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THE 1977 CODE OF ETHICS FOR ARBITRATORS: AN OUTSIDE PERSPECTIVE

John D. Feerick

INTRODUCTION

I applaud the Georgia State University Law Review for making Alternative Dispute Resolution (ADR) Ethics an essential part of these discussions. I am privileged to participate and to serve with John Hinchey, Esq., and Professor Phillip A. LaPorte on the panel charged with discussing the revised Code of Ethics for Arbitrators. The code of ethics (Code) was formed in 1977 by committees of the American Bar Association (ABA) and American Arbitration Association (AAA), with Judge Howard Holtzman playing the major leadership role in its development.¹ The Code was designed for arbitrators serving in commercial disputes and attempted to enhance confidence in domestic arbitrations. Arbitrators and arbitral institutions widely use the Code. Its development was influenced to some extent by an earlier collaborative effort of the National Academy of Arbitrators, the American Arbitration Association, and the Federal Mediation and Conciliation Service.²

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² CODE OF PROF’L RESPONSIBILITY FOR ARBITRATORS OF LABOR MGMT. DISPUTES (as amended 1985) (hereinafter LABOR CODE). However, there are considerable differences between the two documents; for example, their treatment of disclosures by arbitrators depart dramatically. The Labor Code calls for disclosure of “any current or past managerial, representational, or consultative relationship” with any party. Id. § 2.B.1. Required disclosures include “membership on a Board of Directors, full-time or part-time service as a representative or advocate, consultation work for a fee, [and] current stock or bond ownership (other than mutual fund shares or appropriate trust arrangements).” Id. § 2.B.1.a. Arbitrators must also disclose concurrent or recent advocacy or representation of other companies or unions in labor relations matters. Id. § 2.B.2. However, the Labor Code adds a practical note: “It is not necessary to disclose names of clients or other specific details.” Id.

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To be sure, these efforts drew on principles that have existed from time immemorial, emphasizing the importance of integrity and fairness as characteristics of those who serve in dispute resolution roles. It is not unusual to think of arbitration and mediation as American inventions developed in response to the litigiousness of our society and the need to develop inexpensive, timely and private ways of resolving disputes. However, arbitration and mediation have a long history dating back to at least ancient Greece and continuing through the Middle Ages into our early colonial history. In fact, George Washington opted to have any disputes arising under his will finally decided by “three impartial and intelligent men,” known for their probity and understanding. Considering that such a rich tradition underlies these “new methods,” I am reminded of the words in Ecclesiastes: “[T]here is no new thing under the sun.”

If ADR is to remain a vibrant part of the judicial landscape, it is essential that efforts further shape ethical standards and guidelines, as well as their practical connotations. The framers of the United States Constitution were very careful to establish a public justice system comprised of judges and juries operating within a framework of standards and protections designed to assure justice and fairness while simultaneously promoting public confidence. We should give similar care to developing processes through which we purportedly intend to accomplish similar objectives in resolving disputes and controversies. At the very least, the private nature of these processes and the limited reviewability of such adjudicative results demand heightened scrutiny of ethical matters. However, in a nation that places a premium on individual freedom and encourages less formal means of dispute resolution, parties’ choice of dispute resolution mechanisms deserves great respect.

§ 2.B.2.a. A general description of such work and a reasonable approximation of its extent are required. *Id.* The Labor Code also encourages would-be arbitrators to refrain from being “secretive about such friendships or acquaintances,” asserting that “disclosure is not necessary unless some features of a particular relationship might reasonably appear to impair impartiality.” *Id.* § 2.B.3.a.

3. *Ecclesiastes* 1:9 (King James).
Turning to the 1977 Code of Ethics for Arbitrators, of great relevance is the ongoing effort by the ABA to revise some aspects of the Code. Robert Holtzman, a distinguished lawyer and arbitrator, launched this particular initiative. The working group is also coordinating its effort with representatives of such outstanding ADR providers as the American Arbitration Association and the Center for Public Resources.

