suggestion

68. Ettus v. Orkin Exterminating Co., 665 P.2d 730, 739 (Kan. 1983).

69. Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 149 (1968).

70. Fort Wayne Cmty. Schs. v. Fort Wayne Educ. Ass'n, 490 N.E.2d 337, 340 (Ind. Ct. App. 1986).

71. Nat'l Post Off. Mailhandlers v. U.S. Postal Serv., 751 F.2d 834, 839 (6th Cir. 1985).

> the trial judge was actually engaged in a full-blown nap on the bench. Certainly a dozing, heavy-lidded, or nodding judge who is struggling to remain awake and alert is no more acceptable or proper than someone in the same state attempting to operate an automobile. . . . Unlike a judge who is physically absent from the courtroom, a judge who is fighting to stay awake may still be able to control and respond to events happening in the courtroom. Kryger et al., *Principles and Practice of Sleep Medicine* 19 (5th ed. 2011) (supporting the view that "sensory processing at some level does continue after the onset of sleep"). This situation is more akin to a judge who—like any human being—succumbs to a distraction. . . . We decline to establish a bright-line rule suggesting that anytime a judge misses some courtroom event or word the judge is effectively absent. In the case before us, while the inattention appears significant and serious, it was not so significant or serious to either show up in the transcript or generate objections from the parties. We cannot say the district court judge so abdicated and abandoned his judicial responsibilities that he was effectively absent from the courtroom.[72]

But these assumptions about daytime sleepiness are questionable. First, courts should be wary of interpreting scientific literature without the benefit of a full evidentiary hearing in which experts on sleep testify.[73] Second, however, the focus of the courts in these cases on whether a decision maker missed specific evidence or was no longer in control of the proceeding may miss the point. As noted earlier, sleep science shows that daytime sleepiness events are often a symptom of a sleep disorder and that people who have sleep disorders such as sleep apnea exhibit significant problems with neurocognitive performance, including "specific difficulties in assimilating and recalling information presented verbally."[74]

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72. State v. Johnson, 453 P.3d 281, 286–87 (Kan. 2019); *cf.* Tippins v. Walker, 77 F.3d 682, 689–90 (2d Cir. 1996) (distinguishing between "states of drowsiness that come over everyone from time to time during a working day" and deep sleep while holding that defense counsel's repeated and extensive periods of deep sleep during key portions of trial while client's interests were at stake constituted prejudice and violated the Sixth Amendment right to counsel).

73. The Kansas Supreme Court's citation of a scholarly treatise to support its view that a judge who is nodding off may still be able to preside over the courtroom is particularly concerning. The Model Code of Judicial Conduct provides that "[a] judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may be properly judicially noticed." MODEL CODE OF JUD. CONDUCT r. 2.9(C) (AM. BAR ASS'N 2010). Nothing in the court's opinion suggests that the appellate record contained any expert testimony about cognition or sensory processing during periods of sleep or wakefulness. It seems doubtful that the nature of cognition during stages of sleep is "so firmly established as to have attained the status of scientific law" that it is subject to judicial notice. Daubert v. Merrell Dow Pharms., 509 U.S. 579, 592 n.11 (1993). In fact, expert testimony on point might demonstrate a significant distinction between awareness of stimuli and the ability to perform higher-order cognitive functions during various stages of sleep or wakefulness. *See* Elias B. Issa & Xiaoqin Wang, *Sensory Responses During Sleep in Primate Primary and Secondary Auditory Cortex*, 28 J. NEUROSCI. 14467, 14467 (2008).

74. Twigg et al., *supra* note 23, at 102.

Presumably, parties want an arbitrator who can assimilate, recall, and analyze evidence presented verbally at a hearing. Thus, parties seeking to vacate an arbitration award based on an allegation that an arbitrator fell asleep during the hearing should consider presenting expert testimony on the significance of daytime sleepiness as a symptom of sleep disorders and on the neurocognitive effects of sleep disorders on memory and executive function. Such a focus would be more in line with the actual sleep science regarding the significance of brief daytime naps.

VII. Alternatives to Litigation

Because of the significant burdens inherent in proving that an arbitrator slept through a hearing and that such sleeping—if proved—amounted to prejudice and the denial of a fair hearing, it makes sense for advocates to look for other avenues of redress when they encounter a sleeping arbitrator. A couple of options are available to parties. Although neither option is likely to grant a client relief with respect to the case in which the arbitrator fell asleep, these avenues are worth considering for institutional reasons such as maintaining respect and confidence in the arbitration process.

