05.14.15

The College of Labor and Employment Lawyers Semi-Annual Meeting

Proskauer

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THE COLLEGE OF LABOR AND EMPLOYMENT LAWYERS
New York, Connecticut, Northern New Jersey Semi Annual Meeting

May 14, 2015

At Proskauer Rose LLP *Eleven Times Square (at 42nd Street)
*New York, NY 10036

5:30-8:30 P.M. Presentations, Panel Discussion and Question & Answer Period
– 3.5 Hours CLE credit (2.0 ethics) –

Regional Chair for the College and Program Moderator
Evan J. Spelfogel, Epstein Becker & Green, P.C.

Host
Kathleen M. McKenna, Proskauer

Greetings – Alan Epstein, Spector Gordon & Rosen, Vice President, College of Labor and Employment Lawyers

Part I – Ethics in Labor and Employment Arbitration

- Robert L. Douglas
  Formerly Assistant Dean, Hofstra University Law School, and Prominent Arbitrator
- John Gaal
  Bond Schoeneck & King
- Cara Greene
  Outten & Golden

Part II- The NLRB's New Representation/Election Procedures and Rules

- Karen Fernbach
  NLRB Regional Director, Region 2, New York
- David E. Leach
  NLRB Regional Director, Region 22, Newark, NJ
- James G. Paulsen
  NLRB Regional Director, Region 29, Brooklyn

THE COLLEGE OF LABOR AND EMPLOYMENT LAWYERS, INC.

PRINCIPLES OF CIVILITY AND PROFESSIONALISM FOR ADVOCATES

Preamble

As a Fellow of The College of Labor and Employment Lawyers, I recognize that I have a special obligation to ensure that our system of justice works fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all practitioners, but I will also conduct myself in accordance with the following Principles of Civility and Professionalism as guidance for Fellows when dealing with clients, opposing parties, their counsel, the courts, other adjudicators, arbitrators, mediators and neutrals, and the general public.

A. With respect to client(s):

1. Fellows should be loyal and committed to their client's cause. Fellows should not permit that loyalty and commitment to interfere with their ability to provide clients wixth objective and independent advice.
2. Fellows should endeavor to accomplish their client's objectives in all matters as expeditiously and economically as possible.
3. Fellows should counsel their clients with respect to mediation, arbitration and other forms of alternative dispute resolution in appropriate cases.
4. Fellows should advise their clients against pursuing litigation (or any other course of action) that is without merit, and against insisting on tactics which are intended to unduly delay resolution of a matter or to harass or drain the financial resources of the opposing party.
5. Fellows should advise their clients, colleagues and co-workers, and demonstrate by example, that civility and courtesy are not to be equated with weakness.
6. Fellows should counsel their clients that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation, and should abide by the client's decisions concerning the objectives and strategies of the representation.

B. With respect to opposing parties and their counsel:

1. Fellows should be zealous advocates, but should treat opposing counsel, opposing parties, tribunals and tribunal staff with courtesy, civility, respect and dignity, conducting business in a professional manner at all times.
2. In litigation and other proceedings, Fellows should zealously advocate for their clients, consistent with their duties to the proper functioning of our judicial system.
3. Fellows should consult with opposing counsel before scheduling depositions, meetings and hearings, and be cooperative with opposing counsel when scheduling changes are requested.
4. Fellows should refrain from utilizing litigation or any other course of conduct to harass the opposing party.
5. Fellows should refrain from engaging in excessive or abusive discovery tactics.
6. Although delay may be necessary or appropriate in certain circumstances, Fellows should refrain from utilizing improper delaying tactics.
7. In depositions, proceedings and negotiations, Fellows should act with dignity, avoiding groundless objections and maintaining a courteous and respectful demeanor towards all other persons present.
8. Fellows should be guided by the clients' goals in completing a transaction. Pride of authorship, when matters of substance are not involved, only contributes to delay and cost in a transaction.
9. Fellows should clearly identify for other counsel or parties all changes that they have made in documents submitted to them for review.

C. With respect to the courts and other tribunals:

1. Fellows should recognize that the proper functioning of our system of justice is enhanced by both vigorous and zealous advocacy and civility and courtesy.
2. Where consistent with the clients' interests and instructions, Fellows should communicate with opposing counsel or parties in an effort to minimize or resolve litigation.
3. Fellows should voluntarily withdraw claims or defenses when it becomes apparent that they do not have merit.
4. Fellows should refrain from filing frivolous claims, motions or responses thereto.
5. Fellows should make reasonable efforts to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery.
6. Fellows should attempt to resolve by agreement objections to matters contained in the opponents' pleadings and discovery requests or responses.
7. Fellows should notify opposing counsel and, if appropriate, the court or other tribunal, as early as possible when scheduled hearings, meetings or depositions must be cancelled, postponed or rescheduled.
8. Fellows should verify the availability of known key participants and witnesses before dates for hearings or trials are set — or, if that is not feasible, immediately after such dates have been set — so that the court (or other tribunal) and opposing counsel or party can be promptly notified of any scheduling conflicts.
9. Fellows should be punctual in court proceedings, hearings, arbitrations, conferences, depositions and other meetings.
10. Fellows should approach all tribunals with candor, honesty, diligence and utmost respect.

D. With respect to the public and our system of justice:

1. Fellows should remember that, in addition to a commitment to their clients' causes, their responsibilities as lawyers and Fellows of the College include a devotion to the public good.
2. Fellows should endeavor to keep current in the areas of law in which they practice and, when necessary, to associate with, or refer clients to, others knowledgeable in a field of practice in which they do not have the requisite experience.
3. Fellows should conduct themselves in a manner that reflects acceptance of their obligations as Fellows of the College and as members of a self-regulating profession. Fellows should also encourage fellow lawyers to conduct themselves in accordance with the standards set forth in these Principles and other standards of civility and professionalism.
4. Fellows should be mindful of the need to conduct themselves in a way that will enhance the image of the legal profession in the eyes of the public, and should be so guided when considering methods and contents of advertising.
5. Fellows should conduct themselves in a manner that reflects acceptance of their obligation as attorneys to contribute to public service, to the improvement of the administration of justice and to the provision of uncompensated time and civic influence on behalf of those persons who do not have access to adequate legal assistance.

Insert Tab 2

EPSTEIN BECKER GREEN

Evan J. Spelfogel

Member of the Firm

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New York
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EVAN J. SPELFOGEL is a Member of Epstein Becker & Green, P.C., in the labor, employment, and employee benefits practices. Based in the firm's New York office, he represents management and benefit providers in all areas of employment law, labor, and employee relations.

Mr. Spelfogel's experience includes the following:

- Representing management in all aspects of employment law, including age, sex, race, religion, national origin and disability discrimination before the EEOC and deferral agencies, and in state and federal courts
- Counseling clients and litigating concerning FLSA and state wage and overtime, Davis-Bacon Act and prevailing rate matters; affirmative action plans; human resource audits; employee handbooks and policies; drug and alcohol programs; wrongful discharge claims; breach of employment, confidentiality and noncompete contracts; National Labor Relations and Railway Labor Act matters; union avoidance strategies, organizational campaigns and decertification proceedings; strikes and picketing; union negotiations and arbitration; safety laws and regulations; workplace violence, negligent hiring and/or retention; independent contractor vs. employee issues; due diligence in acquisitions and mergers; and employee benefits/ERISA/fiduciary and MPPAA withdrawal liability matters
- Conducting grievance and arbitration hearings, advising on the creation and implementation of non-union alternative dispute resolution procedures (ADR) and the mediation and arbitration of statutory employment discrimination claims.

After graduating from Harvard College and the Columbia University Law School, Mr. Spelfogel served five years with the United States Department of Labor, Office of the Solicitor and the National Labor Relations Board in Washington, D.C., Boston, and New York.

Mr. Spelfogel has served as an adjunct professor at Baruch College of the City College of New York, and as a lecturer in labor law at St. John's University, and at annual labor and employment institutes of New York University, Southern Methodist University, Boston University, and the University of Washington. He has written, edited and published numerous articles, books and book chapters on a broad range of issues, including wage and hour collective actions, comparable worth and pay equity, employment discrimination, wrongful discharge, retiree health care, plant closings and reductions in work force, e-mail and workplace privacy, union picketing and handbilling on private property, NLRB representation and unfair labor practice proceedings, the interaction of ERISA, the ADA and the NLRA, pregnancy disability, sexual harassment and alternative dispute resolution.

A Former Chair of the New York State Bar Association's (NYSBA) Labor & Employment Law Section, Mr. Spelfogel continues to serve on its Executive Committee and as a member of the Executive Committee of the NYSBA's Dispute Resolution Section. He has also served on the American Bar Association's (ABA) Labor & Employment Law Section's governing Council and as a Delegate to the Houses of Delegates of both the ABA and the NYSBA.

Mr. Spelfogel was awarded the 2014 Samuel M. Kaynard Award for Excellence in the Fields of Labor & Employment Law, given annually in recognition of those who hold strong ideals, display keen legal acumen, and make outstanding contributions to the fields of labor and employment law. He was also elected to the College of Labor and Employment Lawyers as a Fellow, the highest recognition by one's colleagues of sustained outstanding performance in the profession, exemplifying integrity, dedication, and excellence. Mr. Spelfogel is currently listed in *The Best Lawyers in America; New York Super Lawyers - Metro Edition; PLC Which Lawyer? Yearbook; Who's Who in America; Who's Who in American Education; Who's Who in Industry and Finance; Who's Who Legal: The International Who's Who of Management Labour & Employment Lawyers;* and *Who's Who in the World.*

Education

Columbia University School of Law (J.D., 1959); Harvard University (A.B., 1956)

Bar Admissions

Massachusetts and New York

Court Admissions

- U. S. Supreme Court
- First, Second, Fourth and Ninth Circuits, U.S. Courts of Appeals
- D MA, SD NY, ED NY, ND NY, ND OH, D CO

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Related Practices
Employment Litigation & Arbitration
Employment Law Counseling & Training
Class/Collective Action
Labor-Management Relations
Reductions in Force / Managing Change
Strategic Corporate Planning

Education
Boston College Law School, J.D., 1978

St. Peter's College, B.A., 1975
summa cum laude

Bar Admissions
New York
New Jersey

Kathleen M McKenna

Partner

Kathleen M. McKenna is a partner in the Labor & Employment Law Department. With a formidable track record for success in major employment matters, she has extensive experience litigating employment disputes of all types, including defending employers against claims alleging all forms of discrimination, sexual harassment, retaliation, wrongful discharge, wage and hour and breach of contract. Her clients include major multi-national businesses, such as television networks, pharmaceutical companies, international retailers and law firms.

Adept at counseling clients at every turn of the litigation process, Kathleen employs a creative mix of litigation experience and business acumen to determine which cases should be litigated in court, which should be resolved in some alternative forum and which can and should be settled. While she is regularly successful on her clients' behalf through negotiation and dispositive motions, she possesses significant jury trial experience, and is well-versed in all forms of alternate dispute resolution.

Kathleen is regularly called upon to support clients with strategies, counseling and training to help them avoid litigation and government investigations, and provides practical advice on all workplace-related issues to today's top employers. These topics include employee discharge and discipline, reductions in force, employment policies and procedures, and compliance with federal, state and local employment laws.

Kathleen also has significant experience dealing with traditional labor matters. She has litigated the full range of labor proceedings and has served as the chief spokesperson or advisor in numerous collective bargaining negotiations. She also has advised management on National Labor Relations Act issues, including union organizing campaigns and representation elections, strikes, picketing, plant closings and work transfers, and purchase and acquisition issues.

Kathleen is a member of the College of Labor & Employment Lawyers. She is also a sought after lecturer on labor and employment issues.

Court Admissions

U.S. District Court, New Jersey

U.S. Court of Appeals, Seventh Circuit

U.S. District Court, New York, Southern District

U.S. District Court, New York, Eastern District

U.S. Court of Appeals, Third Circuit

U.S. Court of Appeals, Second Circuit

U.S. District Court, New York, Northern District

U.S. Supreme Court

Memberships

American Bar Association (Law and Employment Law Section, Litigation Law Section)

New York State Bar Association (Labor and Employment Law Section)

New Jersey State Bar Association (Labor and Employment Law Section)

College of Labor & Employment Lawyers

Awards & Recognition

Chambers USA: Labor & Employment 2007-2014

Best Lawyers in America 2005-2015

Top 50 Female *New York Super Lawyers* 2010-2014

Top 100 *New York Super Lawyers* 2012-2014

New York Super Lawyers 2010-2014

The International Who's Who of Management Labour & Employment Lawyers 2012-2013

Fellow, College of Labor and Employment Lawyers

US Legal 500: Labor & Employment: Workplace & Employment Counseling 2009-2010, 2013-2014

US Legal 500: Labor & Employment: Labor & Employment Litigation 2011-2013

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Philadelphia, PA 19103
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Practice Area(s)
Commercial Litigation
Employment Law
Professional Liability and Malpractice Litigation

Admissions
Pennsylvania, 1969
U.S. District Court Eastern District of Pennsylvania
U.S. District Court Middle District of Pennsylvania
U.S. Court of Appeals 3rd Circuit
U.S. Court of Appeals 7th Circuit
U.S. Court of Appeals 9th Circuit
U.S. Supreme Court

Education
Temple University School of Law
J.D. 1969

Temple University
B.S. (Journalism) 1967

Professional Organizations
The College of Labor and Employment Lawyers, Fellow and Member of the National Board

National Employment Law Association

Philadelphia Bar Association

Pennsylvania Bar Association

American Bar Association

Third Circuit Bar Association

American Association for Justice

Temple American Inn of Court, Master, President 2001-2002

USDC for the E.D. Pa. - Employment Litigation Panel, Mentor

Alan B. Epstein

Alan B. Epstein is the chair of Spector Gadon & Rosen's Employment Law Practice Group. He has litigated complex claims before courts throughout the United States and is admitted to practice before the state and federal courts of Pennsylvania, the United States Court of Appeals for the Third, Seventh and Ninth Circuits, and the United States Supreme Court.

Mr. Epstein concentrates his practice in civil litigation in state and federal courts, with special emphasis on litigating claims and giving transactional advice in the areas of employment rights, civil rights, and constitutional torts. He also represents professionals and organizations of professionals in the many unique problems that arise in the practice of law, medicine, accounting, insurance, real estate, stockbrokerage, pharmacy, and architecture. He is a frequent lecturer and has served as an expert witness in the areas of employment law and professional responsibility. In 2000, he was elected to Fellowship in the prestigious College of Labor and Employment Lawyers and has been selected to serve a three-year term on the Board of Governors beginning January 2011. He has been named as one of the Best Lawyers in America in the publication of that name for over ten years and has been a top 100 Superlawyer in Pennsylvania. He has also been selected as one of the nation's 500 Leading Lawyers (2010), Top 500 Plaintiff's Lawyers (2009), and Top 500 Litigators (2006) by Lawdragon. He is an active member of the National Employment Lawyers Association, and a volunteer mentor for the Employment Litigation Panel of the United States District Court for the Eastern District of Pennsylvania. He has served as a national leader in the American Inns of Court movement, is an active member of the Philadelphia, Pennsylvania and American Bar Associations, and the American Association for Justice.

In the context of significant litigation in the employment law area, he is well known for his participation in high profile litigation for individuals and corporate entities (including the representation of a young, HIV-positive attorney against a prestigious Philadelphia law firm that received national attention because of the award-winning film Philadelphia starring Tom Hanks and Denzel Washington and daily coverage of the trial by Court TV and Cable News Network) and his frequent representation of local and national sports figures, broadcast personalities, and officers and directors of large national corporations who require his service in connection with litigation and negotiation of their contracts of employment.

Mr. Epstein was also the founder and President/CEO of JUDICATE, The National Private Court System, a company coordinating private dispute resolution services for approximately 700 former judges throughout the United States and its territories. He has lectured in the area of alternative dispute resolution and serves as a mediator and arbitrator by private appointment and through certification by state and federal courts.

Robert L. Douglas

Robert L. Douglas is an Attorney, Mediator, and Arbitrator. He has a B.S. from the NYS School of Industrial and Labor Relations at Cornell University; a J.D. from Hofstra Law School, where he served as the Managing Editor of the Law Review; and an LL.M. in Labor Law from the New York University School of Law. He has over thirty five years of experience in dispute resolution (mediation and arbitration) in workplace disputes in the public and private sectors throughout the United States and also has mediated commercial disputes. He served as an Assistant Dean and Special Professor of Law (in Dispute Resolution, Employment Law, Labor Arbitration, Labor Law, and Sports Law) at the Hofstra University Law School from 1982-1994. He taught courses in business subjects at LaGuardia Community College and has experience as an Apprentice Electrician in Local 3 IBEW and the NYC Construction Industry. He frequently teaches arbitrator ethics for the American Arbitration Association, Cornell University, and professional organizations. He has published articles about arbitrator ethics and about remedies for violations of the National Labor Relations Act, as amended. He is a member of the National Academy of Arbitrators and of the New and District of Columbia Bars.

John Gaal

Mr. Gaal is a Member of Bond, Schoeneck & King, PLLC, practicing in its Syracuse and New York City offices. He is a graduate of the University of Notre Dame (1974) and the Notre Dame Law School (1977), where he served as an editor of the Notre Dame Law Review. Following law school, he clerked with the U. S. Court of Appeals for the District of Columbia Circuit. His practice focuses on the representation of management in the full range of Labor and Employment Law matters. Although Mr. Gaal's practice cuts across all industry lines, he has particular experience in the Higher Education, Construction and Health Care sectors. He has co-chaired Bond's Higher Education Practice Group, Chaired its Ethics Committee, and served on its Executive Committee. Mr. Gaal's practice also extends to matters of professional responsibility.

He is listed in The Best Lawyers in America for both Labor and Employment Law and Education Law, is a Fellow of both the American Bar Foundation and the College of Labor and Employment Lawyers, and is a former Chair of the Labor and Employment Law Section of the New York State Bar Association.

Cara E. Greene

Cara E. Greene is a partner at Outten & Golden LLP, where she represents employees in litigation and negotiation in all areas of employment law, including executive and professional contracts and compensation; lawyers as clients; discrimination class actions; whistleblowing; and discrimination based on disability, pregnancy, and family responsibilities. She is Co-Chair of O&G's Family Responsibilities and Disability Discrimination Practice Group and is active in the Financial Services Practice Group and the Executives and Professionals Practice Group.

In addition to reviewing and negotiating employment contracts and compensation guarantees, as well as severance agreements and other exit arrangements, Ms. Greene has litigated both individual and class action cases on behalf of a variety of employees including low-wage hourly workers, highly compensated professionals, and employees in the financial services industry.

She is Secretary of the New York State Bar Association's Labor and Employment Law Section and sits on its Executive Committee; an active member of the American Bar Association's Labor and Employment Law Section (Employment Rights and Responsibilities and Ethics and Professional Responsibilities Committees); a member of the National Employment Lawyers Association and its New York affiliate, NELA/NY; and a member of the New York City Bar Association. Ms. Greene is a frequent speaker at employment law programs and is on the Board of Editors for the Law Firm Partnership and Benefits Reporter. She has been recognized by Super Lawyers (New York Metro Region).

Karen P. Fernbach

aren P. Fernbach was appointed Regional Director for the Manhattan Region of the National Labor Relations Board in December 2011. Since her hire by the Board's New York office in 1977, she has served as Regional Attorney, Supervisory Attorney, Trial Specialist, and Staff Attorney. She graduated from St. John's University School of Law in 1977 and immediately commenced her career with the NLRB. As the Regional Director, Ms. Fernbach is responsible for the administration and enforcement of the National Labor Relations Act in the counties of New York, Bronx, Westchester, Rockland, Putnam, and Orange.