The most significant aspect of the current effort is its goal of achieving a unified code that will apply without distinction to both domestic and international commercial arbitrations. The task is difficult because certain aspects of domestic tripartite panel arbitrations are diametrically opposed to their international counterparts. For example, two party-appointed non-neutral arbitrators and one neutral not infrequently preside over domestic arbitrations. However, while international arbitrators use tripartite panels, they do not embrace the concept of a non-neutral arbitrator. Despite other differences, this appears to be the major point of division in the shaping of a unified revised Code.

As important as ethics codes are to promoting professional integrity and public confidence, Judge Posner has reminded us that privately developed codes are not the starting point for reviewing an arbitration award. As he wrote in *Merit Insurance Co. v. Leatherby Insurance Co.*,

Although we have great respect for the Commercial Arbitration Rules and the Code of Ethics for Arbitrators, they are not the proper starting point for an inquiry into an award’s validity under section 10 of the United States Arbitration Act and Rule 60(b) of the Federal Rules of

6. 714 F.2d 673 (7th Cir. 1983).
Civil Procedure. The arbitration rules and code do not have the force of law.\(^7\)

As Judge Posner discussed, the relevant section of 9 U.S.C. § 10 outlines:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(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.\(^8\)

Thus, the "starting point" in *Merit Insurance Co.* was the federal standard of "evident partiality." However, adherence to a code of ethics is an important factor in assessing the fairness of a particular arbitration result. This Article provides an overview of the Code of Ethics, analyzing recent revisions and proposed enhancements.

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7. *Id.* at 680 (refusing to set aside an arbitration award where one of the arbitrators had a working relationship with a key witness twelve years prior to the arbitration).
I. OVERVIEW OF THE CODE

The 1977 Code of Ethics for Arbitrators consists of a preamble and seven canons, each with subdivisions and some with an introductory note. The canons are as follows:

I. An Arbitrator Should Uphold the Integrity and Fairness of the Arbitration Process.

II. An Arbitrator Should Disclose Any Interest or Relationship Likely to Affect Impartiality or Which Might Create an Appearance of Partiality or Bias.

III. An Arbitrator in Communicating with the Parties Should Avoid Impropriety or the Appearance of Impropriety.

IV. An Arbitrator Should Conduct the Proceedings Fairly and Diligently.

V. An Arbitrator Should Make Decisions in a Just, Independent and Deliberate Manner.

VI. An Arbitrator Should be Faithful to the Relationship of Trust and Confidentiality Inherent in That Office.

VII. Ethical Considerations Relating to Arbitrators Appointed by One Party.9

The revisions in their current form add two entirely new canons and substantively change Canon VII regarding “Arbitrators Appointed by One Party.”10 The new version of Canon VII states: “An Arbitrator

9. CODE OF ETHICS, supra note 1, at 559-65.
Should be Governed by Standards of Integrity and Fairness When Making Arrangements for Compensation and Reimbursement of Expenses.”¹¹ Any such arrangements should occur at the outset of a proceeding and be documented in writing.¹² The proposed fee cannot be contingent on the outcome of the proceeding,¹³ which accords with the ancient notion that you should not be a judge in your own case. Except for party appointed arbitrators, the proposed new canon directs that communications concerning fees must be conducted in the presence of all parties to a matter.¹⁴

New Canon VIII states: “An arbitrator may engage in advertising or promotion of arbitral services in a discreet and professional manner.”¹⁵ This canon requires that any advertisement by an arbitrator be truthful and not misleading.¹⁶ Under the new canon, arbitrators may not proffer success rates in their advertisements but may list their own specific credentials.¹⁷ Additionally, the canon strictly prohibits soliciting employment in any particular case.¹⁸ This canon seems straightforward and right.

The revisions to the 1977 Code require that “arbitrators appointed by one party comply with the provisions of code unless otherwise required by the agreement of the parties or applicable law or arbitral rules.”¹⁹ The revisions go on to list exceptions to this general principle for areas of the code that are inapplicable to party appointed neutrals and non-neutrals.²⁰

Because the work of the committee is ongoing and it is seeking broad input, it would be inappropriate to comment on the current revisions as if they were a finished product. Certain directions,

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11. Working Draft 2001, supra note 4 Canon VII.
12. See id. Canon VII.B(1).
13. See id. Canon VII.D.
14. See id. Canon VII.B(3).
15. Id. Canon VIII.
16. Id. Canon VIII.A.
17. See id. Canon VIII.A. “Specific credentials” would include items such as *curriculum vitae*.
18. See id. Canon VIII.B.
19. Working Draft 2001, supra note 4 Canon IX.
20. See id. Canon IX.C, D.
however, can be clearly discerned and responsibly commented upon. For ease of reference, I refer to them as revisions dealing with integrity and fairness, disclosure, and party-appointed arbitrators.