Parties should register a complaint with the administrative agency that appointed the arbitrator, either before or after the award issues. If the case involves multiple hearing days spread over some period of time or if the evidentiary hearing has ended but the award has not issued, this action would allow the agency—at least in theory—to replace a sleepy arbitrator. Even if the agency fails to disqualify the arbitrator based on a single complaint of falling asleep during a hearing, filing such a complaint would put the agency on notice that the arbitrator might have a problem that the agency should investigate. In turn, such an investigation might identify an underlying cause such as a sleep disorder and help the arbitrator recognize the problem and get treatment for it, thus allowing the arbitrator to remain alert and attentive throughout future hearings.

The complaint process works as follows. Parties to labor and employment arbitrations usually obtain panels of arbitrators from administrative agencies such as AAA, FMCS, or a state labor relations board.[75] Such agencies require the arbitrators on their rosters to adhere to specific ethical codes. Labor arbitrators are subject to the Code of Professional Conduct for Arbitrators of Labor-Management Disputes,

75. Elkouri & Elkouri, How Arbitration Works § 1.5.B (Kenneth May ed., 8th ed. 2016); Elizabeth Shampnoi & Deborah Masucci, *Alternative Dispute Resolution Providers and the Resolution of Employment Disputes*, *in* ADR in Employment Law ch. 4, § 4.I.A (Alfred Feliu ed., 2015). Other such agencies include the National Mediation Board (NMB), which maintains arbitrator panels and boards to hear and decide labor disputes in the rail and airline industries under the Railway Labor Act, 45 U.S.C. § 154.

which was originally drafted in 1951 by representatives of AAA, FMCS, and the National Academy of Arbitrators (NAA).[76] Members of the AAA Panel of Employment Arbitrators and FINRA's arbitrator roster must adhere to the Code of Ethics for Arbitrators of Commercial Disputes (Code of Ethics), which committees of the American Bar Association (ABA) and AAA jointly drafted and which the governing bodies of both associations adopted.[77] Other entities whose arbitrators hear employment disputes, such as JAMS, maintain their own ethical rules.[78]

The Code of Professional Conduct for Arbitrators of Labor-Management Disputes mandates that "[a]n arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument."[79] The AAA Code of Ethics provides that "[a]n arbitrator should uphold the integrity and fairness of the arbitration process"[80] and that "[a]n arbitrator should conduct the proceedings fairly and diligently."[81] These provisions are similar to judicial ethics rules requiring that "[a] judge . . . shall perform all duties of judicial office fairly and impartially."[82] Judicial disciplinary authorities have found that judges violate this section of the Code of Judicial Conduct when they fall asleep in court.[83]

FMCS rules permit parties to file with the Director of the Office of Arbitration Services a written complaint alleging that an arbitrator on the FMCS roster has violated either FMCS arbitration roster regulations or the Code of Professional Responsibility.[84] Upon receipt of a complaint, the FMCS's Arbitrator Review Board will conduct an

76. AAA requires that members of its Labor Panel be "[d]edicated to upholding the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes." *Qualification Criteria for Admittance to the AAA Labor Panel*, AM. ARB. ASS'N, https://adr.org/sites/default/files/document_repository/Labor_QualificationsCriteria_AAAPanel.pdf [perma.cc/FSZ9-K9P5]. FMCS regulations provide that "[a]rbitrators shall conform to the ethical standards and procedures set forth in the Code of Professional Responsibility for Arbitrators of Labor Management Disputes." 29 C.F.R. § 1404.4(b) (2020). State labor boards maintain similar regulations. *See, e.g.*, ARBITRATION RULES AND REGULATIONS pmbl. (N.J. State Bd. of Mediation 2009); OR. ADMIN. R. 115-040-0030.1 (2021); WASH. ADMIN. CODE § 391-65-110 (2020).

77. *Qualification Criteria and Responsibilities for Members of the AAA Panel of Employment Arbitrators*, AM. ARB. ASS'N, https://adr.org/sites/default/files/document_repository/Employment%20Arbitrators%20Qualification%20Criteria.pdf [perma.cc/FSZ9-K9P5].

78. *Arbitrators Ethics Guidelines*, JAMS, https://www.jamsadr.com/arbitrators-ethics (last visited Feb. 3, 2021).