Ms. Fernbach is also an active member of both the Labor and Employment Sections of the NYS and NYC Bar Associations, Member of the Advisory Board of the Cornell Institute of Labor Relations, Executive Board Member of the Labor and Employment Center of St. John's School of Law, and Executive Board Member of the Labor & Employment Center of NYU School of Law. She is an Adjunct Professor at both St. John's University School of Law and Hofstra University School of Law. She has taught Labor Law, Advanced Labor Law, Labor Law-Selected Topics, and Labor & Employment Arbitration. She has lectured before many groups on current issues affecting both labor and management. These organizations have included the Labor Employment Relations Association, Academy of Labor and Employment Lawyers, New York State Bar Association, New York City Bar Association, Practicing Law Institute, the American Conference Institute and Cornell Institute of Labor Relations.

David E. Leach III

David E. Leach III is the Regional Director of the National Labor Relations Board in its Newark Office. Since his hire in 1976, he has served as a Staff Attorney, a Trial Specialist, Supervisory Attorney, Deputy Regional Attorney, and Regional Attorney in the Board's New York Office. In his most recent position, Mr. Leach assists the General Counsel of the National Labor in administering the National Labor Relations Act in the Northern half of New Jersey, a position he assumed in July 2014.

Mr. Leach is a 1971 graduate of Cathedral College, Douglaston, New York, the Seminary for the Diocese of Brooklyn. After graduation, he joined the staff of Mayor John Lindsay and worked on budget planning for the City's social service programs. He graduated from Brooklyn Law School in 1976, after which he commenced his career with the NLRB. Mr. Leach was an instructor at the Xavier Labor Institute from 1979 to 1985, where he taught employees and first line managers about employee rights under the National Labor Relations Act. He has been an adjunct professor at the Joseph L. Mailman School of Public Health at Columbia University since 1984 where he has taught graduate classes in collective bargaining in the health care industry. He is also an adjunct professor of law at Brooklyn Law School since 2001, where he teaches courses in labor law, advanced labor law and a seminar in collective bargaining. He has lectured before various international labor groups and US Army War College in Carlisle, Pa. on policy questions affecting labor and management.

James G. Paulsen

Mr. Paulsen is the Regional Director of the Brooklyn Regional Office (Region 29) of the National Labor Relations Board and was appointed to that position on December 28, 2011. Prior to his appointment as Director, he served as an Assistant General Counsel, in Division of Operations-Management with oversight over eight Regional Offices. He is a member of Senior Executive Service since 1999. In Operations, he helped to coordinate General Counsel policy on utilization of Section 10(j) injunctive relief, chaired the Field Quality Committee and was a lead on the development of NxGen, the NLRB's case management system. In 2003, Mr. Paulsen received a Presidential Rank Award for distinguished service as a Senior Executive. For six months in 2002, Mr. Paulsen served as the Acting Regional Director of the New Orleans Regional Office (Region 15).

Mr. Paulsen began his career with the NLRB as an attorney in the Division of Advice in 1978, worked in the Manhattan (Region 2) and Brooklyn (Region 29) Regional Offices as a Field Attorney, was promoted in 1989 to a Supervisory Attorney in Region 2 and in 1996 to Deputy Assistant General Counsel in Operations–Management. Mr. Paulsen received his B.A. degree from Davidson College, Davidson, North Carolina in 1974, graduating cum laude, and his J.D. degree, with high honors, from the University of Florida Law School in Gainesville, Florida in 1976. During law school, he also served as the Editor-in-Chief of the University of Florida Law Review.

Insert Tab 3

CODE

OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES

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

As amended and in effect September 2007

FOREWORD

This "Code of Professional Responsibility for Arbitrators of Labor-Management Disputes" supersedes the "Code of Ethics and Procedural Standards for Labor-Management Arbitration," approved in 1951 by a Committee of the American Arbitration Association, by the National Academy of Arbitrators, and by representatives of the Federal Mediation and Conciliation Service.

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

Chair
William E. Simkin

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

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

Representing National Academy of Arbitrators
Sylvester Garrett
Ralph T. Seward

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

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

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

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

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

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

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

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PREAMBLE

Background

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

Voluntary arbitration rests upon the mutual desire of management and labor in each collective bargaining relationship to develop procedures for dispute settlement which meet their own particular needs and obligations. No two voluntary systems, therefore, are likely to be identical in practice. Words used to describe arbitrators (Arbitrator, Umpire, Impartial Chair, Chair of Arbitration Board, etc.) may suggest typical approaches, but actual differences within any general type of arrangement may be as great as distinctions often made among the several types.

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

The standards of professional responsibility set forth in this Code are intended to guide the impartial third party serving in all of these diverse procedures.

Scope of Code

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

The word "arbitrator," as used hereinafter in the Code, is intended to apply to any impartial person, irrespective of specific title, who serves in a covered arbitration dispute

procedure in which there is conferred authority to decide issues or to make formal recommendations.

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

Format of Code

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

Application of Code

Faithful adherence by an arbitrator to this Code is basic to professional responsibility.

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

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

1

ARBITRATOR'S QUALIFICATIONS AND RESPONSIBILITIES TO THE PROFESSION

A. General Qualifications

1. **Essential personal qualifications of an arbitrator include honesty, integrity, impartiality and general competence in labor relations matters.**

   An arbitrator must demonstrate ability to exercise these personal qualities faithfully and with good judgment, both in procedural matters and in substantive decisions.

   a. Selection by mutual agreement of the parties or direct designation by an administrative agency are the effective methods of appraisal of this combination of an individual's potential and performance, rather than the fact of placement on a roster of an administrative agency or membership in a professional association of arbitrators.

2. **An arbitrator must be as ready to rule for one party as for the other on each issue, either in a single case or in a group of cases. Compromise by an arbitrator for the sake of attempting to achieve personal acceptability is unprofessional.**

B. Qualifications for Special Cases

1. **When an arbitrator decides that a case requires specialized knowledge beyond the arbitrator's competence, the arbitrator must decline appointment, withdraw, or request technical assistance.**

   a. An arbitrator may be qualified generally but not for specialized assignments. Some types of incentive, work standard, job evaluation, welfare program, pension, or insurance cases may require specialized knowledge, experience or competence. Arbitration of contract terms also may require distinctive background and experience.

   b. Effective appraisal by an administrative agency or by an arbitrator of the need for special qualifications requires that both parties make known the special nature of the case prior to appointment of the arbitrator.

C. Responsibilities to the Profession

1. **An arbitrator must uphold the dignity and integrity of the office and endeavor to provide effective service to the parties.**

    a. To this end, an arbitrator should keep current with principles, practices and developments that are relevant to the arbitrator's field of practice.

2. **An arbitrator shall not make false or deceptive representations in the advertising and/or solicitation of arbitration work.**

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

    a. Arbitrators may disseminate or transmit truthful information about themselves through brochures or letters, among other means, provided that such material and information is disclosed, disseminated or transmitted in good faith to representatives of both management and labor.

4. **An experienced arbitrator should cooperate in the training of new arbitrators.**

2

RESPONSIBILITIES TO THE PARTIES

A. Recognition of Diversity in Arbitration Arrangements

1. **An arbitrator should conscientiously endeavor to understand and observe, to the extent consistent with professional responsibility, the significant principles governing each arbitration system in which the arbitrator serves.**

    a. Recognition of special features of a particular arbitration arrangement can be essential with respect to procedural matters and may influence other aspects of the arbitration process.

2. **Such understanding does not relieve an arbitrator from a corollary responsibility to seek to discern and refuse to lend approval or consent to any collusive attempt by the parties to use arbitration for an improper purpose.**

3. **An arbitrator who is asked to arbitrate a dispute under a procedure established unilaterally by an employer or union, to resolve an employment dispute or agency shop or fair share dispute, has no obligation to accept such appointment. Before accepting such an appointment, an arbitrator should consider the possible need to disclose the existence of any ongoing relationships with the employer or union.**

    a. If the arbitrator is already serving as an umpire, permanent arbitrator or panel member under a procedure where the employer or union has the right unilaterally to remove the arbitrator from such a position, those facts should be disclosed.

B. Required Disclosures

1. **Before accepting an appointment, an arbitrator must disclose directly or through the administrative agency involved, any current or past managerial, representational, or consultative relationship with any company or union involved in a proceeding in which the arbitrator is being considered for appointment or has been tentatively designated to serve. Disclosure must also be made of any pertinent pecuniary interest.**

    a. The duty to disclose includes membership on a Board of Directors, full-time or part-time service as a representative or advocate, consultation work for a fee, current stock or bond ownership (other than mutual fund shares or appropriate trust arrangements) or any other pertinent form of managerial, financial or immediate family interest in the company or union involved.

2. **When an arbitrator is serving concurrently as an advocate for or representative of other companies or unions in labor relations matters, or has done so in recent years, such activities must be disclosed before accepting appointment as an arbitrator.**

   An arbitrator must disclose such activities to an administrative agency if on that agency's active roster or seeking placement on a roster. Such disclosure then satisfies this requirement for cases handled under that agency's referral.

   a. It is not necessary to disclose names of clients or other specific details. It is necessary to indicate the general nature of the labor relations advocacy or representational work involved, whether for companies or unions or both, and a reasonable approximation of the extent of such activity.

   b. *An arbitrator on an administrative agency's roster has a continuing obligation to notify the agency of any significant changes pertinent to this requirement.*

   c. When an administrative agency is not involved, an arbitrator must make such disclosure directly unless the arbitrator is certain that both parties to the case are fully aware of such activities.

3. **An arbitrator must not permit personal relationships to affect decision-making.**

   Prior to acceptance of an appointment, an arbitrator must disclose to the parties or to the administrative agency involved any close personal relationship or other circumstance, in addition to those specifically mentioned earlier in this section, which might reasonably raise a question as to the arbitrator's impartiality.

   a. Arbitrators establish personal relationships with many company and union representatives, with fellow arbitrators, and with fellow members of various professional associations. There should be no attempt to be secretive about such friendships or acquaintances but disclosure is not necessary unless some feature of a particular relationship might reasonably appear to impair impartiality.

4. **If the circumstances requiring disclosure are not known to the arbitrator prior to acceptance of appointment, disclosure must be made when such circumstances become known to the arbitrator.**

5. **The burden of disclosure rests on the arbitrator. After appropriate disclosure, the arbitrator may serve if both parties so desire. If the arbitrator believes or perceives that there is a clear conflict of interest, the arbitrator should withdraw, irrespective of the expressed desires of the parties.**

C. Privacy of Arbitration

1. **All significant aspects of an arbitration proceeding must be treated by the arbitrator as confidential unless this requirement is waived by both parties or disclosure is required or permitted by law.**

   a. Attendance at hearings by persons not representing the parties or invited by either or both of them should be permitted only when the parties agree or when an applicable law requires or permits. Occasionally, special circumstances may require that an arbitrator rule on such matters as attendance and degree of participation of counsel selected by a grievant.

   b. *Discussion of a case at any time by an arbitrator with persons not involved directly should be limited to situations where advance approval or consent of both parties is obtained or where the identity of the parties and details of the case are sufficiently obscured to eliminate any realistic probability of identification.*

      A commonly recognized exception is discussion of a problem in a case with a fellow arbitrator. *Any such discussion does not relieve the arbitrator who is acting in the case from sole responsibility for the decision and the discussion must be considered as confidential.*

      Discussion of aspects of a case in a classroom without prior specific approval of the parties is not a violation provided the arbitrator is satisfied that there is no breach of essential confidentiality.

   c. *It is a violation of professional responsibility for an arbitrator to make public an award without the consent of the parties.*

      An arbitrator may ask the parties whether they consent to the publication of the award either at the hearing or at the time the award is issued.

      (1) If such question is asked at the hearing it should be asked in writing as follows:

      "Do you consent to the submission of the award in this matter for publication?

      ( ) ( )
      YES NO

      If you consent you have the right to notify the arbitrator within 30 days after the date of the award that you revoke your consent."

      It is desirable but not required that the arbitrator remind the parties at the time of the issuance of the award of their right to withdraw their consent to publication.

(2) If the question of consent to the publication of the award is raised at the time the award is issued, the arbitrator may state in writing to each party that failure to answer the inquiry within 30 days will be considered an implied consent to publish.

d. It is not improper for an arbitrator to donate arbitration files to a library of a college, university or similar institution without prior consent of all parties involved. When the circumstances permit, there should be deleted from such donations any cases concerning which one or both of the parties have expressed a desire for privacy. As an additional safeguard, an arbitrator may also decide to withhold recent cases or indicate to the donee a time interval before such cases can be made generally available.

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

D. Personal Relationships with the Parties

1. An arbitrator must make every reasonable effort to conform to arrangements required by an administrative agency or mutually desired by the parties regarding communications and personal relationships with the parties.

a. *Only an "arm's-length" relationship may be acceptable to the parties in some arbitration arrangements or may be required by the rules of an administrative agency. The arbitrator should then have no contact of consequence with representatives of either party while handling a case without the other party's presence or consent.*

b. *In other situations, both parties may want communications and personal relationships to be less formal. It is then appropriate for the arbitrator to respond accordingly.*

E. Jurisdiction

1. An arbitrator must observe faithfully both the limitations and inclusions of the jurisdiction conferred by an agreement or other submission under which the arbitrator serves.

2. A direct settlement by the parties of some or all issues in a case, at any stage of the proceedings, must be accepted by the arbitrator as removing further jurisdiction over such issues.

F. Mediation by an Arbitrator

1. **When the parties wish at the outset to give an arbitrator authority both to mediate and to decide or submit recommendations regarding residual issues, if any, they should so advise the arbitrator prior to appointment. If the appointment is accepted, the arbitrator must perform a mediation role consistent with the circumstances of the case.**

   a. Direct appointments, also, may require a dual role as mediator and arbitrator of residual issues. This is most likely to occur in some public sector cases.

2. **When a request to mediate is first made after appointment, the arbitrator may either accept or decline a mediation role.**

   a. *Once arbitration has been invoked, either party normally has a right to insist that the process be continued to decision.*

   b. *If one party requests that the arbitrator mediate and the other party objects, the arbitrator should decline the request.*

   c. *An arbitrator is not precluded from suggesting mediation. To avoid the possibility of improper pressure, the arbitrator should not so suggest unless it can be discerned that both parties are likely to be receptive. In any event, the arbitrator's suggestion should not be pursued unless both parties readily agree.*

G. Reliance by an Arbitrator on Other Arbitration Awards or on Independent Research

1. **An arbitrator must assume full personal responsibility for the decision in each case decided.**

   a. *The extent, if any, to which an arbitrator properly may rely on precedent, on guidance of other awards, or on independent research is dependent primarily on the policies of the parties on these matters, as expressed in the contract, or other agreement, or at the hearing.*

   b. When the mutual desires of the parties are not known or when the parties express differing opinions or policies, the arbitrator may exercise discretion as to these matters, consistent with the acceptance of full personal responsibility for the award.

H. Use of Assistants

1. **An arbitrator must not delegate any decision-making function to another person without consent of the parties.**

    a. *Without prior consent of the parties, an arbitrator may use the services of an assistant for research, clerical duties, or preliminary drafting under the direction of the arbitrator, which does not involve the delegation of any decision-making function.*

    b. *If an arbitrator is unable, because of time limitations or other reasons, to handle all decision-making aspects of a case, it is not a violation of professional responsibility to suggest to the parties an allocation of responsibility between the arbitrator and an assistant or associate. The arbitrator must not exert pressure on the parties to accept such a suggestion.*

I. Consent Awards

1. **Prior to issuance of an award, the parties may jointly request the arbitrator to include in the award certain agreements between them, concerning some or all of the issues. If the arbitrator believes that a suggested award is proper, fair, sound, and lawful, it is consistent with professional responsibility to adopt it.**

    a. *Before complying with such a request, an arbitrator must be certain of understanding the suggested settlement adequately in order to be able to appraise its terms. If it appears that pertinent facts or circumstances may not have been disclosed, the arbitrator should take the initiative to assure that all significant aspects of the case are fully understood. To this end, the arbitrator may request additional specific information and may question witnesses at a hearing.*

J. Avoidance of Delay

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

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

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

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

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

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

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

a. *If an appropriate award cannot be rendered within the required time, it is incumbent on the arbitrator to seek an extension of time from the parties.*

b. If the parties have agreed upon abnormally short time limits for an award after a case is closed, the arbitrator should be so advised by the parties or by the administrative agency involved, prior to acceptance of appointment.

K. Fees and Expenses

1. An arbitrator occupies a position of trust in respect to the parties and the administrative agencies. In charging for services and expenses, the arbitrator must be governed by the same high standards of honor and integrity that apply to all other phases of arbitration work.

An arbitrator must endeavor to keep total charges for services and expenses reasonable and consistent with the nature of the case or cases decided.

Prior to appointment, the parties should be aware of or be able readily to determine all significant aspects of an arbitrator's bases for charges for fees and expenses.

a. *Services Not Primarily Chargeable on a Per Diem Basis*

By agreement with the parties, the financial aspects of many "permanent" arbitration assignments, of some interest disputes, and of some "ad hoc" grievance assignments do not include a per diem fee for services as a primary part of the total understanding. *In such situations, the arbitrator must adhere faithfully to all agreed-upon arrangements governing fees and expenses.*

b. *Per Diem Basis for Charges for Services*

(1) *When an arbitrator's charges for services are determined primarily by a stipulated per diem fee, the arbitrator should establish in advance the bases for application of such per diem fee and for determination of reimbursable expenses.*

Practices established by an arbitrator should include the basis for charges, if any, for:

(a) hearing time, including the application of the stipulated basic per diem hearing fee to hearing days of varying lengths;
(b) study time;
(c) necessary travel time when not included in charges for hearing time;
(d) postponement or cancellation of hearings by the parties and the circumstances in which such charges will normally be assessed or waived;
(e) office overhead expenses (secretarial, telephone, postage, etc.);
(f) the work of paid assistants or associates.

(2) *Each arbitrator should be guided by the following general principles:*

(a) *Per diem charges for a hearing should not be in excess of actual time spent or allocated for the hearing.*
(b) *Per diem charges for study time should not be in excess of actual time spent.*
(c) *Any fixed ratio of study days to hearing days, not agreed to specifically by the parties, is inconsistent with the per diem method of charges for services.*
(d) *Charges for expenses must not be in excess of actual expenses normally reimbursable and incurred in connection with the case or cases involved.*
(e) *When time or expense are involved for two or more sets of parties on the same day or trip, such time or expense charges should be appropriately prorated.*
(f) *An arbitrator may stipulate in advance a minimum charge for a hearing without violation of (a) or (e) above.*

(3) *An arbitrator on the active roster of an administrative agency must file with the agency the individual bases for determination of fees and expenses if the agency so requires. Thereafter, it is the responsibility of each such arbitrator to advise the agency promptly of any change in any basis for charges.*

Such filing may be in the form of answers to a questionnaire devised by an agency or by any other method adopted by or approved by an agency.

Having supplied an administrative agency with the information noted above, an arbitrator's professional responsibility of disclosure under this Code with respect to fees and expenses has been satisfied for cases referred by that agency.

(4) *If an administrative agency promulgates specific standards with respect to any of these matters which are in addition to or more restrictive than an individual arbitrator's standards, an arbitrator on its active roster must observe the agency standards for cases handled under the auspices of that agency, or decline to serve.*

(5) *When an arbitrator is contacted directly by the parties for a case or cases, the arbitrator has a professional responsibility to respond to questions by submitting the bases for charges for fees and expenses.*

(6) *When it is known to the arbitrator that one or both of the parties cannot afford normal charges, it is consistent with professional responsibility to charge lesser amounts to both parties or to one of the parties if the other party is made aware of the difference and agrees.*

(7) *If an arbitrator concludes that the total of charges derived from the normal basis of calculation is not compatible with the case decided, it is consistent with professional responsibility to charge lesser amounts to both parties.*

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

3

RESPONSIBILITIES TO ADMINISTRATIVE AGENCIES

A. General Responsibilities

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

2. **An arbitrator must observe policies and rules of an administrative agency in cases referred by that agency.**

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

    a. It is not improper for a person seeking placement on a roster to request references from individuals having knowledge of the applicant's experience and qualifications.

    b. Arbitrators should recognize that the primary responsibility of an administrative agency is to serve the parties.