II. REVISIONS

A. Integrity and Fairness

Significantly and commendably, the proposed revisions make clear the arbitrator’s ethical duties to the arbitration process and to the public. Some of these ethical responsibilities cannot be waived. Among those are requirements that arbitrators accept appointment only if they are fully confident in their ability to serve without bias, serve competently, and commence the arbitration in accordance with the requirements of the case, as well as give the matter the time and attention it deserves. An arbitrator may not serve unless able to satisfy these obligations, even if the parties were to agree otherwise.21

The revisions refer to an arbitrator’s obligations beginning when first contacted to serve and continuing throughout the period of the arbitration. The revised Code is silent on the question of an arbitrator’s responsibility after an award is issued, except to discourage an arbitrator from “assist[ing] in proceedings” to enforce or vacate an award.22 The proposed revisions also state that “[u]nless the parties so request, an arbitrator should not appoint himself or herself to a separate office related to the subject matter of the dispute, such as receiver or trustee, nor should a panel of arbitrators appoint one of their number to such office.”23 Such language is appropriate, but clarification concerning future relationships between arbitrators and parties to the proceeding would also enrich the Code. More prohibitory language can be found in other codes regarding

21. Id. Canon I.B.
22. Id. Canon VI.C.
23. Id. Canon VLE.
neutrals becoming involved with parties to the same or related matters.24

Another provision in the revised Code, with possibly profound implications, provides that an arbitrator has no ethical duty to comply with procedures that are "unlawful, unconscionable, or inconsistent with [the] Code."25 This language may become important in consumer and employment disputes involving pre-dispute clauses and due process considerations; it reminds arbitrators not to accept the parties' agreement at face value. The drafters may want to elaborate on this rather provocative provision.

Another fairness provision includes the right of a party "to be represented by counsel or any other person chosen by the party to assist it."26 This provision in particular should serve to enhance confidence in the ADR process despite the fact that it is closed to the public. Section 10 of the Uniform Mediation Act contains a similar provision, but Section 16 of the Uniform Arbitration Act refers only to representation by a lawyer.27 Another desirable addition is language that allows an arbitrator to suggest mediation, conciliation, or other dispute resolution mechanisms.

The revisions also set forth a useful framework for dealing with ex parte communications between a party and an arbitrator. While most communications are inappropriate because they may impact the fairness of a proceeding, some communications are essential to the

24. E.g., the Model Standards of Conduct for Mediators—developed by the ABA, AAA and the Society of Professionals in Dispute Resolution—contains a useful comment in its standard III, which bears upon conflicts of interest. The standard states in pertinent part: "Without the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in a related matter . . . ." MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard III (2000). Additionally, the recent changes to the Model Rules of Professional Conduct provide that mediators, judges, and arbitrators may not represent a client in a matter in which they personally participated. MODEL RULES OF PROF'L CONDUCT R. 1.12(a) (2002).

25. Working Draft 2001, supra note 4 Canon I.E.

26. Id. Canon IV.E.

27. See UNIFORM ARBITRATION ACT § 16 (2000). A comment to Section 16 expresses concern about "incompetent and unscrupulous individuals, especially in securities arbitration, who hold themselves out as advocates." Id. § 16 cmt. The comment further states that, absent illegality, nothing prevents representation by a non-lawyer. Id.
The current revisions appear to strike the right balance between fairness and efficiency.