79. CODE OF PROF'L RESP. FOR ARBS. OF LAB.-MGMT. DISPS. § 5(A) (NAT'L ACAD. OF ARBS. 2007).

80. CODE OF ETHICS FOR ARBS. IN COM. DISPS. Canon I (AM. ARB. ASS'N 2004).

81. *Id.* Canon VI.

82. ABA MODEL CODE OF JUD. CONDUCT r. 2.2 (AM. BAR ASS'N 2010).

83. *In re* Carpenter, 17 P.3d 91, 92–94 (Ariz. 2001) (justice of peace removed for repeatedly falling asleep on the bench and other serious misconduct); *In re* Halverson, 169 P.3d 1161, 1181 (Nev. 2007) ("Clearly, a judge does not perform diligently by sleeping on the bench.").

84. 29 C.F.R. § 1404.5(d) (2020).

inquiry into the facts and will make a recommendation regarding removal.[85] The regulations also assure that the arbitrator will have due process of law, including notice of the charges and an opportunity to be heard.[86] Generally, the Board will only recommend removal when an arbitrator has committed repeated violations of the regulations or Code.[87] Upon receiving a complaint, the Director may also contact the arbitrator and attempt to resolve the issue informally.[88]

While an arbitration is ongoing, AAA rules permit any party to an employment arbitration to request disqualification of an arbitrator for "partiality or lack of independence," "inability or refusal to perform his or her duties with diligence and in good faith," and "any grounds for disqualification provided by applicable law."[89] Once a party files an objection seeking disqualification of an arbitrator, "the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive."[90] A party need not notify the arbitrator of the filing of an objection with the AAA. This allows a party to seek an arbitrator's disqualification "without fear of reprisal from an arbitrator whose neutrality [or diligence] the party already doubts."[91]

FINRA maintains a rigorous process for evaluating arbitrators on its roster and removing arbitrators for proven misconduct, poor performance, and inappropriate demeanor or misbehavior.[92] In every arbitration, FINRA seeks out evaluations of the performance of its arbitrators, including evaluations by parties, representatives, and fellow arbitrators.[93] FINRA receives complaints about arbitrator performance from evaluations, correspondence, and staff reviews and investigations.[94] Upon receiving information about an arbitrator performance problem, FINRA begins the investigation at the regional director level, and the results and recommendations of that regional investigation are reviewed at multiple levels within FINRA's Dispute Resolution arm.[95] A two-member review team of the National Arbitration and Mediation Committee reviews the recommendation and makes a final decision regarding removal of an arbitrator from the roster.[96] In appropriate cases, including complaints about an arbitra-

85. *Id.* § 1404.5(e).
86. *Id*.
87. *Id.* § 1404.5(d)(3).
88. E-mail from Arthur Pearlstein, *supra* note 8.
89. Emp. Arb. Rules & Mediation Procs. r. 16(a) (Am. Arb. Ass'n 2009).
90. *Id*. r. 16(b).
91. Daniel M. Klein, *Ethical Issues*, *in* ADR in Employment Law, *supra*, note 75, at ch. 7, § 7.III.
92. Fienberg & Brady, *supra* note 8, at 2.
93. *Id.* at 3.
94. *Id*.
95. *Id*.
96. *Id*.

tor falling asleep during a hearing, FINRA staff will contact the arbitrator to seek an explanation for the behavior.[97] FINRA's procedures are flexible and—as in the case of FMCS's protocols—permit staff to counsel arbitrators about performance issues in appropriate cases rather than resorting to removal.[98]

In addition to registering official complaints about the misconduct, arbitration advocates should share their evaluations of arbitrators with other practitioners. Every arbitrator is an independent contractor who must compete with other arbitrators on the open market for appointments. Sharing arbitrator evaluations makes the marketplace richer by offering advocates information that can help them make better choices and thus avoid arbitrator misbehavior. Labor and employment lawyers share such information through organizations such as the AFL-CIO Union Lawyers Alliance, the National Employment Lawyers Association (NELA), and their management-side equivalents. Members of such organizations routinely share information about arbitrators through listservs, presentations at professional conferences, and other networking opportunities. An arbitrator who routinely falls asleep during hearings is much less likely to get work if advocates share their experiences with others. That decrease in work may inspire the arbitrator to seek treatment for the problem.