4

PREHEARING CONDUCT

1. **All prehearing matters must be handled in a manner that fosters complete impartiality by the arbitrator.**

   a. The primary purpose of prehearing discussions involving the arbitrator is to obtain agreement on procedural matters so that the hearing can proceed without unnecessary obstacles. If differences of opinion should arise during such discussions and, particularly, if such differences appear to impinge on substantive matters, the circumstances will suggest whether the matter can be resolved informally or may require a prehearing conference or, more rarely, a formal preliminary hearing. When an administrative agency handles some or all aspects of the arrangements prior to a hearing, the arbitrator will become involved only if differences of some substance arise.

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

5

HEARING CONDUCT

A. General Principles

1. **An arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument.**

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

   b. An arbitrator may: encourage stipulations of fact; restate the substance of issues or arguments to promote or verify understanding; question the parties' representatives or witnesses, when necessary or advisable, to obtain additional pertinent information; and request that the parties submit additional evidence, either at the hearing or by subsequent filing.

   c. *An arbitrator should not intrude into a party's presentation so as to prevent that party from putting forward its case fairly and adequately.*

B. Transcripts or Recordings

1. **Mutual agreement of the parties as to use or non-use of a transcript must be respected by the arbitrator.**

   a. *A transcript is the official record of a hearing only when both parties agree to a transcript or an applicable law or regulation so provides.*

   b. An arbitrator may seek to persuade the parties to avoid use of a transcript, or to use a transcript if the nature of the case appears to require one. *However, if an arbitrator intends to make appointment to a case contingent on mutual agreement to a transcript, that requirement must be made known to both parties prior to appointment.*

   c. If the parties do not agree to a transcript, an arbitrator may permit one party to take a transcript at its own cost. The arbitrator may also make appropriate arrangements under which the other party may have access to a copy, if a copy is provided to the arbitrator.

   d. Without prior approval, an arbitrator may seek to use a personal tape recorder to supplement note taking. The arbitrator should not insist on such a tape recording if either or both parties object.

6

POST HEARING CONDUCT

A. Post Hearing Briefs and Submissions

1. **An arbitrator must comply with mutual agreements in respect to the filing or nonfiling of post hearing briefs or submissions.**

   a. An arbitrator may either suggest the filing of post hearing briefs or other submissions or suggest that none be filed.

   b. When the parties disagree as to the need for briefs, an arbitrator may permit filing but may determine a reasonable time limitation.

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

B. Disclosure of Terms of Award

1. **An arbitrator must not disclose a prospective award to either party prior to its simultaneous issuance to both parties or explore possible alternative awards unilaterally with one party, unless both parties so agree.**

   a. Partisan members of tripartite boards may know prospective terms of an award in advance of its issuance. Similar situations may exist in other less formal arrangements mutually agreed to by the parties. In any such situation, the arbitrator should determine and observe the mutually desired degree of confidentiality.

C. Awards and Opinions

1. **The award should be definite, certain, and as concise as possible.**

   a. When an opinion is required, factors to be considered by an arbitrator include: desirability of brevity, consistent with the nature of the case and any expressed desires of the parties; need to use a style and form that is understandable to responsible representatives of the parties, to the grievant and supervisors, and to others in the collective bargaining relationship; necessity of meeting the significant issues; forthrightness to an extent not harmful to the relationship of the parties; and avoidance of gratuitous advice or discourse not essential to disposition of the issues.

D. Clarification or Interpretation of Awards

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

2. **Under agreements which permit or require clarification or interpretation of an award, an arbitrator must afford both parties an opportunity to be heard.**

E. Retaining Remedial Jurisdiction

1. **An arbitrator may retain remedial jurisdiction in the award to resolve any questions that may arise over application or interpretation of a remedy.**

    a. Unless otherwise prohibited by agreement of the parties or applicable law, an arbitrator may retain remedial jurisdiction without seeking the parties' agreement. If the parties disagree over whether remedial jurisdiction should be retained, an arbitrator may retain such jurisdiction in the award over the objection of a party and subsequently address any remedial issues that may arise.

2. **The retention of remedial jurisdiction is limited to the question of remedy and does not extend to any other parts of the award. An arbitrator who retains remedial jurisdiction is still bound by Paragraph D above, entitled "Clarification or Interpretation of Awards," which prohibits the clarification or interpretation of any other parts of an award unless both parties consent.**

F. Enforcement of Award

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

2. **In view of the professional and confidential nature of the arbitration relationship, an arbitrator should not voluntarily participate in legal enforcement proceedings.**

C. Ex Parte Hearings

1. **In determining whether to conduct an ex parte hearing, an arbitrator must consider relevant legal, contractual, and other pertinent circumstances.**

2. **An arbitrator must be certain, before proceeding ex parte, that the party refusing or failing to attend the hearing has been given adequate notice of the time, place, and purposes of the hearing.**

D. Plant Visits

1. **An arbitrator should comply with a request of any party that the arbitrator visit a work area pertinent to the dispute prior to, during, or after a hearing. An arbitrator may also initiate such a request.**

   a. *Procedures for such visits should be agreed to by the parties in consultation with the arbitrator.*

E. Bench Decisions or Expedited Awards

1. **When an arbitrator understands, prior to acceptance of appointment, that a bench decision is expected at the conclusion of the hearing, the arbitrator must comply with the understanding unless both parties agree otherwise.**

   a. *If notice of the parties' desire for a bench decision is not given prior to the arbitrator's acceptance of the case, issuance of such a bench decision is discretionary.*

   b. *When only one party makes the request and the other objects, the arbitrator should not render a bench decision except under most unusual circumstances.*

2. **When an arbitrator understands, prior to acceptance of appointment, that a concise written award is expected within a stated time period after the hearing, the arbitrator must comply with the understanding unless both parties agree otherwise.**

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OPINION NO. 24
May 24, 2006
Subject: Solicitation Impartiality i

This Opinion is rendered based upon Part 1, Section C of the Code, amended June 2003, which states in relevant part:

1
ARBITRATOR'S QUALIFICATIONS
AND RESPONSIBILITIES
TO THE PROFESSION

C. Responsibilities To The Profession

1. An arbitrator must uphold the dignity and integrity of the office and endeavor to provide effective service to the parties.

a. To this end, an arbitrator should keep current with principles, practices and developments that are relevant to the arbitrator's field of practice.

2. An arbitrator shall not make false or deceptive representations in the advertising and/or solicitation of arbitration work.

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

a. Arbitrators may disseminate or transmit truthful information about themselves through brochures or letters, among other means, provided that such material and information is disclosed, disseminated or transmitted in good faith to representatives of both management and labor.

Opinion: Arbitrators may engage in truthful and nondeceptive solicitation, provided that this conduct does not compromise or appear to compromise their impartiality. Solicitations directed to representatives of only one side, labor or management, create an appearance of partiality and, therefore, are improper. ii

Solicitations that violate the Code of Professional Responsibility for Arbitrators of Labor Management Disputes include:

(1) Disseminating or transmitting truthful information about the arbitrator's qualifications, attitudes toward arbitration, or willingness and availability to provide arbitral services to representatives of only one side, labor or management, rather than in good faith to representatives of both management and labor.

(A) An arbitrator's letters, brochures and other forms of written solicitation must make it clear that the communications are being sent to both sides.

(B) It is not a violation to send a written solicitation to members of a bar association, a LERA chapter, or other similar groups whose members include representative of both management and labor, as long as the communication indicates that it is being sent to the entire group.

(C) An arbitrator may respond to inquiries for biographical information from representatives of either labor or management.

(2) Purchasing ads or tables at testimonial dinners and the like that honor representatives of only one side, labor or management .

(A) It is not a violation to accept an invitation to or to purchase tickets to such an event because doing so does not connote sponsorship or solicitation.

(B) It is not a violation to accept an invitation to a general meeting or social event such as a wedding, birthday, holiday or retirement party sponsored by a representative of labor or management.

(3) Giving gifts to the parties in expectation of receiving work.

(A) Gifts of nominal value that are furnished to representatives of labor and management are not prohibited.

(4) Furnishing gifts, meals, tickets for sporting events, concerts or other types of entertainment to representatives of only one side, labor or management, or accepting such favors from only one side or the other.

(A) Such one sided behavior constitutes implicit solicitation, which encourages expectations in the party who receives or furnishes the favor and, thus, undermines the appearance of arbitral impartiality.

(B) It is not a violation for an arbitrator to invite both parties to lunch or dinner and pay for the meal.

(5) Participation in a private, onesidedn interview about an arbitrator's qualifications, attitudes or practices, whether initiated by the arbitrator or by a representative of labor or management.

(A) A onesided interview is permissible only after the arbitrator has confirmed that 1) the interview pertains to a specific appointment, and 2) the representatives of the absent party have given prior approval.

Background Note, Committee of Professional Responsibility and Grievances (CPRG), October21, 2004: Pursuant to a 2002 Consent Agreement and Order entered into between the Federal Trade Commission and the National Academy of Arbitrators(NAA), the NAA revised the Code of Professional Responsibility for Arbitrators of Labor Management Disputes. In addition, the NAA rescinded former Advisory Opinion Numbers 3, 4, 5, 14, 16, 17, 18, 19 and 21 that were initially issued under the unrevised Code. This opinion derives from the CPRG's reexamination of the solicitation aspects of the rescinded advisory opinions. Consequently, Advisory Opinion 24 is an omnibus opinion that was written under the revised Code and that conforms with the terms of the Consent Agreement and Order. iii

Reasons Considered in Reaching this Opinion:

Even though truthful, nondeceptive solicitations are permitted, there are limitations. An arbitrator, in accord with Part 1, Section C. 3 of the Code, must not engage in conduct that would compromise or appear to compromise the arbitrator's impartiality. This means that any solicitation must be evenhanded and transparently so.

A communication or other form of solicitation addressed to either management or labor alone, without the knowledge of the other, creates the appearance of partiality. A party who receives such a solicitation and responds favorably may conclude that the arbitrator, if selected, might be predisposed to rule in its favor. Further, the nonsolicited party also might question the arbitrator's impartiality if it learned about the one sided solicitation. To avoid these outcomes, all solicitations must involve representatives of both management and labor. Thus, where the same solicitation is sent separately to each party, the text of the solicitation should state that the identical communication also is being sent to the other side.

Other forms of solicitation may also violate Part 1, Section C. 3 of the Code. Gifts from an arbitrator to either management or labor alone suffer from the same defect as onesided communication. A recipient could understandably believe that the arbitrator might be predisposed to rule in its favor if chosen for an arbitration case. If gifts are given to both parties, they should be roughly comparable in nature and of limited value. An arbitrator should reject gifts or other favors offered by only one party.

Entertainment and gift giving are analogous forms of conduct. However, there is nothing improper with the arbitrator inviting both parties to lunch or dinner and paying for the meal.

Arbitrators having established relationships with parties to a collective bargaining relationship properly may exercise greater flexibility, so long as all dealings are transparent to both sides. For example, arbitrators who work with the same parties over a period of years may receive invitations to social events such as birthday parties, weddings or retirement banquets. Accepting such invitations is permissible and carries no connotation of solicitation or quid pro quo. Such attendance, however, should be disclosed to the other side if that party's representatives are not also present at the event. Sometimes the situation is reversed and the arbitrator is solicited by only one side, labor or management. For instance, if one party invites an arbitrator to be interviewed to determine his or her suitability for a particular assignment, it would be improper for the arbitrator to agree to the interview without the consent of the other party. Such a oneside discussion about the arbitrator's practices and beliefs puts the absent party at a disadvantage and compromises the appearance of impartiality.

Invited talks to a separate management or labor group, where no specific arbitral assignment is at stake, are not improper.

It also should be noted that Part 1, SectionC.1 of the Code requires the arbitrator to uphold the dignity and integrity of the office.

i This Opinion deals with solicitation, as opposed to advertising, and the adverse impact of improper solicitation on an Arbitrator's impartiality or appearance of impartiality.

ii Representatives are defined as any person working in the interests of labor or management, including, but not limited to, attorneys, law firm sand union or management officials.

iii Part II o ft he FTC Order orders the NAA to cease and desist from:

B.Regulating,restricting,impeding,declaringunethical,interferingwith,or advising against any solicitation of arbitration work, through advertising or other means, by any Arbitrator or by any organization with which Arbitrators are affiliated

PROVIDED THAT nothing contained in this Part shall prohibit Respondent from formulating, adopting, disseminating to its members, and enforcing reasonable ethics guidelines governing the conduct of its members with respect to representations that Respondent reasonably believes would be false or deceptive within the meaning of Section 5of the Federal Trade Commission Act, and

PROVIDED FURTHER THAT nothing contained in this Part shall prohibit Respondent from formulating, adopting, disseminating to its members, and enforcing reasonable ethics guidelines governing conduct that Respondent reasonably believes would compromise or appear to compromise the impartiality of Arbitrators. Such guidelines shall not prevent Arbitrators from disseminating or transmitting truthful information about themselves through brochures and letters, among other means; provided farther, however, that in the event that the NAA determines that the dissemination or transmission of such material may create an appearance of partiality, the NAA may promulgate reasonable guidelines that require, in a manner that is not unduly burdensome, that such material and information be disseminated or transmitted in good faith to representatives of both management and labor.

Thus, the NAA may permissibly regulate solicitation provided that the NAA determines that the "dissemination or transmission of such material may create an appearance of partiality." For the reasons explained in this opinion, the CPRG has made that determination and, therefore, is here promulgating guidelines as permitted by the FTC Order.

OPINION NO. 25

May 20, 2014

Subject: Duty of Disclosure (Ancillary Professional Relationships)

Issues:

What duty of disclosure, if any, exists where the arbitrator requests and/or grants favors to a party or advocate in the context of participation in the activities of a professional organization? What duty of disclosure, if any, exists where the arbitrator has, or has had, a student-teacher relationship with an advocate or a party?

Code Provisions:

1. Arbitrator' Qualifications and Responsibilities to the Profession

C. Responsibilities to the Profession

1. An arbitrator must uphold the dignity and integrity of the office and endeavor to provide effective service to the parties.

2. Responsibilities to the Parties.

B. Required Disclosures

3. An arbitrator must not permit personal relationships to affect decision-making. Prior to acceptance of an appointment, an arbitrator must disclose to the parties or to the administrative agency involved any close personal relationship or other circumstance, in addition to those specifically mentioned earlier in this section, which might reasonable raise a question as to the arbitrator's impartiality.

a) Arbitrators establish personal relationships with many company and union representatives, with fellow arbitrators, and with fellow members of various professional associations. There should be no attempt to be secretive about such friendships or acquaintances but disclosure is not necessary unless some feature of a particular relationship might reasonably appear to impair impartiality.

D. Personal Relationships with the Parties

1. An arbitrator must make every reasonable effort to conform to arrangements required by an administrative agency or mutually desired by the parties regarding communications and personal relationships with the parties.

a) Only an 'arm's length' relationship may be acceptable to the parties in some arbitration arrangements or may be required by the rules of an administrative agency. The arbitrator should then have no contact of consequence with representatives of either party while handling a case without the other party's presence or consent.

Circumstances:

A) Requests made or granted in the context of the activities of a professional organization.

There is a reasonable expectation that arbitrators will be active in bona fide professional organizations with advocates also actively participating. Examples include the various state, provincial and national bar associations, LERA, the College of Labor and Employment Lawyers, and Canadian Industrial Relations Association. The activities of these organizations may include committee work, seminars, meetings and conferences as well as cocktail receptions, dinners and other socially oriented events. Participation in such activities can lead to a variety of relationships between arbitrators and advocate as well as to increased visibility and employment opportunities. Arbitrators may want to or be asked to sponsor a particular advocate for membership, or may seek a reference from an advocate to be accepted as a member of an organization. Arbitrators may also want to speak or request advocates to speak on unpopular subjects or to take on difficult organizational tasks. In such contexts, the argument could be made that the arbitrator is seeking or granting favors leading to indebtedness or the appearance of partiality.

Opinion:

A) Requests or solicitations for speakers, referrals, nominations or responsibility within a professional organization are not solicitations for arbitration work and therefore are not covered in Advisory Opinion 24. Providing service to and participating in the activities of a professional organization fall within the Code Section 1C(1). This provision recognizes the duty to uphold the dignity and integrity of the office. Many professional organizations affirmatively promote such dignity and integrity. As a result, participation generally falls within the scope of Code Section 1C(1)and should be encouraged. Stated differently, such organizations and their positive impact would suffer should arbitrators decline membership in order to avoid a perennial duty of disclosure. In the Committee's view, the Code should not be interpreted to negatively impact professional organizations.

Participation in bona fide professional organizations is neutral by nature and, by definition, does not create the appearance of partiality. This includes setting up and speaking on panels, working with advocates in the context of committees, teams or projects, asking for and

responding to requests for membership references, as well as other activities inherent in the life of an organization.

There are instances, however, where the particular circumstances may create the appearance of partiality. Factors to consider in determining the need for disclosure include, but are not limited to: the nature of the relationship with the advocate; the duration of the relationship and whether it is current or past; the degree to which it is socially oriented as opposed to stemming from the business of the organization; and the expressed preferences of parties to any on-going arbitration arrangement (per Section 2D.1(a)).

If the relationship with an advocate or party exists outside the professional organization, the duty of disclosure is covered by Code Section 2B. The arbitrator should recognize that any feature of a relationship that might reasonably appear to impair impartiality should be disclosed under Code Section 2B(3).

Circumstances:

B) Student-teacher relationship.

It is entirely foreseeable and common in the course of a student-teacher relationship for the student to request the teacher to provide a recommendation for admission into a program or for employment, and such opportunities can often be with a party for whom the arbitrator is called on to serve as a neutral. In addition, after such a recommendation, the student may be accepted for employment and appear before the teacher as an advocate, or as an employee of a party to the dispute. Professors and teachers can accumulate hundreds if not thousands of past students over the course of a career, so that in some cases the past student is not recognized in any way by the arbitrator. By the same token, some relationships originating in the teaching environment last for years if not a lifetime.

Opinion:

B) The existence of a student-teacher relationship, standing alone, does not create a duty of disclosure. Parties are aware when they have selected an arbitrator who is engaged in the teaching profession. It is expected within student-teacher relationships that the teacher will issue recommendations for his/her students to be accepted into programs and/or employment positions which may advocate for either management or labor. Such recommendations may have occurred years earlier or be routine. Routine student-teacher relationships and recommendations do not warrant disclosure. By contrast, for example, in the case of a protégé, the appearance of partiality may exist. The best practice is for the arbitrator to disclose the student-teacher relationship (if the arbitrator remembers it), and in all cases to follow the tenets of Code Section 2B3 and determine whether some feature of the student-teacher relationship might reasonably appear to impair impartiality.

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The Ethical Standards for Labor Arbitrators: What Every Advocate Should Know

By Arbitrator Robert L. Douglas, Esq. and Jeffrey T. Zaino, Esq.

All labor arbitrators should know the standards of professional behavior outlined by the "Code of Professional Responsibility for Arbitrators of Labor-Management Disputes." The Code is a part of most, if not all, training materials for new labor arbitrators.

Unfortunately for the labor arbitration process as a whole, many advocates are completely unaware of the existence of the Code let alone the meaning and application of its provisions. Advocates should have an understanding of the Code to function most effectively in arbitrations.

This Article will provide an overview of the key Code provisions that affect both arbitrators and advocates. Such increased knowledge by advocates will promote the fundamental tenets of the arbitration process: speed, economy and justice.

History of the Code

In 1951, a committee formed by the American Arbitration Association (AAA), the National Academy of Arbitrators (NAA), and representatives from the Federal Mediation and Conciliation Service (FMCS) approved the "Code of Ethics and Procedural Standards of Labor-Management Arbitration." The 1951 Code established detailed ethical and "good practice" guidelines for labor arbitrators and an overall framework for the labor arbitration process in general. The AAA, NAA, and FMCS then revised the 1951 Code in 1972 by establishing the "Code of Professional Responsibility for Arbitrators of Labor-Management Disputes." The Code has been amended five times since 1972; the most recent amendments occurred in 2007.