The 1977 Code prohibited ex parte communications except in three circumstances: (1) communications concerning matters such as time or place of hearing, after which the arbitrator should make each other party aware of the discussion; (2) when a party does not appear after due notice; or (3) if all parties consent to such discussions. The proposed revisions would increase the number of ex parte communications, thereby enhancing the efficiency of the arbitration process. When a party initially contacts a potential arbitrator, the arbitrator may inquire into the party’s identity and respond to questions about availability and suitability. Potential arbitrators may also receive information about the nature of the dispute, but they must be careful not to allow parties to argue the merits of their case. In tripartite arbitrations, party-appointed arbitrators may discuss the choice of the third non-party appointed arbitrator with the appointing party. The revisions would also permit arbitrators to discuss payment arrangements, including submission of routine requests for payment, with the party who appointed them. All of these revisions would streamline the initial stages of the arbitral process, furthering its attractiveness as a litigation alternative.

B. Disclosure

“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” Disclosure requirements also serve a compelling public interest in “avoid[ing]
the appearance of corruption by exposing” matters to the “light of publicity.” 35

It is interesting to note that the Working Draft, in its present form, extends the reach of disclosure and raises the bar concerning what must be disclosed. In so doing, the revisions seem designed to strike a balance between public confidence considerations and the need for a workable arbitration process that both encourages individuals to serve as neutrals and provides awards that withstand challenges based on non-material grounds. According to testimony received by the revising group, parties opposed to mandatory arbitration of consumer and employment disputes are using the current wording of Canon II of the 1977 Code to support their challenges. Particularly, these complainants focus on the Canon’s lack of “knowledge” as a precondition to disclosure of a “financial or personal interest in the outcome of the arbitration,” 36 and the use of a low threshold of disclosure encompassed by the terminology of relationships “which might reasonably create an appearance of partiality or bias.” 37

The added knowledge requirement, coupled with the duty to make a reasonable inquiry as to conflicts, clearly seems warranted, and reflects other codes. 38 However, a reformulation of the phrase

36. CODE OF ETHICS, supra note 1 Canon II.A.
37. Id. Canon II.A(2). The relevant language provides in its entirety:

Persons who are requested to serve as arbitrators should, before accepting, disclose (1) any direct or indirect financial or personal interest in the outcome of the arbitration; (2) any existing or past financial, business, professional, family or social relationships which are likely to affect impartiality or which might reasonably create an appearance of partiality or bias. Persons requested to serve as arbitrators should disclose any such relationships which they personally have with any party or its lawyer, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving members of their families or their current employers, partners, or business associates.

CODE OF ETHICS, supra note 1 Canon II.A.

38. See, e.g., UNIFORM ARBITRATION ACT § 12(a) (2000) (UAA). The UAA requires a reasonable inquiry by arbitrators and disclosure of “known facts that a reasonable person would consider likely to affect the [neutral’s] impartiality.” Id. § 12(a). Similar language is found in the Uniform Mediation Code, as well as in a number of international statutes and rules. Arbitrators shall disclose "any circumstance likely to give rise to justifiable doubts as to [his] impartiality or independence." INT’L ARBITRATION R. Art. 7.1 (2001).
"appearance of partiality or bias" may not be necessary given the wide latitude enjoyed by the current terminology. Frivolous, trivial, and remote pieces of information are arguably not contemplated by this provision, but a reasonableness standard that considers all the relevant circumstances is implied. Nonetheless, it would be useful

39. The seminal case on disclosure by arbitrators is the Supreme Court's decision in Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968). There, a neutral arbitrator on a tripartite arbitration panel failed to disclose "repeated and significant" business dealings with one of the parties to the case. Id. at 146. In setting aside the award, Justice Black compared the role of arbitrator to that of an Article III judge, stating that an award should be set aside even where there is the ""slightest pecuniary interest,"" and that an arbitrator was in a more vaunted position than a judge because an arbitrator "decid[es] the law as well as the facts and [is] not subject to appellate review." Id. at 148-49 (quoting the Court in Tumey v. Ohio, 273 U.S. 510, 524 (1929)). The Court did not suggest that merely having a previous business dealing with a party will result in the automatic elimination of an arbitrator. On the contrary, the Court asserted "arbitrators cannot sever all their ties with the business world," but any relationship must be disclosed to all parties. Id. at 148-49. Three other Justices joined Justice Black in his opinion.

Justice White, joined by Justice Marshall, filed a concurring opinion disagreeing that arbitrators should be held to the same standard as Article III judges. Id. at 150 (White, J., concurring). "It is often because they (arbitrators) are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function." Id. (emphasis added). An arbitrator "cannot be expected to provide the parties with his complete and unexpurgated business biography." Id. at 151. White further stated: "[I]t is enough for present purposes to hold, as the Court does, that where the arbitrator has substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed." Id. at 151-52.