VIII. Suggested Best Practices for Arbitrators

Many people—especially those who are most alert in the morning hours, so-called "morning people"—report feeling drowsy in the early afternoon. [99] Research has shown that this post-lunch dip relates to the normal circadian rhythm and has little to do with meal consumption.[100] "The magnitude of sleepiness caused by the post-lunch dip is increased by fatigue, stress, and/or sleep loss."[101]

Arbitrators who experience occasional afternoon dips have several options for fighting off sleepiness and regaining the level of alertness necessary to conduct a hearing. Although research has shown that a short post-lunch nap is effective in restoring alertness,[102] such naps are usually not a practical alternative in the setting of a normal arbi-

97. *Id*. at 4.
98. *Id.*
99. Frederik Bes, Marc Jobert & Hartmut Schulz, *Modeling Napping, Post-Lunch Dip, and Other Variations in Human Sleep Propensity*, 32 SLEEP 392, 396 (2009).
100. *Id*. at 392.
101. Omar Boukhris, Raouf Abdessalem, Achraf Ammar, Hsen Hsouna, Khaled Trabelsi, Florian A. Engel, Billy Sperlich, David W. Hill & Hamdi Chtourou, *Nap Opportunity During the Daytime Affects Performance and Perceived Exertion in 5-m Shuttle Run Test*, 10 FRONTIERS IN PHYSIOLOGY, art. 779, at 2 (2019).
102. *Id*. at 6.

tration hearing. Thus, arbitrators must look for other solutions. First, arbitrators should get some exercise, preferably outside in the fresh air. When feeling drowsy, arbitrators should consider taking a fifteen-minute break and going for a brisk walk in the sunshine. Physical activity helps revive ebbing alertness and energy, and exposure to bright light serves as a wake-up call to the brain.[103] Second, the arbitrator may choose to practice controlled breathing, particularly the "ha" breath exercise, which can help wake the arbitrator's mind and body from an afternoon slump.[104] Finally, a caffeinated drink might help maintain alertness.

But, for some arbitrators, there may be more to their napping than the normal afternoon slump. Labor and employment arbitrators are getting older. The average age of an NAA member was 52.7 in 1962.[105] By 1969, the average age of NAA members had risen to 57.[106] By 1985, the average age of NAA members had increased to 62, and it remained steady through the late 1990s, when a survey conducted by Cornell University showed the average age of an NAA member was 63.[107] Today, however, the average active NAA member is 73.4 years old, and the median age is 74.[108] The average age of active male members of

103. Sonia Ancoli-Israel & Jennifer L. Martin, *Insomnia and Daytime Napping in Older Adults*, 2 J. Clinical Sleep Med. 333, 339–40 (2006).

104. Leslie Alderman, *Breathe. Exhale. Repeat*, N.Y. Times, Nov. 15, 2016, at D4.

105. Mario F. Bognano & Clifford E. Smith, *The Demographic and Professional Characteristics of Arbitrators in North America*, 41 Proc. Nat'l Acad. Arbs. 266, 269–70 (1985).

106. *Id*. at 269.

107. Michel Picher, Ronald L. Seeber & David B. Lipsky, Cornell/Perc Inst. on Conflict Resol., The Arbitration Profession in Transition: A Survey of the National Academy of Arbitrators 11 (2000).

108. Author's calculations of the ages of "active members" listed in the NAA's 2020 Membership Directory as it was available online on August 7, 2020. Nat'l Acad. of Arbitrators, 2020 Membership Directory, https://naarb.org/wp-content/uploads/2020/11/2020-NAA-Membership-Directory-11.3.20.pdf [https://perma.cc/VNJ7-234Q]. The NAA distinguishes between "standing members" who are not serving as fee-for-service arbitrators and "active members" who are continuing to serve as fee-for-service arbitrators. *Id.* at 6. Birth years were determined using available online resources, particularly AtoZ Database and Ancestry.com, with confirmation of details such as arbitrator addresses using other available public databases such as state bar websites listing licensed attorneys. The author was able to find reliable birth dates or years for 427 out of 430 active NAA members listed in the 2020 Membership Directory.

the NAA is currently 74.75, and the average age of an active female members is 68.7.[109]

The average age and age distribution of arbitrators are significant because changes in sleep patterns are a normal part of the aging process.[110] According to sleep studies, older people may experience more fragmented nighttime sleep and spend more time in lighter stages of sleep than in deep sleep.[111] In addition, older people often sleep less than do younger adults and experience a higher rate of EDS (excessive daytime sleepiness).[112] In addition, sleep disorders such as insomnia and sleep apnea are more common among older people.[113]