The Code contains the core principles that have made arbitration so well-respected as a fair, honest, and impartial method to resolve disputes in the workplace. As the primary creator and overseer of the Code, the NAA has always recognized the vital importance of the Code to bolster the integrity of the arbitration process. The current President of the National Academy of Arbitrators, Roberta Golick, recently observed:

> We in the dispute resolution profession are fortunate to have a Code of Professional Responsibility that has been jointly adopted by the National Academy of Arbitrators, the American Arbitration Association, and the Federal Mediation and Conciliation Service. For several decades, the Code has functioned, in effect, as a constitution for our members and as a bill of rights for those who enlist our services.

Impartiality

In most cases, labor arbitrators are selected directly by the parties and advocates. Thus, they understand the importance of being known and respected by both the union and management advocates that rank and select them. This can be a challenging balancing act for the arbitrator, specifically new arbitrators, and can lead to the perception that some arbitrators intentionally split the difference in tough decisions to avoid upsetting either the union or management advocates. The drafters of the Code understood the danger of this perception by including Part 1 A 2 that provides: "[c]ompromise by an arbitrator for the sake of attempting to achieve personal acceptability is unprofessional." Advocates should be aware that when arbitrators intentionally split the difference, they are acting in an unethical manner and in violation of the Code.

Dignity/Integrity

Labor arbitrators and advocates interact on an ongoing basis at many professional and social events. Arbitrators routinely attempt to achieve greater visibility by speaking with advocates and by distributing business cards with the goal of soliciting business. Is such conduct ethical? Is it ethical for an arbitrator to advertise? The answer to both questions is yes, but Part 1 C of the Code does set standards by noting that "[a]n arbitrator shall not engage in conduct that would compromise or appear to compromise the arbitrator's impartiality. Arbitrators may disseminate or transmit truthful information about themselves through brochures or letters, among other means, provided that such material and information is disclosed, disseminated or transmitted in good faith to representatives of both management and labor." The NAA issued Advisory Opinion 24, which describes in detail permitted and prohibited approaches for arbitrators to solicit work.

Training New Arbitrators

The labor-management community always needs to develop the next generation of labor arbitrators. A special interest exists to enable an acceptable pool of younger and more diverse arbitrators to gain experience to become seasoned arbitrators. The profession is especially challenging to enter because most panels, like the AAA's panel, require that the arbitrator be neutral (i.e., not affili-

ated with or representing unions or management). The greatest training resource for a new arbitrator is an experienced arbitrator. Part 1 C 4 recognizes the importance of experienced arbitrators teaching aspiring arbitrators by emphasizing that "[a]n experienced arbitrator should cooperate in the training of new arbitrators."

Collusion

In arbitration, the parties control the arbitration process by deciding who will arbitrate the case and what procedures will be followed. What if, however, the advocates through collusion seek assistance from the arbitrator to issue an undisclosed consent award when, for political reasons or legal reasons they cannot publicly agree to the outcome. Is it ethical for the arbitrator to issue the undisclosed consent award? The Code in Part 2 A provides direction by pointing out that an arbitrator should, "refuse to lend approval or consent to any collusive attempt by the parties to use arbitration for an improper purpose." An arbitrator therefore has an explicit obligation to avoid participating in such improper collusion.

Duty to Disclose

Like a judge, an arbitrator should not permit his or her personal relationships to affect decision-making. A common disclosure with labor arbitrators that teach in a law school or in an undergraduate institution is that the advocate was a former student. Is it unethical if the arbitrator does not disclose that the advocate was a former student? The answer depends on the degree of the relationship. Part 2 B (2 B 3 a) of the Code indicates that, "[a]rbitrators establish personal relationships with many company and union representatives, with fellow arbitrators, and with fellow members of various professional associations. There should be no attempt to be secretive about such friendships or acquaintances but disclosure is not necessary unless some feature of a particular relationship might reasonably appear to impair impartiality." The Arbitrator bears the unconditional burden to disclose information to the parties. In doing so, some confusion has existed about the standard to determine the proper scope of disclosure. The judicial trend favors wider disclosure of relationships by using an inference of bias standard rather than a presumption of bias standard. Such wider disclosure, however, may have the unavoidable impact of enabling a party that seeks to delay an arbitration hearing to use the disclosure of information as a pretextual basis to insist on the recusal or disqualification of an arbitrator. Although such situations may occur, the importance of guaranteeing the impartiality of arbitrators outweighs the potential delay of some proceedings.

Privacy of Arbitration and Publishing Decisions

Arbitration in general is a private process. There exists no official public record and the process, unless the parties agree otherwise, is confidential. Advocates, however, oftentimes need resources such as published decisions to assess arbitrators during the arbitrator selection process. Some ADR providers publish redacted decisions but only with the consent of the parties. LexisNexis has over 9,000 labor decisions and is a wonderful resource for advocates. Can an arbitrator, however, unilaterally provide consent to have his or her decisions published? Part 2 C provides clear direction to the arbitrator noting, "[a]ll significant aspects of the arbitration proceeding must be treated by the arbitrator as confidential unless this requirement is waived by both parties or a disclosure is required of permitted by law." The Code sets forth a detailed procedure for arbitrators to obtain permission from the parties to publish a decision. Some arbitrators avail themselves of this opportunity whereas other arbitrators view the privacy of arbitration as a bar to the arbitrator becoming involved in the effort to publish an arbitration decision.

Ex Parte Communication/Ex Parte Hearings

The labor-management community in our nation is relatively small and it is likely that an arbitrator selected for a case will encounter either the union or management advocate in some social or professional context while the case is pending. Arbitrations should be mindful of the Code prohibitions on ex parte communications. The Code provides specific language in Part 2 D 1 and Part 4 1 b about avoiding ex parte communication. Exceptions do exist such as communication that is purely administrative and not substantive or if one party opts not to participate in the process. If a party decides not to participate in the arbitration proceeding, an arbitrator, pursuant to Part 5 C, "must be certain, before proceeding ex parte that the party refusing or failing to attend the hearing has been given adequate notice of the time, place, and purposes of the hearing."

Mediation by Arbitrator

Some labor arbitrators believe that if they are assigned to a case as an arbitrator that they are precluded from mediating that case. The Code, however, in Part F extensively discusses mediation and clarifies that an arbitrator, under certain circumstances, can mediate a labor arbitration case. Potential conflicts exist, however, when a labor arbitrator exerts too much pressure on the parties to mediate and when one party is clearly not receptive to mediating the matter. Part F2 c notes, "[a]n arbitrator is not precluded from suggesting mediation. To avoid the possibility of improper pressure, the arbitrator should not so suggest unless it can be discerned that both parties are likely to be receptive. In any event, the arbitrator's suggestion should not be pursued unless both parties readily agree." Either party retains the unilateral right at any time to insist that the arbitration go forward.

Use of Assistants

Some busy labor arbitrators enlist assistance to help with research and the preparation of decisions. When a

mentoring relationship exists between the experienced and the aspiring arbitrator, the new arbitrator frequently writes mock decisions or portions of decisions from actual cases for review by the experienced arbitrator. The Code discusses the use of assistants and explicitly notes in Part 2 H that "[a]n arbitrator must not delegate any decision-making function to another person without consent of the parties." The Code permits arbitrators to use assistants for "research, clerical duties, or preliminary drafting under the direction of the arbitrator, which does not involve the delegation of any decision-making process." The opportunity for aspiring arbitrators to engage in such preliminary drafting constitutes a valuable method of training newer arbitrators and sometimes enables such new arbitrators to obtain compensation from the experienced arbitrator for such efforts.

Consent Awards

In the arbitration process, advocates sometimes reach certain agreements concerning some or all of the issues and jointly request that the arbitrator include these agreements in an award. Part 2 I permits disclosed consent awards and undisclosed consent awards but notes that the arbitrator must believe that the "suggested award is proper, fair, sound, and lawful...." The Code cautions that, "an arbitrator must be certain of understanding the suggested settlement adequately in order to be able to appraise its terms. If it appears that pertinent facts or circumstances may not have been disclosed, the arbitrator should take the initiative to assure that all significant aspects of the case are fully understood. To this end, the arbitrator may request additional specific information and may question witnesses at a hearing."

Delay by Arbitrator

Popular and busy arbitrators sometimes accept additional cases notwithstanding the fact that they will be unavailable for months. Also, some arbitrators, due to their schedules, fail to render timely decisions. These types of delays undermine the process of arbitration. Advocates facing a delay by an arbitrator should be aware of Part 2 J that notes, "[i]t is a basic professional responsibility of an arbitrator to plan a work schedule so that present and future commitments will be fulfilled in a timely manner. When planning is upset for reasons beyond the control of the arbitrator, every reasonable effort should nevertheless be exerted to fulfill all commitments. If this is not possible, prompt notice should include reasonably accurate estimates of any additional time required. To the extent possible, priority should be given to cases in process so that other parties may make alternative arbitration arrangements."

Fees and Expenses

In most cases, except with permanent and rotating labor panels, the arbitrator sets his or her per diem, cancellation fee policy, and study time fees. The arbitrator's fees are listed on the panel card or resume that is distributed to the advocates. The Code addresses fees and expenses in Part 2 K by noting that "[a]n arbitrator must endeavor to keep total charges for services and expenses reasonable and consistent with the nature of the case or cases decided." One area of contention and confusion about fees is the wrongly held belief that there is some type of acceptable industry standard connecting the amount of hearing days to the amount of study days that can be billed (e.g., for every day of hearing, it is acceptable to charge two days of study time). In the absence of a special arrangement by the parties and the arbitrator, Part 2 K 1 b 2 b addresses any confusion about study time ratios by underscoring that: "[p]er diem charges should not be in excess of actual time spent."

Gifts to Agency Personnel

Arbitrators work with administrative agencies with the goal of being listed for consideration by the parties for many different potential cases. The arbitrators know and understand the important role of the administrative agencies and its case managers in compiling lists of arbitrators. Arbitrators typically want to make sure that the case managers know of them and frequently list them. The Code limits the relationship between the arbitrator and the administrative agencies. Part 3 A 3 states "[a]n arbitrator must not seek to influence an administrative agency by any improper means, including gifts or other inducements to agency personnel." Administrative agencies, like the AAA, have zero tolerance policies with respect to case managers receiving any type of gift from arbitrators and/or advocates.

Hearing Conduct

Part 5 of the Code covers the arbitrator's role in hearing conduct by providing that: "[a]n arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence." However, what if an arbitrator becomes too aggressive and heavy handed in the process by asking a whole series of questions throughout the hearing and/or during the examination of witnesses? Part 5 A 1 c addresses these potential concerns by indicating that, "[a]n arbitrator should not intrude into a party's presentation so as to prevent that party from putting forward its case fairly and adequately." An arbitrator, however, retains the right to clarify the record by questioning a witness when necessary for the arbitrator to understand the testimony of the witness.

Transcript

Requesting and arranging to have a hearing transcribed remains primarily an area for the parties to

discuss and to decide.. The Code, however, does have a specific section on transcripts. Part 5 B notes that an arbitrator "may seek to persuade the parties to avoid use of a transcript, or to use a transcript if the nature of the case appears to require one." If the parties do not agree to a transcript, the Code states that the arbitrator may have the side requesting the transcript pay for it and make a copy available to the other party.

Plant Visits

Plant or worksite visits are rare in the labor arbitration process. From time to time, however, plant visits are requested and may affect the outcome of a decision. The Code provides guidance to both arbitrators and advocates. Part 5 D explains that an arbitrator "should comply with a request of any party that the arbitrator visit a work area pertinent to the dispute prior to, during, or after a hearing. An arbitrator may also initiate such a request." Such plant visits should occur with safeguards to avoid any ex parte communication between a party and the arbitrator.

Post-hearing Briefs

To brief or not to brief sometimes becomes an issue in labor arbitration cases. Is the case complicated enough? Will the arbitrator need briefs? Is the cost to brief justified? These questions, and others, are typically decided by the parties. If they are not, what role, if any, does the arbitrator play? Part 6 A 1 states, "[a]n arbitrator may either suggest the filing of post hearing briefs or other submissions or suggest that none be filed." Part 6 A 1 b further notes that if the parties cannot agree on the need for briefs, "an arbitrator may permit filing but may determine a reasonable time limitation."

Bench Decisions/Expedited Awards

The Code also provides guidance to arbitrators on important topics related to the conclusion of a case such as bench decisions and expedited awards. For example, Part 5 E notes, "[w]hen an arbitrator understands, prior to acceptance of appointment, that a bench decision is expected at the conclusion of the hearing, the arbitrator must comply with the understanding unless both parties agree otherwise." The Code also notes that if the arbitrator understands that the parties expect an expedited decision, the arbitrator must comply.

Retaining Jurisdiction

The role of the arbitrator, in most cases, concludes upon the issuance of an award at which time the functus officio doctrine provides that the power of the arbitrator ceases. The Code in Part 6 E, however, discusses the one exception of the unilateral right of an arbitrator to retain remedial jurisdiction. "An arbitrator may retain remedial jurisdiction in the award to resolve any questions that may arise over application or interpretation of a remedy."

Conclusion

The breadth of the Code is extensive by covering all aspects of the arbitrator's role in the labor arbitration process. For over sixty years, the Code has served as a time-tested tool for guiding arbitrators, the parties, and administrative agencies. Advocates who know and understand the Code have a tremendous opportunity to preserve and to elevate the ethical standards of the arbitration process. By doing so, labor arbitration will continue to obtain the respect of the parties, the judiciary, and the public.

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TRAINING

Robert L. Douglas is a labor mediator and arbitrator in New York City. He is a member of the Bars of New York and Washington, D.C. Subsequent to his apprenticeship, he became the assistant dean of Hofstra Law School.

Arbitrators, Apprentices, and Arbitration

ROBERT L. DOUGLAS

This article identifies the nature of the agreement between a mentor and an apprentice, discusses who should bear the responsibility for training new arbitrators, and examines some of the strengths and weaknesses of the apprenticeship approach to achieve acceptability as an arbitrator. These ideas are based on the author's three-year experience as an apprentice to Arbitrator Eric J. Schmertz, dean of Hofstra Law School.

The author criticizes certain interpretations of the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes as giving a false impression to advocates about the propriety of apprentices assisting mentors in the drafting of opinions without the prior consent of the parties. The focus then shifts to analyzing the short-term benefits that apprenticeships provide for the apprentice and mentor as well as the long-term benefits for the labor-management community.

There have been quite a few articles and reports discussing the content, purpose, and structure of apprenticeship arrangements—from the apprentice's standpont,[1] the mentor's perspective,[2] or from the viewpoint of the institutional context of training new arbitrators.[3]

Despite such publications, however, apprenticing continues to be a rather mysterious venture that stimulates a peculiar mixture of inquisitiveness, polite encouragement, and outright skepticism from many quarters.[4] Such reactions can be attributed, in part, to the hesitancy by some mentors and apprentices to disclose fully the extent of an apprentice's activities. This reluctance arises because

[1] John Van N. Dorr III, "Labor Arbitrator Training: The Internship," *The Arbitration Journal* 36 (June 1981): 4; Arnold M. Zack, "An Evaluation of Arbitration Apprenticeships," in Jean T. McKelvey, ed., *Challenges to Arbitration*, Proceedings of the Thirteenth Annual Meeting of the National Academy of Arbitrators (Washington, D.C.: BNA, 1960), p. 169.

[2] Paul Prasow and Edward Peters, "What Makes a Mainline Arbitrator?," in Prasow and Peters, eds., *Arbitration and Collective Bargaining: Conflict Resolution in Labor Relations* (New York: McGraw-Hill Book Co., 1970), pp. 284–293; Arnold M. Zack, "Who Is Responsible for the Development of Arbitrators—The Parties or the Arbitrators?," *The Arbitration Journal* 36 (June 1981): 11.

[3] Committee on Labor Arbitration to the Section of Labor Relations Law of the American Bar Association, "The Development of Qualified, Experienced and Acceptable New Arbitrators," reprinted in Mark L. Kahn, ed., *Collective Bargaining and the Arbitrator's Role*, Proceedings of the Fifteenth Annual Meeting of the National Academy of Arbitrators (Washington, D.C.: BNA, 1962), p. 242; Committee on Research and Education, "Education and Training of Arbitrators," in Jean T. McKelvey, ed., *The Profession of Labor Arbitration*, Selected Papers from the First Seven Annual Meetings of the National Academy of Arbitrators, 1948–1954 (Washington, D.C.: BNA, 1957), pp. 170, 171–172; Committee on the Training of New Arbitrators, "Replenishment of Professional Arbitrators," in Mark L. Kahn, ed., *Labor Arbitration—Perspectives and Problems*, Proceedings of the Seventeenth Annual Meeting of the National Academy of Arbitrators (Washington, D.C.: BNA, 1964), pp. 317, 319–322; "The Development of Qualified New Arbitrators," in Kahn, *Collective Bargaining and the Arbitrator's Role*, *op. cit.*, pp. 205, 209–210 (discussion by Frederick R. Livingston), pp. 222, 224–226 (discussion by Ralph T. Seward); Michael F. Hoellering, "Recent Developments at the American Arbitration Association," *Labor Law Journal* 29 (August 1978): 477, 480–481; Thomas J. McDermott, "Activities Directed at Advancing the Acceptability of New Arbitrators," in Barbara D. Dennis and Gerald G. Somers, eds., *Labor Arbitration at the Quarter Century Mark*, Proceedings of the Twenty-fifth Annual Meeting of the BNA, (Washington, D.C.: BNA, 1973), pp. 331, 333–334; Thomas J. McDermott, "The Development of New Arbitrators: Report of Committee, 1970–1971," in Gerald G. Somers and Barbara D. Dennis, eds., *Arbitration and the Public Interest*, Proceedings of the Twenty-fourth Annual Meeting of the National Academy of Arbitrators (Washington, D.C.: BNA, 1971), p. 305; "Survey of the Arbitration Profession in 1969," in Somers and Dennis, eds., *Arbitration and the Public Interest*, *op. cit.*, pp. 275, 277–279.

[4] See, e.g., Herbert Benar, "Woes of a Newcomer Neutral," *The Arbitration Journal* 27 (September, 1972): 186 (author's name is a pseudonym); Letter from Sidney L. Cahn to the Editor, *The Arbitration Journal* 36 (December 1981): 4; cf. Harold W. Davey, "How Arbitrators Decide Cases," *The Arbitration Journal* 27 (December 1972): 274, 284–285; Peter Seitz, "So You Want to be an Arbitrator! A Guide to the Perplexed," *The Arbitration Journal* 27 (September 1972): 179, 184–185.

"A genuine apprenticeship, unlike a transient internship, involves a long-term commitment that is designed not merely to enable an apprentice to achieve a threshold level of acceptability, but rather to prepare the newcomer to function ultimately as a mainstream arbitrator."

the ethical guidelines that govern arbitrator conduct are interpreted, all too often, to discourage the practical use of apprentices.[5] As a consequence, apprenticeships become unnecessarily sensitive arrangements and are therefore underutilized. This is unfortunate, since a bona fide apprenticeship can serve as an effective mechanism for training tomorrow's arbitrators.

This article is written to continue the dialogue over the apprenticeship institution. In particular, procedural and substantive experiences that occur during a typical apprenticeship will be shared and a proposal will be offered to revise the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes[6] (hereinafter referred to as the code) to encourage the productive use of apprentices.

[5] See, e.g., Dorr, "Labor Arbitrator Training," *op. cit.*, pp. 7–9; *cf.* Committee on Research and Education, "Education and Training of Arbitrators," *op. cit.*, pp. 170, 171; "The Development of Qualified New Arbitrators," in Kahn, *Collective Bargaining and the Arbitrator's Role, op. cit.*, pp. 225–226 (discussion by Ralph T. Seward); Thomas J. McDermott, "The Development of New Arbitrators," in Somers and Dennis, eds., *Arbitration and the Public Interest, op. cit.*, pp. 318–319.

[6] National Academy of Arbitrators, American Arbitration Association, Federal Mediation and Conciliation Service, *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*, 1974.