The three dissenting Justices would have confirmed the arbitration award. Id. at 152 (Fortas, J., dissenting). Justice Fortas stated that the Court erred in creating a new standard for setting aside arbitration awards. Id. He summarized the Court's opinion as a per se rule mandating that "regardless of the agreement between the parties, if an arbitrator has any prior business relationship with one of the parties of which he fails to inform the other party, however innocently, the arbitration award is always subject to being set aside." Id. at 153.

Commonwealth Coatings and its progeny are slightly confusing due to the absence of a majority opinion in the primary case. See generally id. at 145. However, upon closer inspection, it becomes clear that many courts do in fact follow the standard Justice White enunciated in his concurrence. For example, the Fourth Circuit in ANR Coal Co., Inc. v. Cogentrix of North Carolina, Inc., 173 F.3d 493 (4th Cir. 1999), upheld an arbitration award even though a neutral arbitrator failed to disclose the full extent of his relationship with one of the parties. 173 F.3d at 495. The court reasoned: "Because an arbitrator's failure to disclose, in and of itself, provides no basis to vacate an award, and because the facts here do not demonstrate evident partiality by the arbitrator, we must reverse." Id. Under Justice Black's view, the court should have vacated the award because, as stated above, any relationship between the arbitrator and party must be disclosed. However, the Fourth Circuit stated that "[f]ailure to disclose the sort of attenuated, nonsubstantial relationships at issue here violates neither the teaching of Commonwealth Coatings nor AAA Rule 19." Id. at 499. The court added in dicta that failure to reveal a connection is only a factor towards the evident partiality outlined in 9 U.S.C. § 10(a)(2). Id.

However, the Eighth Circuit, in Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 51 F.3d 157 (8th Cir. 1995), vacated an arbitration award where there was a significant undisclosed connection
for the working group to develop a commentary on disclosure as well as a method for providing necessary disclosure guidance to would-be neutrals.40

The Working Draft is on the right track in terms of requiring arbitrators to disclose "the nature and extent of any prior knowledge he or she may have of the dispute" and their use of research assistants.41 Another sound revision is the requirement that both neutral and non-neutral party appointed arbitrators fully disclose interests and relationships to both the parties and other arbitrators.42 In tripartite matters, neutral presiding arbitrators must be able to evaluate the participation of colleagues. It is important to the functionality of the neutral presiding arbitrator that the advocacy, if it

between the arbitrator and one of the parties. Id. The Eighth Circuit rejected both the Black and the White standard, stating it would vacate under either view. Id. at 159. The court maintained: "Because the concurring opinion presents an arguably narrower standard and the votes of the concurring Justices White and Marshall were needed to create a majority, there is some uncertainty among the courts of appeals about the holding of Commonwealth Coatings." Id.

For further discussion of this topic, see generally the UNIFORM ARBITRATION ACT § 12 (2000). See also Middlesex Mut. Ins. Co. v. Levine, 675 F.2d 1197, 1204 (11th Cir. 1982) (holding that because an arbitrator neglected to disclose his significant relationship to some of the parties, vacating the arbitration award was proper because of the reasonable appearance of bias); Int'l Produce, Inc. v. A/S Rosshavet, 638 F.2d 548, 551-52 (2d Cir. 1981) (reversing the lower court's decision to vacate an award and holding that the Supreme Court in Commonwealth Coatings "did not expand the § 10 standard of 'evident partiality' to include 'appearance of bias'"); United States Wrestling Fed'n v. Wrestling Div. of AAU, Inc., 605 F.2d 313, 318, 321 (7th Cir. 1979) (arguing that disqualification issues are to be considered on a case-by-case basis and finding that "[t]he record . . . refutes any contention that both parties were not given a full and fair hearing before the tribunal arbitrators").