The good news is that sleeping disorders and daytime sleepiness are amenable to treatment.[114] Thus, arbitrators should ask their sleep partners and roommates about possible sleep disorders, and they should be open to hearing from arbitration agencies and advocates about instances in which they have fallen asleep during a hearing. If there is a problem, the arbitrator should seek medical diagnosis and treatment. If treatment fails, the arbitrator should consider resignation because falling asleep during hearings damages the institution of arbitration and the reputation of the arbitrator. Thus, the increasing

109. **Table 1—Age Distribution of Academy Members 1999 & 2020**

Age Ranges	1999 NAA Active Members by Age Group	Percentage of Total Membership by Age Group in 1999	2020 Active Members by Age Group	Percentage of Total Membership by Age Group in	2020 Active Members —Men	2020 Active Members —Women
Under 50	47	10.4%	4	1%	3	1
50 to 59	155	34.4%	18	4.2%	10	8
60 to 69	118	26.2%	106	24.8%	62	44
70 to 79	100	22.2%	209	49%	172	37
80 to 89	30	6.7%	82	19.2%	79	3
90 or over	1	0.2%	8	1.9%	8	0

The data in this table for 1999 is taken from PICHER, SEEBER & LIPSKY, *supra* note 107. The 2020 data is drawn from the author's research, described *supra* note 108.

110. Kamalesh K. Gulia & Velayudhan Hohan Kumar, *Sleep Disorders in the Elderly: A Growing Challenge*, 18 PSYCHOGERIATRICS 155, 157 (2018).

111. *Id*.

112. Pagel, *supra* note 16, at 391.

113. Diego Z. Carvalho et al., *Excessive Daytime Sleepiness and Fatigue May Indicate Accelerated Brain Aging in Cognitively Normal Late Middle-Aged and Older Adults*, 32 SLEEP MED. 236, 236 (2017).

114. *See* Ancoli-Israel & Martin, *supra* note 103, at 340.

age of arbitrators in recent years suggests that the problem described in this article will continue to be a concern.

IX. Suggested Best Practices for Advocates

Because contesting an arbitration award based on a claim that the arbitrator slept through part of the hearing requires the challenger to clear some very high hurdles, the best strategy is probably to try to keep the arbitrator awake in the first place, or—if he or she nods off—to wake him or her up and proceed with the hearing. If the arbitrator continues to sleep through the hearing despite the advocate's best efforts and if the opposing advocate either does not concede that the arbitrator has fallen asleep or is uncooperative in developing a joint strategy to confront the problem, attorneys and clients face a difficult choice in deciding whether to object to the arbitrator's sleeping. If a party decides not to object, the arbitrator's award may be founded on an incomplete understanding of the evidence or may be adversely affected by cognitive performance deficits related to a sleep disorder. If the party objects, the arbitrator may take offense and hold it against the objector. Even though such a reaction would violate the arbitrator's ethical duty to avoid "conduct that would compromise or appear to compromise the arbitrator's impartiality,"[115] parties must weigh the possibility when deciding how to proceed.

Although the Model Rules of Professional Conduct may not require a lawyer to consult with the client before deciding to make a record of arbitral sleeping, a prudent lawyer should consult with his or her client because of the possibility that making such a record could prejudice the arbitrator against the client. Rule 1.4(a)(2) provides that "[a] lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished."[116] The Comment to Rule 1.4 provides that consultation about a particular litigation decision depends on "the importance of the action under consideration and the feasibility of consulting with the client."[117] The relevant factors weigh heavily in favor of client consultation. First, the decision whether to object to the arbitrator's inattention is of critical importance to the objectives of the representation—that is, winning the case. Second, a party representative is almost always present during an arbitration hearing. Third, the circumstances allow for lawyer-client communication and consultation about the decision whether to object on the record. Specifically, the decision does not need to be made on the spur of the moment. The lawyer can wait for a break in the proceedings and

115. Code of Prof'l Resp. for Arbs. of Lab.-Mgmt. Disps. r. 1.C.3 (Nat'l Acad. of Arbs. 2007).

116. Model Rules of Prof'l Conduct r. 1.4(a)(2) (Am. Bar Ass'n 2020).

117. *Id.* r. 1.4 cmt. 3.

then discuss the potential risks and benefits of raising the issue with the client.