THE APPRENTICESHIP AGREEMENT

An apprenticeship is a private agreement between an established arbitrator (the mentor) and a prospective arbitrator (the apprentice) in which the mentor facilitates the training of the apprentice by exposing the apprentice to hearings of cases and by permitting the apprentice to participate in the process of drafting opinions and awards. The apprentice learns how to adjudicate disputes impartially by repeatedly observing actual cases: the apprentice witnesses the evolution of a demand for arbitration into a hearing, then into the development of a complete record, and, eventually, into the rendition of an opinion and award.

During each stage of a case, the apprentice is afforded a chance to absorb the procedural and substantive practices that apply to arbitration. The apprentice may even participate in tours of worksites, private conferences between the parties, and, if the mentor also serves as a private mediator, occasional mediation assignments. In addition, the apprentice observes the arbitrator's responsibilities of scheduling hearings, rendering timely opinions and awards, and calculating fees and expenses.

A bona fide apprenticeship program is therefore a serious endeavor that must be distinguished from a short-lived internship of one day, one week, or one month. A genuine apprenticeship, unlike a transient internship, involves a long-term commitment that is designed not merely to enable an apprentice to achieve a threshold level of acceptability, but rather to prepare the newcomer to function ultimately as a mainstream arbitrator. Consequently, a successful apprenticeship will produce a new arbitrator who is trained to write sound opinions and to conduct dignified and procedurally flawless hearings.

WHO SHOULD BEAR THE TRAINING BURDEN?

Many commentators have argued that the primary burden for developing new arbitrators should be placed on the parties or on established arbitrators. The reasons advanced in sup-

port of these arguments are not persuasive.

For instance, some authors assert that the parties ought to select new arbitrators to avoid the delays in scheduling hearings and receiving decisions that are inherent with using established arbitrators.[7] An issue that warrants arbitration, however—because a genuine dispute exists concerning a provision of a collective bargaining agreement, a grievance that is politically sensitive, or an impasse in bargaining that is resolved by invoking interest arbitration—should be handled by an arbitrator who commands the respect and trust of the parties. To suggest that the parties give a chance to an unknown and untested arbitrator, who has yet to establish a track record whereby these qualities can be examined, is unsound in theory and untenable in practice. The incentives that a hearing might be scheduled more expeditiously and a decision might be received sooner do not generally outweigh the risks to the parties of using an unproved newcomer.[8]

In addition, some arbitrators perceive a professional responsibility to train new arbitrators[9] in accordance with the general principle of the code that "an experienced arbitrator should cooperate in the training of new arbitrators."[10] To cooperate suggests working together—possibly for mutual economic benefit. Working together, however is not the equivalent of the veteran assuming a primary responsibility for assuring the ultimate success of the newcomer. Indeed, the willingness of an arbitrator to engage an apprentice is a substantial undertaking that few arbitrators are willing to assume.[11] "Cooperating in the training of new arbitrators" must therefore not be interpreted by potential mentors or apprentices to signify that the mentor is guaranteeing that the apprentice will succeed in achieving acceptability. Otherwise, potential mentors will be deterred from engaging apprentices and apprentices will be disappointed to discover the tenacity that is required before acceptability is achieved.

Furthermore, analysts have maintained for decades that there is a shortage of acceptable arbitrators so

"It is disturbing that the code is insensitive to these substantial challenges that an aspiring arbitrator confronts. Instead of facilitating the entry of newcomers into the profession, the code's vagueness reduces the viability of apprenticeships and, perforce, deters such efforts to train new arbitrators."

[7] Robert Coulson, "New Views of Arbitration: Satisfying the Demands of the Employee," *Labor Law Journal* 31 (August 1980): 495, 496; Ben Fischer, "The Steel Industry's Expedited Arbitration: A Judgment After Two Years," *The Arbitration Journal* 28 (September 1973): 185; Patrick R. Westerkamp and Allen K. Miller, "The Acceptability of Inexperienced Arbitrators: An Experiment." *Labor Law Journal* 22 (December 1971): 736.

[8] See Peter Seitz, "Delay: The Asp in the Bosom of Arbitration," *The Arbitration Journal* 36 (September 1981): 29; Zack, "An Evaluation of Arbitration Apprenticeships," in McKelvey, *Challenges to Arbitration, op. cit.*, p. 173; *cf.* Richard I. Block, "Arbitrator Advertising," *The Arbitration Journal* 35 (June 1970): 21, 26; Coulson, "New Views of Arbitration," *op. cit.*, p. 496. But see Fischer, "The Steel Industry's Expedited Arbitration: A Judgment After Two Years," *op. cit.* (suggestion that sophisticated parties in mature bargaining relationships should use newer arbitrators in routine cases).

[9] Zack, "Who is Responsible for the Development of Arbitrators," *op. cit.*, p. 12. See also, "The Development of Qualified New Arbitrators," in Kahn, *Collective Bargaining and the Arbitrator's Role, op. cit.*, pp. 205, 209–210 (discussion by Frederick R. Livingston).

[10] *Code of Professional Responsibility, op. cit.*, paragraph 20.

[11] See, e.g., Harold W. Davey, "What's Right and What's Wrong with Grievance Arbitration: The Practitioners Air Their Views," *The Arbitration Journal* 28 (December 1973): 209, 222; Edwin R. Teple, "1980 Report of the Committee on the Development of Arbitrators," in Barbara D. Dennis and James L. Stern, eds., *Decisional Thinking of Arbitrators and Judges*, Proceedings of the Thirty-third Annual Meeting of the National Academy of Arbitrators (Washington, D.C.: BNA, 1981), p. 452 (only 13 "interns" in the entire United States were working with Academy arbitrators); Joan Weitzman, "Developing Competence and Acceptability in New Neutrals," in *Dispute Resolution: Public Policy and the Practitioner*, 1977 Proceedings, Fifth Annual Meeting, Society of Professionals in Dispute Resolution (Washington, D.C.: Society of Professionals in Dispute Resolution, 1978), pp. 52, 55–56; Zack, "An Evaluation of Arbitration Apprenticeships," in McKelvey, *Challenges to Arbitration, op. cit.*, p. 171.

that a void will be created when these seasoned veterans retire.[12] Notwithstanding these dire projections, the institution continues to respond to its mandate of peacefully resolving disputes. Although there are certainly delays that the system generates, any structure that requires coordinating the activities of lawyers, union and company representatives, witnesses, and arbitrators is bound to generate scheduling difficulties, as well as adjournments, cancellations, and some procrastination. To assign the responsibility for delays primarily to established arbitrators is a convenient oversimplification: advancing the idea that an influx of new arbitrators will suddenly cure this defect belies the facts.

Certainly, newer arbitrators have less congested schedules. Once newcomers establish a reputation for impartiality and competence, however, their schedules will also become full. Therefore, the goal of reducing delays ought not to be accorded undue prominence in the debate about increasing the number of acceptable arbitrators and fixing the responsibility for overseeing the entry of newcomers. In fact, it may well be that the system ingeniously achieves a delicate balance of matching the supply of mainstream arbitrators with the demand for their services.[13]

For these reasons, the fundamental responsibility for achieving acceptability—both in terms of technical competence and visibility[14]—is more properly assumed by the aspiring arbitrator. The emerging arbitrator must obtain adequate training and project appropriate qualities to the parties who select arbitrators. The novice must first elect to pursue the apprenticeship approach and must then initiate the difficult strategy for convincing a suitable, established arbitrator to engage an apprentice. It is the neophyte who must apply for inclusion on arbitration panels and must assemble the necessary credentials and references to support such applications. Similarly, it is the new arbitrator who must generate a personal income to ensure a degree of financial self-sufficiency that permits the aspirant to get established without compromising the critical trait of independence. And, of course, it is the beginning arbitrator who bears the sole burden of developing a track record of opinions and awards that will transform the promising, but unproven rookie into a seasoned veteran.

THE IMPACT OF THE CODE OF ETHICS

It is disturbing that the code is insensitive to these substantial challenges that an aspiring arbitrator confronts. Instead of facilitating the entry of newcomers into the profession, the code's vagueness reduces the viability of apprenticeships and, perforce, deters such efforts to train new arbitrators.

In particular, the code sets forth the general principle that "an arbitrator must not delegate any decision-making function to another person without consent of the parties."[15] The code amplifies this general principle as follows:

> Without prior consent of the parties, an arbitrator may use the services of an assistant for research, clerical duties, or preliminary drafting under the direction of the arbitrator, which does not involve the delegation of any decision-making functions.[16]

A recent article by Arbitrator John Van N. Dorr III considered these provisions in the context of the use of apprentices.[17] The author, who had apprenticed to Arbitrator Arnold M. Zack,[18] conducted a "survey of interns whose mentors belong to the N.A.A. [National Academy of Arbitrators]."[19] On the basis of that data, the author concluded that

> . . . in most cases the intern does at least occasional drafting, and in some instances even *decided* at least some, if not all, of the questions presented by a case, *leaving final approval of the opinion and award to the mentor* (emphasis added).[20]

The author then labeled such conduct as unethical:

> Not only is the latter practice *clearly improper* under the code, unless prior ap-

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[12] See, e.g., Robert Coulson, "Experiments in Labor Arbitration," *Labor Law Journal* 17 (May 1966): 259, 261; "The Development of Qualified New Arbitrators," in Kahn, *Collective Bargaining and the Arbitrator's Role, op. cit.*, pp. 212, 215 (discussion by William E. Simkin); Brian L. King, "Management and Union Attitudes Affecting the Employment of Inexperienced Labor Arbitrators," *Labor Law Journal* 22 (January 1971): 23; Barry Silverman, "Labor Arbitrator Development Programs: A Trade Unionist's Point of View," in *Broader Perspectives in Dispute Resolution*, 1978 Proceedings, Sixth Annual Meeting, Society of Professionals in Dispute Resolution (Atlanta, Georgia: Society of Professionals in Dispute Resolution, 1979), pp. 91, 92–93; Emanuel Stein, "The Selection of Arbitrators," *New York University Conference on Labor 8* (1955): 291, 295–296; "Survey of the Arbitration Profession in 1969," in Somers and Dennis, eds., *Arbitration and the Public Interest, op. cit.*, pp. 278–280, 290–292.

[13] See, e.g., Lois MacDonald, "The Selection and Tenure of Arbitrators in Labor Disputes," *New York University Conference on Labor* 1 (1948): 145; Thomas J. McDermott, "Progress Report: Programs Directed at the Development of New Arbitrators," in Barbara D. Dennis and Gerald G. Somers, eds., *Arbitration of Interest Disputes*, Proceedings of the Twenty-sixth Annual Meeting of the National Academy of Arbitrators (Washington, D.C.: BNA, 1974), pp. 247, 248; Arnold Zack, "New Programs for Continuing Education for Arbitrators," in *Dispute Resolution: Public Policy and the Practitioner, op. cit.*, p. 65; Arnold M. Zack, "The Re-Training of Arbitrators," *The Arbitration Journal* 33 (March 1978): 31.

[14] See, e.g., Robert Coulson, "Labor Arbitration: The Insecure Profession?," *Labor Law Journal* 18 (June 1967): 336; H. Davey, "What's Right and What's Wrong with Grievance Arbitration," *op. cit.*, p. 230; Eric W. Lawson, Jr., "Arbitrator Acceptability: Factors Affecting Selection," *The Arbitration Journal* 36 (December 1981): 22; Meyer S. Ryder, "The Impact of Acceptability on the Arbitrator," in Charles M. Rehmus, ed., *Developments in American and Foreign Arbitration*, Proceedings of the Twenty-first Annual Meeting of the National Academy of Arbitrators (Washington, D.C.: BNA, 1968), p. 94; Note, *Hofstra Law Review* 3 (Winter 1975): 155, 158–159.

[15] *Code of Professional Responsibility, op. cit.*, paragraph 62.

[16] *Ibid.*, paragraph 63.

[17] Dorr, "Labor Arbitrator Training," *op. cit.*, p. 4.

[18] Arbitrator Zack apparently subscribes to Arbitrator Dorr's viewpoint. Zack, "Who is Responsible for the Development of Arbitrators," *op. cit.*, p. 13.

[19] Dorr, *op. cit.*, p. 6, note 7, *citing* Teple, "1980 Report on the Committee on the Development of Arbitrators," in Dennis and Stern, eds., *Decisional Thinking of Arbitrators and Judges, op. cit.*, p. 452.

[20] Dorr, *op. cit.*, p. 8. But see "Report on a Survey of Arbitration Interns," in 1980 Report on the Committee on the Development of Arbitrators, in Dennis and Stern, eds., *Decisional Thinking of Arbitrators and Judges, op. cit.*, pp. 456, 458–459. The underlying report, prepared by Arbitrator Dorr, expressly states: "Usually the intern's drafts are based on his notes and the case is discussed with the mentor *before* the opinion is written. . . . The amount of revision carried out by the mentor was not ascertained" (emphasis added).

"As long as each mentor acts diligently in overseeing the input of each apprentice by actually subscribing to the treatment and disposition of the final opinion and award, a careful analysis of the code and the underlying ethical issues indicates that a mentor need not secure the prior approval of the parties for using an apprentice in this way."

proval is obtained, but it is also contrary to the parties' expectations (emphasis added).[21]

In my judgment such a conclusion is unwarranted. The survey reveals that the mentors had to approve the opinions and awards before they were rendered. As a result, the arbitrators had not delegated any decision-making function. The work products of the apprentices were merely preliminary drafts that the mentors could have adopted, modified, or rejected. As long as each mentor acts diligently in overseeing the input of each apprentice by actually subscribing to the treatment and disposition of the final opinion and award, a careful analysis of the code and the underlying ethical issues indicates that a mentor need not secure the prior approval of the parties for using an apprentice in this way. The practice described in the survey is therefore *clearly proper* under the code.

In contrast, if a mentor fails to direct an apprentice how the procedural and substantive issues in a case are to be decided and then neglects to review the apprentice's work product, the apprentice would be exercising the decision-making function. This would most definitely violate fundamental notions of fairness as well as the code: arbitrators cannot abdicate their personal responsibility to decide a case. Accordingly, mentors must exercise proper control over any work that is performed for them by an apprentice.

ADVANTAGES OF AN APPRENTICE

Placing this burden on a mentor to review an apprentice's work does not negate the advantages of using an apprentice. On the assumption that an apprentice would have obtained appropriate schooling before entering into an apprenticeship, the mentor's workload can be substantially eased after some initial seedtime. To accomplish this, an indispensable part of an apprenticeship should be for the apprentice to study in detail all of the mentor's prior opinions. This exercise is a unique way to strengthen the apprentice's understanding of the arbitration process, while familiarizing the apprentice with the mentor's writing style and approach to resolving disputes. As a consequence, the mentor will require less time to supervise the apprentice's written work.

All parties benefit from this approach. The mainstream arbitrator will be "cooperating in training new arbitrators"[22]—in accordance with the code's tenets on an arbitrator's responsibility to the profession—while also acquiring new time to write opinions for old cases, to accept new cases, or to relax. The apprentice also benefits by obtaining compensation for assisting the mentor draft opinions and, at the same time, by sharpening his or her drafting and analytical skills. In addition, the parties will probably receive more timely opinions and, in some cases, more thorough determinations due to the higher degree of care that the apprentice and mentor are apt to exercise over the case. Naturally, the cost to the parties remains unaffected by the use of an apprentice: the arbitrator bills a normal fee, based on hearing days and appropriate study days, out of which the apprentice's compensation is paid by the mentor.

[21] Dorr, "Labor Arbitrator Training," *op. cit.*, p. 8.

[22] *Code of Professional Responsibility*, *op. cit.*, paragraph 20.

TREATMENT OF FORMER APPRENTICES

In light of the training that an apprentice receives, the administrators of arbitration panels should consider waiving any casehandling requirements that applicants for inclusion on those panels must normally satisfy. Instead, administrators could permit the mentor and the apprentice to submit a detailed report that would verify the duration, content, and quality of the apprenticeship. In this way, an apprenticeship would relieve the aspiring arbitrator of the Catch-22 quandry of how to fulfill the casehandling requirements for inclusion on various arbitration panels when the primary, if not exclusive, means of being designated for cases arises only after one is already a member of these same arbitrator rosters.

Second, administrators can bolster an apprentice's efforts to achieve acceptability once the apprentice is added to a panel of arbitrators. Apprentices should inform administrators of the identity of the parties whom the apprentice has met during the apprenticeship. As lists of arbitrators are compiled for new cases, the administrators can test the apprentice's acceptability with these practitioners. Circulating the apprentice's name on such a planned basis thereby enlists the arbitration institution in encouraging apprenticeships and what they represent, rather than in confining them to the Catch-22 maze. Whether the apprentice is actually selected by the parties to serve in a particular case is a separate issue that should involve the general attitude of the parties—not the agency—toward trying new arbitrators as well as toward utilizing a particular newcomer. It is crucial that arbitration agencies afford the parties this opportunity to decide for themselves who is acceptable, instead of the agencies precluding such a test by never allowing the apprentice's name to reach the selectors.

CONCLUSION

Until the code is revised to explicitly authorize and encourage the constructive use of apprentices by arbitrators, the burden that aspiring arbitrators legitimately bear in achieving acceptability will be unduly accentuated. Inaction will ensure that apprenticeships remain underutilized and enigmatic: mentors, apprentices, and the parties will continue to be disinclined to acknowledge and discuss the actual scope of an apprentice's training due to the misconception that having apprentices draft opinions under the close scrutiny of their mentors is somehow unethical in the absence of the parties' prior consent. Although at the present time one hopes that the code's lack of clarity was merely inadvertent, perpetuating the code's susceptibility to misinterpretation, rather than addressing the dynamics of responsibly and ethically expanding the use of apprenticeships, will raise serious doubts about the profession's commitment to open its ranks to qualified newcomers.

After clarifying the code, the profession and its labor and management constituency ought to redirect their resources toward making apprenticeships the rule, rather than the exception, for becoming an established arbitrator. In this way, the significant challenges that society entrusts to arbitrators of rights and interest disputes will be handled by truly qualified and properly trained individuals. With the cooperation of the arbitration profession and representatives of labor and management, the dispute settlement community will be better equipped to make its critical contribution toward preserving industrial justice and stability. ■

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Ethical Advocacy Under New York's Rules of Professional Conduct

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Ethical Advocacy Issues Under New York's Rules of Professional Conduct

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I. Introduction

New York's "Rules of Professional Conduct" ("Rules") were announced by Chief Judge Judith Kaye on December 17, 2008, to take effect April 1, 2009. These Rules were the culmination of a comprehensive review of New York's Code of Professional Responsibility ("Code") which began in 2003. These Rules are significant both for some of the changes that were made as well as for some of the changes that were not made.

The first set of professional conduct rules for lawyers were adopted in Alabama in 1887. These rules provided the foundation for the American Bar Association's ("ABA") initial Canons of Ethics adopted in 1908. In 1969, the ABA issued the Model Code of Professional Responsibility ("Model Code"), providing more detailed guidance to lawyers. By the early 1970's, virtually every state adopted the Model Code, albeit sometimes with some variations, with New York's version of the Code taking effect January 1, 1970.

In 1983 the ABA moved away from the Model Code and adopted Model Rules of Professional Conduct ("Model Rules"), reflecting both significant substantive and format changes. New York was poised to be one of the first states to adopt the new Model Rules when they were narrowly voted down by the Bar Association's House of Delegates.

In 2002, as a result of "Ethics 2000," the ABA published significant modifications to the Model Rules. Again, while a number of states adopted many of those changes, New York did not.

There had been modifications to New York's Code over the years, with the most significant coming in 1990 and 1999, and with the addition of a comprehensive set of advertising guidelines in 2007. But the basic format and many of the substantive provisions of the original Code remained in place until 2009.