40. See Judicial Council of California, Proposed Changes to California Rules of Court (Jan. 7, 2002). Among its proposed disclosure standards are provisions including domestic partners as family members and requiring disclosures of close personal friendships with a party or attorney. Id. at Standard 7, ¶ (b)(1). "[P]ast, present, or currently expected service as a dispute resolution neutral for a party or a lawyer for a party" or by a party appointed arbitrator in tripartites are required disclosures. Id. Standard 7, ¶ (b)(2). More controversial disclosures concern revealing the relationship between a party arbitrator and a dispute resolution provider organization. Id. Standard 7, ¶ (b)(6).

While certain aspects of the proposed changes may impose onerous, if not unnecessary, burdens on arbitration as a forum, the overall thrust of providing guidance for neutrals is highly useful, helping neutrals avoid an accidental plunge into a non-disclosure quagmire. John Hinchey has helpfully suggested that ADR provider organizations arm their arbitrator neutrals with checklists outlining the kinds of conflicts they need to avoid.

41. Working Draft 2001, supra note 4 Canon II.A(3).

42. Id. Canon II.E.
be that, of a non-neutral party appointed arbitrator not deceive him in some manner.

C. Party-Appointed Arbitrators and Tripartite Panels

Since 1977 the number of business transactions with international dimensions and implications has grown exponentially. "Perhaps most importantly, the 2001 Revision sponsors were concerned that the 1977 Code’s predominant focus on commercial arbitrators in domestic disputes within the United States was no longer useful or realistic."43 The sponsors ambitiously set out to see if they could develop a single code covering both domestic and international arbitrations. As might have been expected, their greatest challenge has been harmonizing the concept of non-neutral arbitrators on tripartite panels in domestic arbitrations with the rule of arbitrator neutrality in international arbitrations. Currently the committee is focusing on whether there should be a supplement to the Code or a new canon that addresses this subject in a way that is palatable across various constituencies. Without speaking to the merits of the debate, an explanation of the committee’s work is necessary.

Provisions concerning non-neutral party-appointed arbitrators are contained in Canon VII of the 1977 Code, which provides "[n]onneutral arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness."44 For example, a non-neutral arbitrator may not engage in delay tactics, harass, or mislead the parties or other arbitrators.45 A non-neutral arbitrator must also conduct proceedings fairly and diligently.46 The distinction between neutral and non-neutral arbitrators and the extent of arbitrator predisposition have often been subjects of litigation. A primary issue

43. Id. at Introduction.
44. CODE OF ETHICS, supra note 1 Canon VII.A(1).
45. Id.
46. Id. Canon I.D.
in *Delta Mine Holding Co. v. AFC Coal Properties, Inc.* was the extensive nature of the involvement of a party appointed non-neutral arbitrator in case preparation. There, the arbitrator had a substantial, ongoing relationship with the party, assisted the appointing party in preparing for the arbitration hearing, and disclosed panel deliberations to the party.

The court in *Delta Mine Holding* examined 9 U.S.C. § 10(a)(2) and its "evident partiality" provision. The court offered three reasons why the district court erred in vacating the arbitration awards under this standard. First, the challenging party had not raised the issue during the course of the arbitration and thereby waived its right to raise this issue. Second, although the district court was factually accurate in stating that the non-neutral party appointed arbitrator was partial, this was exactly the type of arbitration to which both parties had contracted. "In other words, the arbitration agreements expressly contemplated the selection of partial arbitrators—persons with substantial financial interests in and duties of loyalty to one party." The court of appeals declared parties free to contract to the desired method of arbitration, including the use of non-neutral party appointed arbitrators. Third, the court stated that the challenging party could not show that the "evident partiality" of the arbitrator had a prejudicial effect on the outcome of the deliberation. The first two rationales are well recognized among the courts; however, the court of appeals did not cite any judicial authority requiring a showing of prejudice—a concept not specifically mentioned in 9 U.S.C. § 10.

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47. 280 F.3d 815 (8th Cir. 2001).
48. *Id.* at 817.
49. *Id.* at 819.
50. *Id.* at 820-22.
51. *Id.* at 821.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 821-22.
In the Working Draft's current form, required disclosures for non-neutral arbitrators parallel those for neutral party-appointed arbitrators. Both must disclose full information to the other arbitrators and the parties to the dispute. This is a change from the 1977 Code, which required non-neutral arbitrators to disclose only the general nature and scope of an interest in a particular matter.