Once a party has decided to raise the issue of arbitral inattention, it is essential to make a clear record. Failure to object on the record at the hearing will likely cause a court to dismiss any lawsuit seeking to vacate the award on grounds of waiver. In objecting, the party should describe in detail each instance in which the arbitrator fell asleep with specific reference to how long the arbitrator remained inattentive and include a proffer regarding the evidence the arbitrator missed during each such incident. If possible, the objector should also offer cell phone videos showing the arbitrator dozing. If the hearing is being recorded—as many hearings are during the global coronavirus pandemic—the objector should specifically mention the video recording in making the objection. Having a contemporaneous factual record of the arbitrator's sleeping incidents will make it more likely that a court will need to hold an evidentiary hearing on the issue of arbitral misconduct or misbehavior, which is the first hurdle that the party will face in litigation seeking to vacate the award based on an allegation that the arbitrator slept through critical evidence.

To prove that the arbitrator's inattention denied the client a fair hearing and thus caused prejudice, lawyers should consider calling a healthcare provider or academic researcher as an expert witness to testify about the relationship between daytime sleepiness and sleep disorders and the neurocognitive problems associated with sleep disorders. Evidence that people with sleep disorders have specific problems assimilating and recalling information presented verbally might be particularly pertinent to a court's assessment of the prejudice prong of the analysis of whether to vacate an award for arbitral misconduct or misbehavior.

Finally, whether or not an arbitrator's sleeping during a hearing winds up in court, lawyers and other advocates should report such incidents to the administrative agency that appointed the arbitrator and should share the information with other arbitration advocates. Such reports will help the administrative agencies investigate suspected misconduct and police their rosters of arbitrators. They will also help other parties avoid using arbitrators who have fallen asleep during hearings and will help arbitrators seek diagnoses and treatment for underlying sleep disorders, which will allow them to stay alert during hearings and continue to serve parties as effective arbitrators. Ultimately, sharing information about arbitrator inattention will shed light on the problem and make the institution of arbitration stronger.

Conclusion

Arbitrators—like all other decisionmakers—are at risk of inattention or even falling asleep during hearings. When arbitrators fall

asleep, they undermine the confidence of the public and participants in the arbitration process. They also risk missing critical evidence, thus calling into question their competence and the fairness of their decision-making. Everyone involved with the institution of arbitration has responsibilities to prevent and correct arbitral sleepiness.

Arbitrators themselves must monitor their sleep habits and overall health to make sure that any sleep disorders are diagnosed and treated. Even if they do not have an underlying sleep disorder, arbitrators must also take affirmative steps to recognize an afternoon dip and to regain alertness if they feel drowsy during hearings.

Administrative agencies that provide arbitration panels to parties should provide information about sleep disorders, medical treatment, and ways to regain alertness during hearings to arbitrators on their panels. Agencies should also develop clear protocols for investigating and dealing with incidents of arbitrator sleepiness and should let customers know how to report such incidents confidentially.

Courts should relax the standard for judging prejudice when an arbitrator has fallen asleep during a hearing. The current standard—denial of a fair hearing—is simply too tolerant of arbitrator somnolence. Despite the sound public policy reasons for limiting judicial review of arbitration awards generally, requiring only a slight showing of prejudice in cases of proven arbitral napping would provide parties and the public with assurances that the arbitration process is committed to having alert arbitrators issue awards based on a complete hearing of the evidence. This option is particularly crucial to public confidence in the institution of arbitration because of the incredibly narrow scope of judicial review of arbitration awards.

Advocates also have a key responsibility to make sure arbitrators remain alert and to report incidents in which arbitrators fail to stay awake. If a party intends to challenge an award based on a claim that the arbitrator fell asleep during the hearing, the advocate must make a record of the arbitrator's alleged misconduct. Failure to bring the issue of sleeping to the arbitrator's attention during the hearing will result in the reviewing court dismissing the suit based on waiver. The challenging party's lawyer must also be able to prove that the arbitrator fell asleep during the hearing and should offer expert testimony regarding the cognitive impairments associated with daytime sleepiness in order to prove that the arbitrator denied the parties a fair hearing by falling asleep during the hearing. As we have explored, hoping for a court to vacate an award without an objection on the record, strong evidence of arbitral sleeping, and expert testimony about the consequences of daytime sleepiness would be a pipe dream and a waste of your time and your client's money.