In 2003, the New York State Bar Association empanelled the Committee on Standards of Attorney Conduct (COSAC) to look at a substantial reworking of the Code, both from a substantive and a formatting perspective, to determine whether it could be brought more into line with the Model Rules and the rest of the country. The Committee completed its work in 2005 and throughout much of 2006 and 2007 COSAC presented its recommendations to the Bar Association's House of Delegates for review. Ultimately these proposals were endorsed by the House and submitted to the Appellate Divisions with the recommendation that they be adopted as the Appellate Divisions' rules. (Our current Code consists of Disciplinary Rule's (DRs) and Ethical Considerations (ECs). The DRs are mandatory standards of conduct which exist as court rules (found in 22 NYCRR Part 1200 and jointly adopted by the four Appellate Divisions), while the ECs are aspirational standards established by the Bar Association.) The submission to the Appellate Divisions included both the Rules, to replace the DRs, and supporting and explanatory Comments, to take the place of the ECs. The Bar Association recommended that the Appellate Divisions adopt both.

On December 17, 2008, the Appellate Divisions announced adoption of the "Rules of Professional Conduct" based (mostly) upon the Bar Association's recommendations. While the Appellate Divisions version reflects the formatting changes proposed by the Bar Association and many of the substantive changes, it does not reflect all of the proposed changes. And unfortunately, the Appellate Divisions did not explain why some changes were adopted and

some were not, so lawyers are after left to guess as to the Appellate Divisions' thinking. In addition, the Appellate Divisions neither adopted nor commented on their decision not to adopt the supplementary Comments proposed by the Bar Association. Presumably the Appellate Divisions opted to leave it for the Bar Association to separately implement the Comments as "non-mandatory" guidance, in the same vein as the current ECs.

Since 2009, revisions to the Bar Association's comments have occurred in 2011 and 2015.

It is beyond the scope of this paper to exhaustively review all of the changes reflected in the Rules. Rather, its focus is on a discussion of select advocacy issues which labor and employment law practitioners frequently face, in their roles both as advocates and as neutrals. This paper includes a discussion not only of some of the significant changes found in the Rules, but also some of the significant "non-changes" – changes proposed by the Bar Association but which were rejected by the Appellate Divisions.

II. Formatting Changes

Before turning to substantive advocacy issues, a few words about formatting changes associated with the Rules. First, the name was changed in 2009. Prior to April, 2009, our professional conduct standards were called the "Code of Professional Responsibility." As of April 1, 2009, these rules are called the "Rules of Professional Conduct."

In addition, the prior Code consisted of DRs and ECs. Those provisions were tied to nine fundamental Canons. Those provisions were numbered DR 1-101, DR 2-101, DR 2-102, etc. and EC 1-1, EC 2-1, EC 2-2, etc. While consistent with the original Model Code, this numbering and formatting system bore no resemblance to the Model Rules system used in virtually every

other state. Thus it was often difficult to do even basic comparative ethics research with other jurisdictions.

The most basic change reflected in the Rules is formatting which uses the same numbering system as the Model Rules and most of the rest of the nation. Thus Rules now appear as Rule 1.1, 1.2, 1.3 through 8.5. Following each Rule is a series of "Comments" numbered [1], [2], [3], etc. In addition, the Rules follow exactly the grouping of concepts found in the Model Rules.

III. Selected Advocacy Issues

A. Confidentiality Provisions on the Obligation of Candor to the Tribunal

The lawyer's basic confidentiality obligation is found in Rule 1.6.

1. Definitions

"Confidential Information" is defined as:

- information gained during or relating to the representation of a client
- whatever its source
- which
  - is protected by the attorney-client privilege,
  - is likely to be embarrassing or detrimental to the client if disclosed, or
  - the client has requested be kept confidential.

The Rule explicitly excludes from the definition of confidential information:

- legal knowledge or legal research or
- information that is generally known in the local community or in the trade, field or profession to which the information relates.

No similar explicit exclusions exist under the prior Code.

Based on the Bar Association's Comment [4A], "gained during or relating to" the representation of a client does not include information gained before a representation begins or after it ends, presumably even if the information otherwise "relates to" the representation. The Comment also defines "relates to" as "has any possible relevance to the representation or is received because of the representation."

2. Disclosure or Use of Confidential Information

Rule 1.6 prohibits knowingly revealing confidential information or using such information to the disadvantage of a client or for the advantage of another, unless

- the client provides informed consent,
- the disclosure is impliedly authorized to advance the interests of the client and is either reasonable or customary,
- or as provided below.

On its face Rule 1.6 continues the former New York Code provision (which is broader than the Model Rule) prohibiting both the disclosure of client confidential information and the use of that confidential information (without regard to disclosure).

3. Exceptions to Confidentiality

Rule 1.6 continues the former Code provisions which permitted, but did not require, a lawyer to reveal (Rule 1.6 expressly adds "or use") confidential information to:

- prevent the client from committing a crime,
- withdraw a representation previously given by the lawyer which is believed to still be relied upon by others, where the lawyer has discovered that the

representation was based on materially inaccurate information or is being used to further a crime or fraud,

- defend the lawyer (or her employees or associates) against an accusation of wrongful conduct[1],
- establish or collect a fee, or
- when otherwise permitted or required under the Rules or to comply with other law.

The prefatory language of Rule 1.6 expressly provides that confidential information can be so disclosed or used only to the extent - - and no more than - - the lawyer reasonably believes necessary to achieve these objectives. While a similar limitation on disclosures was likely implicit under the Code, now it is explicit.

Significantly, Rule 1.6 adds two new exceptions to confidentiality. First, a lawyer may reveal confidential information as reasonably necessary to secure legal advice about compliance with the Rules or other law. While this disclosure has been recognized in the past by "practice and custom" under the prior Code (see ABA Formal Opinion 98-411 (1998) (recognizing limited disclosures implicitly permitted without client consent provided no disclosure of attorney-client privileged information and the disclosure is not prejudicial to the client), this recognition is now explicit in the Rules.

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[1] While New York's Rule is, in this regard (permitting disclosure for self defense purposes), the same as the former Code, it is worth noting that this provision continues to be significantly narrower than the Model Rules in that it permits disclosure/use by the lawyer to defend herself while the Model Rules also permits disclosure by the lawyer to pursue claims against a client. The Bar Association's proposal would have further narrowed this confidentiality exception by limiting defensive use to circumstances involving an accusation of wrongful conduct "concerning the lawyer's representation of the client" which is "made in a proceeding that has been brought or that the lawyer reasonably believes will be brought." The Appellate Divisions did not adopt this narrow view in the Rules.

In what may be one of the most significant changes in the Rules, Rule 1.6 now permits a lawyer to reveal or use confidential information to prevent reasonably certain death or substantial bodily harm to anyone. While this provision has been a part of the Model Rules for years, a comparable exception has never been a part of the New York Code. But even this new basis for permissive disclosure is very limited. As explained in the Bar Association's Comments [6B], harm is reasonably certain to occur only if it will be suffered imminently or if there is a present and substantial risk that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. The Comments provide the following illustrations of the scope of this provision:

- A client accidentally discharged toxic waste into a town's water supply. The lawyer may reveal confidential information to protect against harm if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.
- If the harm the lawyer seeks to protect against is merely a statistical likelihood that something is expected to cause some injuries to unspecified persons over a period of years, there is no present and substantial risk justifying disclosure.
- Wrongful execution of a person is a life-threatening and imminent harm permitting disclosure but only once the person has been convicted and sentenced to death.
- That an event will cause property damage but is unlikely to cause substantial bodily harm does not provide a basis for disclosure.

The Model Rules are broader still in that they permit disclosure to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from a client's commission of a crime or fraud, if the client has used the lawyer's services to further that crime or fraud. New York's Rule 1.6 does not permit disclosure "merely" to protect property or financial interests (unless the "future crime" exception otherwise applies).

In the case of permissive disclosure to prevent reasonably certain death or substantial bodily harm, to prevent the client from committing a crime, and/or to withdraw a lawyer's representation, Comment [6A] sets out a number of factors for a lawyer to consider in deciding whether to disclose or use confidential information:

- the seriousness of the potential injury to others if the prospective harm or crime occurs;
- the likelihood that it will occur and its imminence;
- the apparent absence of any other feasible way to prevent the potential injury;
- the extent to which the client may be using the lawyer's services in bringing about the harm or crime;
- the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action; and
- any other aggravating or extenuating circumstances.

4. Impact of Confidentiality Provisions on the Obligation of Candor to the Tribunal

Prior DR 7-102 (B) (1) provided that if a lawyer learned that a client, in the course of a representation, had perpetrated a fraud upon a person or the tribunal, the lawyer was required to call upon the client to rectify it. If the client refused or was unable to do so, the lawyer was required to reveal the fraud to the person/tribunal except to the extent that that information was protected as a client confidence or secret under DR 4-101. In most instances this exception – disclosure unless the information is a client confidence or secret – swallowed the rule. Thus, for example, if a lawyer came to learn that a client had committed perjury (an obvious fraud upon the tribunal), that information was almost by definition a client confidence or secret which could not be disclosed even under this provision. See NYSBA Formal Opinions 674 (1995) and 523 (1980); New York County Opinion 706 (1995); New York City Opinion 1994-8 (1994). In such a case, and assuming the client did not rectify the perjury, the lawyer's choices were to nonetheless continue the representation without disclosure to the tribunal, but only if continued representation could be accomplished without reliance on that perjured testimony or, in many cases, to withdraw from the representation. See New York County Opinion 712; People v. Andrades, 4 N.Y. 3d 355 (2005). But under the prior Code, disclosure was not permitted.

Disciplinary Rule 7-102 (B) (2) also provided that if a lawyer learned that someone other than a client has perpetrated a fraud upon a tribunal, the lawyer was to reveal that fraud. There was no similar exception, in the language of the rule, for protecting client confidences and secrets in that circumstance. Nonetheless, in NYSBA Formal Opinion 523 (1980), the Bar Association's Committee on Professional Ethics held that the explicit exception to the disclosure obligation for client confidential information found in DR 7-102(B)(1) applied by implication in circumstances covered by DR 7-102(B)(2).

In what is one of the most significant change in the Rules, Rule 3.3 provides that if a lawyer, a lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer must take reasonable remedial measures, including , if necessary, disclosure to the tribunal. In other words, it requires disclosing client/witness perjury, as a last resort, even if that knowledge is otherwise "protected" as client confidential information. (A lawyer confronted with this remedial obligation must keep in mind CPLR § 4503(a)(1), the legislatively-enacted attorney-client privilege. The interplay between Rule 3.3 and CPLR § 4503 is not entirely clear. However, there is some commentary that suggests that the impact of CPLR § 4503 is to preclude the lawyer from testifying or otherwise presenting "evidence" to remedy false evidence under Rule 3.3 if not otherwise covered by an exception to the attorney-client privilege (e.g., crime-fraud exception). Under this view, the privilege might not otherwise prevent a lawyer from providing remediation in a non-evidentiary way. See NYSBA Formal Opinions 837 and 980.)

Similarly, Rule 3.3 provides that if a lawyer represents a client before a tribunal and that lawyer knows that anyone (i.e., including one other than the lawyer, the client or a witness called by the lawyer) intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding, he must take reasonable remedial measures, including if necessary disclosure to the tribunal, even if that information is otherwise protected by Rule 1.6 as confidential information.[2]

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[2] Rule 3.3 contains two other changes in the prior provisions of the Code that are worthy of some mention:

- Rule 3.3 continues the Code's prohibition against a lawyer knowingly making a false statement of fact or law to a tribunal, but now also expressly prohibits a lawyer from failing to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

Both Model Rule 3.3 and the Bar Association's proposal to the Appellate Divisions explicitly provided that this disclosure obligation "continues to the conclusion of the proceeding," defined by Comment [13] to mean "when a final judgment in the proceeding has been affirmed on appeal or the time for review, if any, has passed." Rule 3.3 as adopted by the New York Appellate Divisions contains no such temporal limitation. Nonetheless, ethics opinions have recognized that this obligation to remedy false statements related to a proceeding before a tribunal extends as long as the fraudulent conduct can be remedied, which may extend beyond the proceeding – but not forever. NYSBA Formal Opinions 831, 837 and 980; see also New York City Formal Opinion 2013-2 (obligation ends "only when it is no longer possible for the tribunal to which the evidence was presented to reopen the proceedings based on new evidence, and it is no longer possible for another tribunal to amend, modify or vacate the final judgment based on the new evidence").

B. Rule 4.4 and Respect for Rights of Third Persons: The Acquisition of an Adversary's Information

A common dilemma faced by lawyers is the handling of confidential information mistakenly sent to them by an opposing party or counsel – the misdirected fax or email. Although historically the Code had not expressly addressed how these situations should be handled, numerous ethics opinions over the years have done so. While those authorities have not been of one view, the "majority" view seems to have been that upon realizing the inadvertent receipt of confidential information, the lawyer should read no further, advise the sending person of the receipt and, at least sometimes, return or otherwise follow the sender's instructions

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- Rule 3.3 also provides that in an ex parte proceeding, a lawyer must inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not those facts are adverse to the lawyer's client.

(including to return, destroy or not use the materials). See generally ABA Formal Opinion 92-368 (since withdrawn) and New York County Opinion 730 (2002) (following ABA approach) but see New York City Opinion 2003-04 (2003) (following ABA approach only if the lawyer is made aware that the material was inadvertently sent prior to reviewing it, and requiring only notice to the sender when the material is reviewed prior to any advance warning that the material was inadvertently sent).

Rule 4.4 now explicitly addresses this issue, but does not necessarily provide much guidance to lawyers. Rule 4.4 provides that a lawyer who receives a document relating to the representation of the lawyer's client and who knows or reasonably should know that the document was inadvertently sent must promptly – but merely – notify the sender of that receipt. (Interestingly, the Rule is not limited to confidential information, but rather covers any document relating to the representation of a lawyer's client.) As a matter of ethics, this Rule imposes no requirement that the recipient refrain from further review, that the material be returned, that the sender's instructions be followed, that the material not be used, etc. It only requires that the sender be notified.

Having said that, it is important to understand that if the document in fact contains attorney-client privileged information and the lawyer keeps reading beyond what is necessary to realize she is not the intended recipient, then the lawyer is still at risk that a court will disqualify the lawyer, or otherwise impose sanctions and/or preclude evidence. See, e.g., State Compensation Ins. Fund v. WPS, Inc., 82 Cal. Rptr. 2d 799 (Cal. Apps. 1999) (sanctions); Spears v. Fourth Court of Appeals, 797 S.W. 2d 654 (Texas 1990) (disqualification); In re Shell Oil Refinery, 143 F.R.D. 105 (E.D. La. 1992) (order precluding use of information). Thus before a lawyer keeps reading, she should make sure she has first checked to see if in the

relevant jurisdiction, inadvertent disclosure is a waiver of the privilege. If not, the prudent course would be to not read further without first seeking court intervention.

Rule 4.4 is silent with respect to the intentional, albeit perhaps improper, receipt of an opposing party's confidential information. Comment 2 to Rule 4.4 merely notes the obvious by indicating that the Rule in fact "does not address the legal duties of a lawyer who receives a document that the lawyers knows or reasonably should know may have been wrongfully obtained by the sending person." See also New York City Formal Opinion 2012-1; NYSBA Formal Opinion 945 (2012) (same); but see Forward v. Foschi, 27 Misc. 3d 1224A (Sup. Ct. Westchester County, 2010) (suggesting a broader interpretation to Rule 4.4).

C. Rule 4.2 and Communications with Represented Persons

Rule 4.4 provides no significant substantive change from the prior Code, DR 7-104 (A), which prohibited direct communication between a lawyer and another party who is represented by counsel with respect to the matter of that representation. Nor is there any change in the Rule which would alter who, in an organizational context, is considered represented by virtue of the organization's representation by counsel. Similarly, there is no change in the circumstances in which a client may communicate directly with an opposing party who is represented by counsel.

Rule 4.4 also carries forward, exactly, the provisions of DR 7-104 (B), which permitted a lawyer to cause a client to communicate directly with a represented party, and to fully assist that client with those communications, provided the lawyer has given reasonable advance notice to that other party's lawyer. Interestingly, the Bar Association's proposal called for eliminating the need to provide advance notice to opposing counsel before causing a client to engage in and assisting a client with direct communications, but the Appellate Divisions failed to include this change.

D. Rule 3.4 and Fairness to Opposing Party and Counsel: Threats of Criminal Prosecution

Rule 3.4 continues DR 7-105 (which has no explicit counterpart in the Model Rules), which provided that a lawyer may not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter. The Bar Association had proposed prohibiting threats of criminal charges only if doing so were unlawful (e.g. extortion), and would have otherwise permitted them even "solely" for the purpose of gaining an advantage in a civil matter. The Appellate Divisions rejected this proposed change, and the provision remains unchanged.

While this rule does not prohibit a lawyer from reporting a crime committed by an adverse party for the purposes of having it prosecuted, it does prohibit threatening to commence or commencing prosecution solely as a means to secure a settlement. See In re Galven, 102 A.D.2d 1006 (3d Dept. 1985); New York City Opinion 1995-13 (1995). An opinion by the New York State Bar Association's Committee on Professional Ethics, New York State Formal Opinion 772 (2003), gives a very literal reading to this provision. There, the Committee affirmed that, as the language suggests, the prohibition only applies if the "sole purpose" behind the threat or commencement of prosecution is to secure a civil settlement. If some other purpose is evident, a violation will not be found.

Oddly enough, it is permissible for the lawyer representing the party subject to criminal charges to raise the issue and seek as part of any civil settlement that criminal charges not be filed. It is similarly permissible for the other party's attorney to negotiate over such a restriction once this door has been opened by the potential criminal defendant or his counsel. New York City Opinion 1995-13.

Although a potential criminal defendant in New York may ethically request the other party to agree to forebear criminal prosecution as a condition of settlement, New York City Opinion 1995-13 makes clear that such agreements may not in fact be enforceable by either party. As the Committee in that decision noted:

> Should the aggrieved party choose to report the defendant's conduct after the defendant has performed pursuant to the settlement, the defendant will not be able either to prevent a prosecution or to obtain damages. In the event of non-performance of settlement conditions by the potential defendant, on the other hand, the potential plaintiff may not be permitted by the courts to recover on the settlement because it contains a non-reporting agreement.

Id. Therefore, a lawyer negotiating a settlement containing a non-reporting agreement should disclose to the client that the settlement may ultimately be unenforceable by either party due to the presence of such a provision.

Care must be taken that the party agreeing to forebear reporting not agree to, nor the party soliciting that forbearance seek, an agreement that obligates the victim to destroy evidence, fail to cooperate with law enforcement authorities if such cooperation is requested, or suppress or alter evidence that the lawyer or client is under a legal obligation to produce. Entering into such agreements may themselves be criminal acts under New York law. See, e.g., N.Y. Penal Law §§ 215.40 (Tampering with Physical Evidence); 177.05/175.10 (Falsifying Business Records); 205.50 (Hindering Prosecution) 215.50 (Criminal Contempt) and 215.00 (Bribing a Witness). In addition, lawyers for both parties entering into a settlement agreement which contains an agreement not to report a crime must be sure that the agreement does not run afoul of N.Y. Penal Code § 215.45 (Compounding a Crime). As the New York City Committee on Professional and Judicial Ethics observed:

> [T]he legality of every agreement not to report a crime is controlled by N.Y. Penal Law § 215.45, Compounding a Crime, which forbids offering or accepting "any benefit" upon an understanding that, in return, criminal conduct will not be reported. The statute provides an affirmative defense that excludes from criminal liability a person who offers or accepts a benefit upon a reasonable belief that the benefit was no more than the amount due as restitution or indemnification for the harm caused by the crime. This law places strict limits upon anyone who wishes to negotiate a civil settlement that includes an agreement not to report criminal conduct. First, one must have a reasonable belief that facts in the case support a criminal charge. Second, any civil claim that is settled must arise from the same facts that give rise to the criminal charge. Third, any benefit conferred may be no more than the amount reasonably believed to constitute restitution or indemnification for the crime.