Regarding ex parte communications, both the revisions and the 1977 Code would allow non-neutrals to engage in such communications, as long as they inform the parties and the other arbitrators whether they intend for such communications to occur throughout the proceeding. Following such disclosure, non-neutrals may then discuss all aspects of a case with their respective party; however, the following areas of discussion are prohibited under the current revisions: deliberations of the arbitration tribunal, the subject matter of a record that is closed pending the decision of the tribunal, and any final or interim decision prior to the time that information is disclosed to all parties. These useful additions serve to promote the principles of integrity and fairness.

When an ex parte communication has occurred prior to the arbitration hearing, the non-neutral must disclose that fact, though the revisions do not require the non-neutral to divulge the content of the communication. If a non-neutral arbitrator intends to communicate with the appointing party during the arbitration, the initial disclosure of that intent is sufficient and there is no requirement to disclose each occurrence of a communication.

The proposed revisions also state that non-neutral arbitrators may not communicate with the presiding, neutral arbitrator outside the presence of the opposing party’s non-neutral arbitrator and that the presiding arbitrator must send any written communications between

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56. See supra text accompanying notes 39-47.
58. Id. Canon IX.D(3)(c).
59. Id. Canon IX.D(3)(b).
60. Id.
the non-neutral and presiding arbitrator to the opposing party's non-neutral arbitrator.\textsuperscript{61} The restriction on oral communications outside the presence of all arbitrators may be too rigid. A myriad of reasons exists for allowing communications between fewer than all the arbitrators, while any undesirable appearance may be counteracted by requiring the presiding arbitrator to disclose the nature of any communication to the third arbitrator.\textsuperscript{62} Even when all the arbitrators are neutral, this is desirable practice by any presiding arbitrator.

The revisions' drafters are also considering whether to require non-neutrals to disclose which topics are being addressed in ex parte communications and how they are assisting their party in case preparation. This is most likely a response to \textit{Delta Mine Holding}, where the court stated: "It may be that many professional neutral arbitrators, if presented with this situation, would have required fuller initial disclosures by the party arbitrators and would have established clearer and better articulated procedural ground rules for the pre-hearing preparations and the post-hearing deliberations."\textsuperscript{63}

In discussing the different roles of party-appointed neutrals and non-neutrals, the revisions, as noted above, mandate certain obligations for both groups of arbitrators. All party-appointed arbitrators must conduct hearings within the confines of the Code.\textsuperscript{64} They also must "be faithful to the relationship of trust and confidentiality inherent in [the] office [of arbitrator]."\textsuperscript{65} Among other things, this means arbitrators may not divulge confidential information for personal advantage, discuss the deliberations of the tribunal, or announce an award prior to the panel's official

\textsuperscript{61} \textit{Id.} Canon IX.D(3)(d).

\textsuperscript{62} For example, when two arbitrators write a majority opinion with one arbitrator dissenting, there is no practical reason why the dissenting arbitrator must be present for each discussion of the majority's opinion.

\textsuperscript{63} \textit{Delta Mine Holding Co. v. AFC Coal Props., Inc.}, 280 F.3d 815, 824 (8th Cir. 2001).

\textsuperscript{64} \textit{Working Draft 2001, supra} note 4 Canon IX.

\textsuperscript{65} \textit{Id.} Canon VI.
announcement. In addition, all arbitrators must follow the new canon on advertising. 66

The Working Draft would benefit from an additional, overarching canon concerning an arbitrator’s obligation to the arbitration process itself. 67 Standard Nine of the Model Standards of Conduct for Mediators developed by the AAA, ABA, and Society of Professionals in Dispute Resolution (SPIDR) offers a possible model. 68

As the effort to merge domestic and international arbitration practice continues, it is vital to the integrity of arbitration to expressly delineate whether a party appointed arbitrator is neutral or non-neutral. Arbitrators have a duty to ensure that their status is known and communicated to all parties and the other arbitrators. 69 According to the revisions, this should happen at the earliest possible time before consideration of “procedural or substantive matters.” 70 This determination can be made by the “agreement of the parties, applicable arbitration rules, or governing law.” 71 If these are silent, the arbitrator is expected to act “according to the same standards as the third arbitrator.” 72 This means that party-appointed arbitrators are to be neutral absent any express provision to the contrary. 73

66. Id. Canon VIII.

67. The revisions mention that arbitrators have “a responsibility not only to the parties but also to the process of arbitration itself.” Working Draft 2001, supra note 4 Canon LA.

68. MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard IX (2000). Canon IX is entitled “Obligations to the Mediation Process: Mediators Have a Duty to Improve the Practice of Mediation.” Id. The comment to the canon states: “Mediators are regarded as knowledgeable in the process of mediation. They have an obligation to use their knowledge to help educate the public about mediation; to make mediation accessible to those who would like to use it; to correct abuses; and to improve their professional skills and abilities.” Id. cmt. A reference to ADR pro bono work would be a useful addition and increase the level of respect for ADR.

69. Working Draft 2001, supra note 4 Canon IX.A.

70. Id.

71. Id.

72. Id.

73. The 1977 Code reached the opposite result, namely, that absent an agreement to the contrary, party-appointed arbitrators are presumed to be non-neutral. CODE OF ETHICS, supra note 1, at Introduction. This may be a good example of the current working group attempting to concede on some points to the norms of international practice.
The proposed revisions also address the area of ex parte communications prior to any determination of whether a party-appointed arbitrator will be neutral or non-neutral; the revisions call for such an arbitrator to act in the same manner as neutral arbitrators, with the same general restrictions and specific exceptions.  

The revisions also discuss special obligations of party-appointed arbitrators. As a general matter, the neutral party-appointed arbitrators will be expected to behave similarly to arbitrators in single arbitrator proceedings, and they may only accept appointment if confident that they "can serve independently from the parties, potential witnesses and the other arbitrators." The revisions also provide that party-appointed neutral arbitrators may have "special experience or expertise in the areas of business, commerce or technology" involved in the arbitration and may entertain views on "general issues or approaches likely to arise in the arbitration." However, they may not serve if they have "prejudged any of the specific factual or legal determinations to be addressed in the arbitration."

Neutral party-appointed arbitrators are not obligated to withdraw if requested to do so by the other party, as long as they can serve impartially. In ruling out challenges to party-appointed arbitrators, the committee rightly seeks to protect the forum chosen by the parties to an agreement. If an agreement allows a party to choose its preferred arbitrator, permitting challenges to that agreement would undermine the terms of such an agreement. Alternatively, there is a valid argument that closing the door to challenges creates a greater risk to the arbitration process. That is to say, not providing an opportunity for challenges and having a resolution before a proceeding begins may encourage greater post-award litigation, raising issues that could arguably have been dealt with at the outset.

74. See earlier discussion of ex parte communications, supra Part II.A.
75. Working Draft 2001, supra note 4 Canon I.B.
76. Id. Canon IX.C(1).
77. Id.
78. Id. Canon IX.C(2).
The word "ethics" is found somewhere in every daily newspaper. It is part of our lawyer’s code. It is a required subject at ABA approved law schools. What is ethical, however, is far from clear as many contexts involve judgment calls which hover somewhere between right and wrong. I recall from my experience on the New York State Commission on Government Integrity the operating rule of its ethics committee for staff and members, if you had to approach the committee for guidance, that fact alone answered the question. That is to say, disclose it, or if it had to do with entering into a relationship while serving, do not do it. The revisions also evidence movement toward that guidance in the following disclosure section comment: "Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure."79

Robert Holtzman and his colleagues deserve a huge debt of gratitude for taking on the difficult task of arbitrator ethics in our twenty-first century world. Codes of ethics are essential in promoting ethical consciousness and providing much needed guidance for the legal profession. As William Safire has noted: "Talk of ethics is not just academic. It is part of our life and the best part of our life."80 At the end of the day, however, the individual conscience must be the touchstone. Err on the side of disclosure, as Justice White noted in Commonwealth Coatings. Make every effort to show parties a sensitivity to "right conduct" and to the impact appearances have on public confidence and on parties to arbitration proceedings. ADR has a noble history and its future depends upon the strength of its ethical foundations.

79. Id. Canon II.B.
80. Luncheon address at a 1980s forum on "Ethics in America" by the New York Times.