New York City Opinion 1995-13 (1995) (citations omitted). Likewise, proof of a threat to present criminal charges unless specified action is performed constitutes a prima facie case of criminal coercion, N.Y. Penal Law §135.60, and if property is actually obtained, it constitutes a prima facie case of extortion, N.Y. Penal Law § 155.05. In both cases, an affirmative defense similar to that available to a charge of Compounding a Crime exists. See N.Y. Penal Law §§ 135.75 and 155.12(a). Thus it is important that a party agreeing to forego filing charges not attempt to secure more than proper restitution in exchange for doing so.

ABA Formal Opinion 94-383 (1994) concluded that a lawyer may not threaten to file a disciplinary complaint or report against opposing counsel solely to obtain an advantage in a civil case. Although this type of agreement is not per se prohibited by the Model Rules of Professional Conduct, when the opposing counsel's misconduct raises a serious question about his honesty, trustworthiness or fitness as a lawyer, the lawyer has an absolute obligation to report the opposing counsel under Model Rule 8.3(a). New York's Rules contain a similar provision in Rule 8.3. Under both the Model Rules and New York's Rules, however, the reporting obligation only extends to information which is not a client confidence or secret. Thus, the ABA

Committee concluded that threatening to report such a violation if settlement is not reached is impermissible because it suggests that if a settlement is reached, reporting (even if otherwise required) will not occur. The Committee also found that a threat of disciplinary action against opposing counsel is unethical, even in cases where reporting is not required, if "the misconduct is unrelated to the civil claim, the disciplinary charges would not be well-founded in fact and law, or if the threat has no substantial purpose or effect other than to embarrass, delay, or burden opposing counsel or his client, or to prejudice the administration of justice." See also Nassau County Opinion 98-12 (1998) (reaching a similar conclusion).

NYSBA Formal Opinion 772 casts some doubt on this conclusion, at least in New York. There the Committee on Professional Ethics narrowly construed the same language in DR 7-105 as applying only to the filing of "criminal charges." While it noted that other bodies (including the ABA and Nassau County) had reached a conclusion that the prohibition extended to other types of non-criminal disciplinary charges, it concluded that "the threatened or actual filing of complaints with, or the participation in proceedings of, administrative agencies or disciplinary authorities lies outside the scope of DR 7-105(a)." The facts before the Committee did not involve attorney disciplinary charges, but rather dealt with the filing of professional disciplinary charges against an adversary-broker under the rules of the New York Stock Exchange. Whether a different result would have been reached if attorney disciplinary charges had been in issue is unclear. However, given the fact that Opinion 772 explicitly indicates its disagreement with Nassau County Opinion 98-12, and the Nassau County matter did involve an attorney disciplinary complaint, it would appear that, at least in the eyes of the NYSBA Committee, DR 7-105 did not, and Rule 8.3 likely does not, extend that far.

E. Requesting Non-Cooperation with an Adversary

Model Rule 3.4 contains a provision which prohibits a lawyer from even requesting a person other than a client to refrain from voluntarily giving relevant information to another party unless that person is a relative, employee, or agent of the client (and then only if the lawyer believes that that other person's interests will not be adversely affected by refraining to provide that information). There was no similar provision in New York's Code. The New York State Bar Association proposed adding this Model Rule provision to Rule 3.4, with the modification that a non-cooperation request could also be made to a former employee of a client or to someone who is contractually obligated or otherwise owes a legal duty to the client to refrain from disclosing certain information. The Appellate Division rejected this proposal as well, suggesting that a lawyer may continue to request anyone to refrain from voluntarily providing information to other side.

F. Rule 3.7 and Lawyer As Witness

Under the prior DR 5-102 (A) and (C), a lawyer could not be both an advocate before the tribunal and a witness on a significant issue for his client (except in a few narrow situations, i.e., an uncontested matter, testimony that relates to a fee, etc.) So if a lawyer had to be a witness for his client, he could not advocate before the tribunal. This prohibition did not prevent the lawyer's firm from appearing as an advocate on behalf of the client, nor did it prevent the lawyer from participating in non-advocacy matters associated with the representation (e.g., discovery, outside presence of court). See Gross, "Amendments to the New York Code of Professional Responsibility, Part III" NYLJ (March 12, 1990); Conigliaro v. Horace Mann School, 1997 U.S. Dist. LEXIS 5169 (S.D.N.Y. 1997); Nassau County Opinion 92-37 (1992).

Rule 3.7 does not substantively change this outcome in that it continues to prohibit a lawyer from acting as "advocate before the tribunal" in any matter in which he is "likely" to be a witness on a significant issue of fact (except for basically the same exceptions).

In addition, DR 5-102 (B) and (D) provided that if a lawyer ought to be called as witness other than on behalf of his client – i.e., by the other side – and his testimony might be prejudicial to the client, neither the lawyer nor his firm could continue to represent the client, at all (i.e., in an advocacy role or otherwise).

Rule 3.7 similarly precludes any lawyer in a firm from advocating before the tribunal on behalf of a client if he, or any other lawyer in the firm, is likely to be called as a witness other than on behalf of the client, on a significant issue, and his testimony may be prejudicial to the client. But in a significant change from the prior Code, the non-testifying members of the firm are not necessarily barred from continuing to represent that client in a role other than as advocate before the tribunal.

However, in no case may the lawyer or firm continue representation, as an advocate or otherwise, unless doing so is consistent with Rule 1.7. Rule 1.7 prohibits representation of a client where there is a significant risk that the lawyer's professional judgment will be adversely affected by the lawyer's own financial, business, property or other personal interests. Certainly in a case in which another lawyer in the firm is likely to testify – and especially if that testimony is likely to be prejudicial to the firm's client -- a lawyer must at least assess whether his professional/personal relationship to that testifying lawyer is such that she cannot continue representing the client even in a non-advocacy role. And if she can pass this test, the client must consent, confirmed in writing.

G. Communications With Unrepresented Persons

Under Rule 4.3, a lawyer has an obligation to not state or imply to an unrepresented person that they are "disinterested" in a matter in which they represent a client. In addition, a lawyer must make reasonable efforts to correct an unrepresented person's misunderstanding about the lawyer's role. Finally, whenever a lawyer knows that the interests of an unrepresented person are or have a reasonable possibility of being in conflict with those of her client, she can provide no legal advice to that unrepresented person other than the advice to secure counsel.

H. Arbitrator's Authority to Disqualify Counsel for Ethics Violations

Under New York law, disqualification of counsel for a violation of the ethics rules is considered an issue to be determined by the courts and not arbitrators. See, e.g., Northwestern Nat'l Ins. Co. v. Insco, Ltd., 866 F. Supp. 2d 214 (SDNY 2011); Simply Fit of N. Am., Inc. v. Poyner, 579 F. Supp. 2d 371 (EDNY 2008); Munich Reinsurance America v. Ace Prop. & Cos., 500 F.Supp.2d 272 (S.D.N.Y. 2007); Merrill Lynch v. Benjamin, 1 A.D.3d 39 (1st Dept. 2003); Bidermann Licensing v. Avmar, 173 A.D.2d 401 (1st Dept. 1991). Consequently, if faced with such a situation in an arbitration context, an advocate may need to request an adjournment in order to permit application to a judicial forum.

I. Rules 1.12, 2.4 and 8.3 and Arbitrators and Mediators

Two provisions of the Rules explicitly address issues related to lawyers who act as arbitrators, mediators and/or third party neutrals. First, Rule 1.12 provides that unless all parties give informed consent confirmed in writing, a lawyer can not represent anyone in connection with a matter in which the lawyer participated personally and substantially as an arbitrator, mediator or third party neutral. Although new, there is nothing surprising about a prohibition against moving from the role of arbitrator/mediator/third party neutral to the role of an advocate

in the same matter without the consent of all parties. This Rule, however, would permit that lawyer's firm to serve as an advocate, provided the arbitrator/mediator/third party neutral lawyer is screened from the firm's representation, receives no part of the fee from that representation, written notice is promptly given to the parties and any appropriate tribunal, and there are no other circumstances in the particular representation which create an appearance of impropriety.

Rule 1.12 also provides:

> A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as ... an arbitrator, mediator or other third party neutral.

Presumably this provision is meant to prohibit an arbitrator/mediator/third party neutral from seeking a job with a party or lawyer of a party where that party/lawyer is a party/lawyer in a matter pending before that person as an arbitrator, mediator, or third party neutral. However, the provision may be subject to an even broader interpretation. For example, if a lawyer is serving as an arbitrator in matter A, can he have discussions with one of the lawyers involved in that arbitration regarding his availability to serve as an arbitrator in an upcoming unrelated matter (including on behalf of entirely different parties)? Can he discuss with such a lawyer his availability to serve on a permanent arbitration panel being negotiated in a collective bargaining agreement for a different employer and union? Or would that constitute a negotiation for employment? Would that arbitrator's simple appearance on a AAA panel for another case involving one or more of the lawyers now appearing before him be enough to constitute a "negotiation" for these purposes? While it should be appropriate to assume that the latter situation -- merely showing up on another AAA panel or even coming up as the "next" arbitrator in line under a previously negotiated permanent panel list -- does not trigger an issue under Rule

1.12, it does not appear that an arbitrator could otherwise engage in any conversation with a lawyer appearing before him about his ability to serve in any other matter.

Rule 2.4, titled "Lawyer Serving as Third Party Neutral," expressly provides that a lawyer serving as an arbitrator, mediator or other third party neutral must inform unrepresented parties that the lawyer/neutral is not representing them. That Rule further provides that when the lawyer/neutral knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer must explain the difference between the lawyer's role as a third party neutral and a lawyer's role as an advocate who represents a client

Rule 8.3 deals with reporting attorney misconduct. All lawyers are subject to a requirement to report another lawyer whom we know has committed a violation of the Rules which raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer, unless that knowledge is itself a client confidence.

The Bar Association had proposed that lawyers serving as arbitrators, mediators or other third party neutrals be excluded from this reporting obligation if their information about another lawyer was gained in a confidential arbitration/mediation proceeding. The Appellate Divisions rejected this exception. Consequently, a lawyer-arbitrator/mediator/neutral who in the course of that proceeding acquires knowledge that another lawyer has committed an ethical violation that raises a substantial question as to that lawyer's fitness to practice, is obligated to report that lawyer to the appropriate disciplinary authorities. It is not clear how this Rule will be applied in situations where a mediation session, for example, is considered "confidential" by statute or court rule, as opposed to a matter of professional ethics. Presumably, this reporting obligation is not intended to override such a statutory or similar obligation, but there is no explicit exception in the Rules.

APPENDIX A

SELECTED PROVISIONS FROM NEW YORK'S RULES OF PROFESSIONAL CONDUCT

RULE 1.0: TERMINOLOGY

(a) "Advertisement" means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.

(b) "Belief" or "believes" denotes that the person involved actually believes the fact in question to be true. A person's belief may be inferred from circumstances.

(c) "Computer-accessed communication" means any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.

(d) "Confidential information" is defined in Rule 1.6.

(e) "Confirmed in writing," denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person's oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(f) "Differing interests" include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

(g) "Domestic relations matter" denotes representation of a client in a claim, action or proceeding, or preliminary to the filing of a claim, action or proceeding, in either Supreme Court or Family Court, or in any court of appellate jurisdiction, for divorce, separation, annulment, custody, visitation, maintenance, child support, alimony, or to enforce or modify a judgment or order in connection with any such claim, action or proceeding.

(h) "Firm" or "law firm" includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized

to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization.

(i) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.

(j) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

(k) "Knowingly," "known," "know," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(l) "Matter" includes any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, mediation or any other representation involving a specific party or parties.

(m) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional legal corporation or a member of an association authorized to practice law.

(n) "Person" includes an individual, a corporation, an association, a trust, a partnership, and any other organization or entity.

(o) "Professional legal corporation" means a corporation, or an association treated as a corporation, authorized by law to practice law for profit.

(p) "Qualified legal assistance organization" means an office or organization of one of the four types listed in Rule 7.2(b)(1)-(4) that meets all of the requirements thereof.

(q) "Reasonable" or "reasonably," when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer. When used in the context of conflict of interest determinations, "reasonable lawyer" denotes a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation.

(r) "Reasonable belief" or "reasonably believes," when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(s) "Reasonably should know," when used in reference to a lawyer, denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(t) "Screened" or "screening" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or the firm is obligated to protect under these Rules or other law.

(u) "Sexual relations" denotes sexual intercourse or the touching of an intimate part of the lawyer or another person for the purpose of sexual arousal, sexual gratification or sexual abuse.

(v) "State" includes the District of Columbia, Puerto Rico, and other federal territories and possessions.

(w) "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

(x) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording and email. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

RULE 1.6:
CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b). "Confidential information" consists of information gained during or relating to the representation of a client,

whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime;

(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or

(ii) to establish or collect a fee; or

(6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee.

RULE 1.7:
CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

RULE 1.12: SPECIFIC CONFLICTS OF INTEREST FOR FORMER JUDGES, ARBITRATORS, MEDIATORS OR OTHER THIRD-PARTY NEUTRALS

(a) A lawyer shall not accept private employment in a matter upon the merits of which the lawyer has acted in a judicial capacity.

(b) Except as stated in paragraph (e), and unless all parties to the proceeding give informed consent, confirmed in writing, a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as:

(1) an arbitrator, mediator or other third-party neutral; or

(2) a law clerk to a judge or other adjudicative officer or an arbitrator, mediator or other third-party neutral.

(c) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral.

(d) When a lawyer is disqualified from representation under this Rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless the firm acts promptly and reasonably to:

(1) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(2) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

(3) the disqualified lawyer is apportioned no part of the fee therefrom;

(4) written notice is promptly given to the parties and any appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule; and

(5) there are no other circumstances in the particular representation that create an appearance of impropriety.

(e) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

RULE 2.4:
LAWYER SERVING AS THIRD-PARTY NEUTRAL

(a) A lawyer serves as a "third-party neutral" when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

RULE 3.3:
CONDUCT BEFORE A TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the

lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

(f) In appearing as a lawyer before a tribunal, a lawyer shall not:

(1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply;

(2) engage in undignified or discourteous conduct;

(3) intentionally or habitually violate any established rule of procedure or of evidence; or

(4) engage in conduct intended to disrupt the tribunal.

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) (1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce;

(2) advise or cause a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein;

(3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal;

(4) knowingly use perjured testimony or false evidence;

(5) participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false; or

(6) knowingly engage in other illegal conduct or conduct contrary to these Rules;

(b) offer an inducement to a witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the matter. A lawyer may advance, guarantee or acquiesce in the payment of:

(1) reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel, and reasonable related expenses; or

(2) a reasonable fee for the professional services of an expert witness and reasonable related expenses;

(c) disregard or advise the client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling;

(d) in appearing before a tribunal on behalf of a client:

(1) state or allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;

(2) assert personal knowledge of facts in issue except when testifying as a witness;

(3) assert a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein;

(4) ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person; or

(e) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

RULE 3.7:
LAWYER AS WITNESS

(a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:

(1) the testimony relates solely to an uncontested issue;

(2) the testimony relates solely to the nature and value of legal services rendered in the matter;

(3) disqualification of the lawyer would work substantial hardship on the client;

(4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or

(5) the testimony is authorized by the tribunal.

(b) A lawyer may not act as advocate before a tribunal in a matter if:

(1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or

(2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

RULE 4.2:
COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

(a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

(b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

RULE 4.4:
RESPECT FOR RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

RULE 8.3:
REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(b) A lawyer who possesses knowledge or evidence concerning another lawyer or a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct.

(c) This Rule does not require disclosure of:

(1) information otherwise protected by Rule 1.6; or

(2) information gained by a lawyer or judge while participating in a bona fide lawyer assistance program.

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*The Ethics of Honesty in Negotiations**

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I. An Attorney's Obligations to be Truthful.

a. General Rule: An attorney must be truthful and honest in his or her interactions with opposing counsel, clients, and the court.

b. New York Rules of Professional Conduct ("Rule(s)"):

i. Rule 4.1: In the course of representing a client a lawyer shall not knowingly make a false statement of fact or law to a third person.

ii. Rule 8.4: A lawyer or law firm shall not: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

iii. Rule 3.3: (a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

c. While the ethics rules recognize that a certain amount of "puffery" is expected and acceptable when negotiating for a client, when does puffery slip into lying? Unlike litigation, where the role of the court helps to ensure compliance with this obligation, informal negotiation and mediation are self-policed fields. It is critical, then, that attorneys understand the obligation of honesty in negotiations and mediations.

*Versions of this paper originally appeared under the titles *The Ethics of Honesty in Alternative Dispute Resolution* (National Employment Lawyers Association seminar: "ABCs of Alternative Dispute Resolution") and *Emergency Ethics – Crisis Management for the Employment Attorney* (NYSBA Labor & Employment Law Section 2012 Fall Meeting).

II. Puffery or Dishonesty?

a. While dishonesty is prohibited in alternative dispute resolution, "puffery" is not.

i. *See* Am. Bar Ass'n Formal Ethics Op. ("ABA Opinion") 06-439 (2006) (recognizing that lawyers may "puff" as to certain issues).

ii. *Ausherman v. Bank of Am. Corp.*, 212 F Supp. 2d 435, 446 (D. Md. 2002). "Recognizing just where the line is to be drawn between ethical and unethical behavior during the negotiation process can be difficult to discern."

iii. ABA Opinion 06-439 recognizes that whether a statement is puffery or misrepresentation depends on the circumstances of the negotiation.

iv. "A fact is material to a negotiation if it reasonably may be viewed as important to a fair understanding of what is being given up and, in return, gained by the settlement . . . it seldom is a difficult task to determine whether a fact is material to a particular negotiation." *Ausherman*, 212 F Supp. 2d at 449.

v. Examples of factual misrepresentations include falsely stating that a party does not have settlement authority, lying about the cost of a settlement term, or claiming that certain evidence does or does not exist. *See* ABA Op. 06-439 at 1. Conversely, posturing around settlement intentions generally is acceptable and does not constitute a material fact.

As one commentator explains:

> For professional responsibility purposes, statements about a party's willingness to compromise or resolve a dispute, a party's willingness to compromise or resolve a criminal matter, a party's willingness to concede something or a value placed on a concession, the strength or weakness of a party's factual or legal positions, the strengths or weaknesses of a party's case, the value or worth of the subject of the parties' negotiation, and a party's goals or objectives all qualify as "puffery" or "posturing" . . . Douglas R. Richmond, *Lawyers' Prof'l Responsibilities & Liabs. in Negotiations*, 22 Geo. J. Legal Ethics 249, 269 (2009); *See also* ABA Formal Opinion 06-439 ("Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category.").

Nor are statements as to possible future possible events (for instance, whether a party will initiate litigation) considered material facts. *See In re Trans Union Corp. Privacy Litig.*, MDL 1350, 2009 WL 4799954, *41 (N.D. Ill Dec. 9, 2009), *order mod & remanded*, 629 F3d 741 (7th Cir 2011) ("In this case, the statement or promise at issue is about future conduct, not historical fact. Such future-oriented statements are typically not considered "factual" under fraud caselaw.").

As the court explained in *In re Trans Union Corp. Privacy Litigation*, "Thus, while an attorney can be disciplined for lying in a negotiation about an objective material fact, such as the amount of available insurance coverage or the death of the client, a threat to take particular legal action is a statement about the future and is not generally received as a hard promise, but rather as something the speaker "might" do." *Id.*

III. Affirmative Disclosure

a. General Rule: An attorney usually is not obliged to affirmatively disclose facts or information, but an attorney may not lie as to the existence of facts or information or make a misrepresentation through omission.

b. Hypothetical: Client A was discharged for her employer after she complained about discrimination. Initially, A was unable to find another job and after several months of informal negotiations the parties agreed to mediate. Three days before the mediation and after the parties had submitted their position statements, in which Client A indicated that she had not been able to find work, Client A was offered a comparable job. At mediation, the mediator asks if A has been able to mitigate her damages. How must the attorney respond?

While the ethics rules require that attorneys be honest in their interactions with third parties, including mediators and opposing parties, attorneys usually are not obliged to affirmatively disclose facts or information. *See* Rule 4.1, Comment 1 ("A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts."); *Statewide Grievance Comm. v. Gillis*, CV030479677S, 2004 WL 423905 (Conn. Super. Ct. Jan. 28, 2004) ("Petitioner has provided no authority, nor does this court find any, for the proposition that an attorney who represents a potential plaintiff must . . . blurt out the details of all the facts that could have an adverse effect on the merits or value of his or her client's claim.").

ABA Formal Ethics Opinion 94-387 (1994) explains it this way: As a general matter, the Model Rules of Professional Conduct . . . do not require a lawyer to disclose weaknesses in her client's case to an opposing party, in the

context of settlement negotiations or otherwise. Indeed, the lawyer who volunteers such information without her client's consent would likely be violating her ethical obligation to represent her client diligently, and possibly her obligation to keep client confidences.

While an attorney ordinarily does not have an obligation to affirmatively disclose relevant facts or information as part of the negotiation process, an attorney may not lie as to the existence of facts or information, since this would explicitly violate both Rules 4.1 and 8.4. Furthermore, misrepresentation may be achieved through omission, for instance, by failing to disclose the death of a client. *See Kentucky Bar Ass'n v. Geisler*, 938 S.W.2d 578, 579 (Ky. 1997) (sanctioning attorney for failing to disclose, in negotiations, the death of his client); ABA Op. 95–397 (1995) ("When a lawyer's client dies in the midst of the settlement negotiations of a pending lawsuit in which the client was the claimant, the lawyer has a duty to inform opposing counsel and the Court in the lawyer's first communications with either after the lawyer has learned of the fact.")

In the hypothetical above, the attorney likely has an obligation to inform the mediator that the client has been offered comparable employment, since the mediation statement submitted only three days earlier indicated that Client A had been unable to mitigate her damages. Failing to do so may constitute a misrepresentation as to a material fact. *See* 4.1, Comment 1 ("A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.").

c. Reliance on Misinformation: An attorney is not obligated to correct misinformation upon which the other party is relying, so long as (1) the attorney is not the source of the misinformation and (2) he or she refrains from intentionally adopting, promoting, or affirming a misrepresentation. *See* N.Y. Cty. Law. Ass'n. Comm. Prof. Eth. Op. 731, 2003 WL 25294953 (2003) ("While an attorney has a duty not to mislead intentionally . . . we believe that an attorney is not ethically obligated to prevent an adversary from relying upon incorrect information which emanated from another source . . . we conclude that the lawyer may refrain from confirming or denying the exogenous information, provided that in so doing he or she refrains from intentionally adopting or promoting a misrepresentation."). *See also* N.Y. Cty. Law. Ass'n. Comm. Prof. Eth. Op. 686, 1991 WL 755942 (1993) ("If, based on information imparted by the client, a lawyer makes an oral representation in a negotiation, which is still being relied upon by the other side, and the lawyer discovers the representation was based on materially inaccurate information, the lawyer may withdraw the representation even if the client objects. The Code of Professional Responsibility does not require the lawyer to disclose the misrepresentation.

IV. Conclusion

Although alternative dispute resolution is less formal than litigation, attorneys must remember that the ethics rules requiring honesty still apply. While posturing around nonmaterial facts is permissible in negotiations, lying – whether through act or omission – is prohibited. Doing so will not only cause plaintiffs' attorneys to lose credibility, it may cause them to end up in hot water with the court and disciplinary committee.

Cara E. Greene is a partner at Outten & Golden LLP, in New York, New York, where she represents employees, partners, and lawyers in all aspects of the employment and partnership relationship.

Insert Tab 4

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 15-06 Date: April 6, 2015

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Richard F. Griffin, Jr., General Counsel

SUBJECT: Guidance Memorandum on Representation Case Procedure Changes Effective April 14, 2015

I. INTRODUCTION

On December 15, 2014, the Board adopted a final rule[1] that will modify in certain respects the procedures applicable to the processing of representation cases. These changes are scheduled to go into effect on April 14, 2015 and will apply to all representation cases filed on or after that date. Representation cases filed before April 14, 2015 will continue to be processed using the rules in effect before April 14, 2015.

In adopting the final rule the Board explained that the amendments made by the final rule remove unnecessary barriers to the fair and expeditious resolution of representation cases, simplify representation-case procedures, codify best practices, and make them more transparent and uniform across regions. Duplicative and unnecessary litigation is eliminated; unnecessary delay is reduced; procedures for Board review are simplified; and rules about documents and communications are modernized in light of changing technology. The Board adopted these amendments to provide targeted solutions to discrete, specifically identified problems to enable the Board to better fulfill its duty to protect employees' rights by fairly, efficiently, and expeditiously resolving questions of representation.[2]

Neither the final rule, nor this memorandum, establishes new timeframes for conducting elections or issuing decisions. We will not be able to fully assess what impact the rule will have on the overall timing of elections until we have had some experience processing representation petitions under the final rule. Regions should continue to process representation petitions and conduct elections expeditiously, consistent with the Board's Rules.

The Agency is committed to providing ongoing guidance about the procedures that will govern the processing of representation cases after the implementation of the final rule.[3] The

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[1] 79 Fed. Reg. 74308.

[2] See 79 Fed. Reg. 74308.

[3] Documents that will be available on the Agency website to the assist in implementing the final rule include: fillable forms; sample completed forms; a document explaining the required format of the initial list and the voter list; and answers to frequently asked questions.

guidance provided in this memorandum is intended to explain, as clearly as possible, how representation cases will be processed from beginning to end, incorporating both the final rule changes and the procedures that remain unchanged. Where inconsistent, this memorandum supersedes the instructions in the Agency's manuals and other guidance, which will be updated in the near future. Although there may be issues about the implementation of the final rule that will require subsequent resolution, I am confident that the guidance provided herein will allow regions to implement the final rule effectively and efficiently. I am also confident that the dedication and professionalism consistently demonstrated by the personnel in the Agency's field offices will be exhibited in the implementation of the Board's new representation procedures.

A Committee comprised of senior managers from the Field and Headquarters carefully reviewed the final rule and identified and developed guidance for implementing it.[4] This memorandum describes the changes made by the final rule and provides guidance to Agency personnel, parties, practitioners, and other stakeholders on how the final rule will impact representation case processing from the initial processing through certification.

II. INITIAL PROCESSING OF THE PETITION

A. Final Rule Changes to Initial Processing Procedures

The final rule makes the following changes to the initial processing of petitions:

- §102.60 requires the petitioner to serve the petition, a Statement of Position form, and a Description of Representation Case Procedures form on the employer and all other parties named in the petition and to file a certificate of service with the Region concerning those documents.

- §102.60 provides that representation case petitions may be E-Filed.

- §102.61 provides that, when filed, the petition must be accompanied by the petitioner's showing of interest.

- §102.61 requires that petitions in RC, RD, and RM cases include the name and contact information of the individual who will serve as the petitioner's representative and accept service of all papers in the representation proceeding and the type, date(s), time(s), and location(s) of election sought by the petitioner.

- §102.63(a) provides that within 2 business days after service of the notice of hearing, the employer must post a Notice of Petition for Election. The employer must also distribute the notice electronically if the employer customarily communicates with its employees electronically. It also provides that the pre-election hearing will generally be scheduled to open 8

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[4] The members of the Committee are: Region 14 Director Dan Hubbel; Region 18 Director Marlin Osthus; Region 5 Regional Attorney Paula Sawyer; Region 25 Assistant to the Regional Director Pat Nachand; Region 27 Assistant to the Regional Director Kelly Selvidge; Region 4 Deputy Regional Attorney Richard Heller; Region 7 Supervisory Field Examiner Elizabeth Kerwin; Region 2 Field Attorney Burt Pearlstone; Region 7 Field Examiner Ethan Ray; Senior Advisor Celeste Mattina; Assistant General Counsel Aaron Karsh; Assistant General Counsel Dottie Wilson; and Deputy Assistant General Counsel Dolores Boda.

days from the notice of hearing, and §102.64(c) provides that the hearing will continue from day to day until completed unless the regional director concludes that extraordinary circumstances warrant otherwise.

- §102.63(b) requires non-petitioning parties to file a Statement of Position form before the hearing that identifies the issues they wish to litigate at the hearing and if they contend the proposed unit is not appropriate, the classifications, locations or other employee groupings that must be added to or excluded from the unit to make it an appropriate unit. The employer must also include an alphabetized electronic list(s) of employees with the full names, work locations, shifts, and job classifications of all individuals in the proposed unit and, if the employer claims the unit is inappropriate, a separate list of the full names, work locations, shifts, and job classifications of all individuals the employer claims should be added to the proposed unit in order to make it an appropriate unit. The employer must also separately indicate any individuals on the list whom it believes must be excluded from the proposed unit to make it an appropriate unit. Non-petitioning parties must also list those individuals whose eligibility to vote they intend to contest at the pre-election hearing and the basis for each such contention.

- §102.61(f) and 102.114(g) allow the showing of interest to be submitted by facsimile transmission.

B. Serving and Filing a Petition - §§102.60, 102.61 and 102.63(a)

Petition Forms: Petition forms in RC, RD, and RM cases have been revised to include the name and contact information of the individual who will be the petitioner's representative and accept service of all papers for purposes of the representation proceeding. The petition forms also include the petitioner's position on the type, date(s), time(s), and location(s) of election sought. To accommodate this additional information and ensure that the form remains readable, the petition form has been changed from one form where the petitioner checked a box to indicate the purpose of the petition (certification, decertification, unit clarification, etc.) to separate forms for RC, RD, RM, UC, UD, AC, and WH cases. All forms are available on the NLRB's website and in the NLRB's regional offices.

Service: To ensure the earliest possible notice of the filing of a petition and the Statement of Position requirement, a petitioner in an RC, RD, or RM case must serve on all parties named in the petition (1) a copy of its petition; (2) a Description of Representation Case Procedures (Form NLRB-4812); and (3) a Statement of Position form (Form NLRB-505). Both the Description of Procedures form and the Statement of Position form will be available on the NLRB website and in the regional offices. If the petition is E-Filed (through the Board's website, *www.nlrb.gov*), the petitioner must serve the petition and forms on the parties by electronic mail (email), if possible. If a party does not have the ability to receive electronic service, that party must be notified by telephone of the substance of the transmitted document and a copy of the document must be served by personal service no later than the next day, by overnight delivery service, or, with the permission of the party receiving the document, by facsimile transmission.[5] If the petition is filed by facsimile, §102.114(h) of the Board's Rules requires that service on the parties must be made in the same way as used to file the document, or in a more expeditious manner. When a party cannot be served by facsimile, or chooses not to

[5] See §102.114(a) and (i).

accept service by facsimile, the party must be notified personally or by telephone of the substance of the transmitted document and a copy of the document shall be served by personal service or overnight delivery service.

Filing: The petitioner may file the petition by E-Filing, by facsimile, by mail, or in person at one of the NLRB's field offices. The petition should be filed with the regional director for the regional office in which the proposed or actual bargaining unit exists. If the bargaining unit exists in two or more regions, it may be filed in any of those regions.

At the time of filing its petition, a petitioner seeking certification as the collective-bargaining representative (an RC case) or seeking to decertify an incumbent representative (an RD case) must provide the NLRB (but not the parties), evidence of employee interest in an election ("showing of interest"). This evidence is usually in the form of cards or signature sheets, which must be dated, authorizing the labor organization to represent the employees or providing that the employees no longer wish to be represented by the incumbent union.[6] If a petition is filed by an employer (an RM case), the petitioner must provide, at the same time it files its petition, proof of a demand for recognition by the labor organization named in the petition or evidence supporting a statement of good faith uncertainty about majority support for an existing representative. If the showing of interest is E-Filed or faxed, the original of the showing of interest documents must be received by the regional office no later than 2 business days after the E-Filing or facsimile filing.[7] If the E-Filed or faxed showing of interest is not followed by original documents containing handwritten signatures within 2 business days, the region will dismiss the petition.[8]

The petition may be amended before and during the hearing in the discretion of the regional director. If amended prior to the hearing, the petitioner should serve the amended petition on the other parties.

C. Docketing the Petition and Issuance of a Notice of Hearing - §§102.61 and 102.63(a)

A petition will not be docketed by the NLRB unless it is accompanied by both the showing of interest (original or electronically filed or faxed) and the required certificate of service showing that the petition, the Statement of Position form, and the Description of Representation Case Procedures form have been served on all the parties named in the petition. Upon filing, the petition is reviewed in the regional office for sufficiency and the showing of interest is checked to ensure that the petition is supported by at least 30 percent of the employees in the proposed unit. If both the petition and the showing are sufficient, the petition is given a case number, and assigned to a Board agent to process. RC, RD, or RM petitions should be

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[6] The Board directed the General Counsel to conduct an analysis, which is ongoing, of whether a practicable way exists for the Board to accept electronic signatures to support a showing of interest, while adequately safeguarding the important public interests involved.

[7] See §102.61(f). Although the final rule says "2 days" instead of "2 business days," because the specified time is less than 7 days, pursuant to §102.111(a), the time is effectively 2 business days and is written that way here for clarity.

[8] See 79 Fed. Reg. 74329.

assigned the highest docketing priority. A petitioner generally can expect that a petition received by noon will be served that same business day by the region.

A docket letter that transmits the petition, a Notice of Representation Hearing, a Notice of Petition for Election (Form 5492), a Description of Procedures in Representation Cases (Form NLRB-4812), and the Statement of Position (Form NLRB-505) is prepared for each party. However, a notice of hearing will not be included if it is apparent that dismissal of the petition is appropriate, for example if the petition is untimely filed. The region will mark the correspondence "Urgent," send the docket letter and all attachments by regular mail, and, to give the parties the earliest notice of the hearing and their obligations, will also send these documents by either email or facsimile transmission if available. If no email or facsimile number is listed on the petition, the region will attempt to obtain one to send these documents. In addition, the Board agent will attempt to contact the parties promptly after sending the documents to confirm their receipt and discuss processing the petition.

Except in cases presenting unusually complex issues, the regional director[9] will set the hearing on the eighth day after service of the notice of hearing, excluding intervening holidays. If the eighth day falls on a Federal holiday or weekend, the hearing will be scheduled for the next business day. The hearing will continue from day to day until completed unless the regional director concludes that extraordinary circumstances warrant otherwise.[10] The docket letters will inform the parties that we will continue to explore all potential areas of agreement in order to reach an election agreement and to eliminate or limit the costs associated with formal hearings.

Both the docket letter and the Notice of Representation Hearing will specify the due date for the Statement of Position, which will be noon on the business day before the opening of the hearing if the hearing is set to open 8 days from service of the notice of hearing. If the hearing is set to open *more than* 8 days from the service of the notice, the regional director may set the due date for the position statement earlier than at noon on the business day before the hearing. However, parties will have at least 7 days notice of the due date for completion of the Statement of Position form in all cases. The Statement of Position form generally will be due no later than noon (in the time zone of the region issuing the Notice of Hearing) on the business day before the hearing so that it may serve its intended purposes of facilitating entry into election agreements and narrowing the scope of any hearing that must be held, thereby enabling the Board to expeditiously resolve questions concerning representation.

Form NLRB-4812, which accompanies the docket letter and describes the procedures in representation cases, has been revised to reflect the changes described here and is available on the NLRB's website.

After the docket letters have been sent to the parties, the region should ensure that the E-Filed or faxed showing of interest is followed by original documents containing handwritten signatures within 2 business days. If not received, the region will dismiss the petition.

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[9] Any reference in this memorandum to the regional director includes an acting regional director.

[10] See discussion below in Section V.L.

D. Notice of Petition for Election - §102.63(a)(2)

The employer is sent a Notice of Petition for Election with the docket letter and is notified that, within 2 business days after service of the notice of hearing, the employer must post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted. The Notice of Petition for Election must be posted so all pages are simultaneously visible. If the employer customarily communicates with *all* the employees in the petitioned-for unit through electronic means, the employer must also distribute the Notice of Petition for Election electronically to the *entire* unit. If the employer customarily communicates with only some of the employees in the petitioned-for unit through electronic means, then the employer must distribute the Notice of Petition for Election electronically to those employees.[11]

The employer must maintain the posting of the Notice of Petition for Election until the petition is dismissed or withdrawn or the Notice of Petition for Election is replaced by the Notice of Election. Failure to properly post or distribute the Notice of Petition for Election may be grounds for setting aside the election whenever proper and timely objections are filed.

E. Statement of Position - §102.63(b)

The Statement of Position form solicits information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. In RC cases, a Statement of Position must be filed by the employer; in RD and RM cases, a Statement of Position must be filed by the employer and the union. The Board did not require that an intervenor file a Statement of Position, but indicated that the regional director has discretion to impose this requirement on an intervenor.[12]

If a party contends as part of its Statement of Position that the proposed unit is not appropriate, the party will be required to state the basis for its contention that the proposed unit is inappropriate, and state the classifications, locations, or employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit. As part of their Statement of Position, the parties must also identify any other individuals whose eligibility they intend to challenge at the pre-election hearing and the basis of each such contention. As part of its Statement of Position form, the employer will also provide an alphabetized list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit. If the employer contends that the proposed unit is not appropriate, the employer must separately list the same information for all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit, and must further indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit.

The employer must submit the list in an electronic format approved by the General Counsel, unless the employer certifies that it does not have the capacity to produce the list in the required format. I have concluded that, for ease of access of the data, the lists must be filed in common, everyday electronic file formats that are searchable. The lists must be in a table in a

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[11] See 79 Fed. Reg. 74379.

[12] See 79 Fed. Reg. 74375, fn. 325 and 74383.

Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word. The first column of the table must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. The font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at *www.nlrb.gov/what-we-do/conduct-elections*.

Ordinarily, the Statement of Position must be filed with the regional office and served on the other parties such that it is received by them by noon on the business day before the opening of the hearing. The Statement of Position form may be E-Filed, but unlike other E-Filed documents, will *not* be timely if filed on the due date but after noon in the time zone specified in the Notice of Representation Hearing.

F. Requests for Postponement of Hearing and Extension of Time to Submit Statement of Position - §102.63(a) and (b)

If a party wishes to postpone the hearing, it may make a request to the regional director. The regional director may postpone the hearing for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances. A party wishing to request a postponement should make the request in writing and set forth in detail the grounds for the request. The request should be filed with the regional director and should include the positions of the other parties regarding the postponement. E-Filing the request is preferred, but not required. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request. The regional director also has discretion to postpone the hearing when the regional director concludes that it is highly probable that the parties will be able to enter into an election agreement.[13]

A request to postpone the hearing will not automatically be treated as a request for an extension of the Statement of Position due date. If a party wishes to request both a postponement of the hearing and a postponement of the Statement of Position due date, the request must make that clear and must specify the reasons that postponements of both are sought. The regional director may postpone the time for filing and serving the Statement of Position for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances.

G. Dismissal or Withdrawal of Petition

The petitioner may be asked to withdraw its petition if the investigation discloses, for example, that further processing is inappropriate because of a lack of jurisdiction or because the petition is untimely. A regional director may approve a petitioner's oral request to withdraw a petition. If the petitioner refuses to withdraw the petition, the regional director may dismiss it and advise the petitioner of the right to request review by the Board of the regional director's dismissal.

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[13] See 79 Fed. Reg. 74424.

III. ELECTION AGREEMENTS

A. Types of Election Agreements

By entering into an election agreement, the parties can avoid the time and expense of participating in a pre-election hearing. Three types of agreements are available to resolve representation issues: (1) a consent election agreement which provides that the regional director's rulings on challenged ballots and election objections are final and binding; (2) a full consent agreement, which provides for final regional director determination of both pre-election and post-election disputes; and (3) a stipulated election agreement, under which the regional director will resolve any post-election disputes subject to discretionary Board review. In about 90 percent of the cases, with Board agent assistance, the parties enter into an election agreement that specifies the appropriate unit, the payroll period to be used in determining which employees in the appropriate unit are eligible to vote, and the type, place, date, and hours of voting, along with any special eligibility formulas.

Consistent with current practice, the Board agent will contact the parties shortly after the petition is filed to explore the possibility of entering into an election agreement and narrowing the issues if a hearing is held. If an election agreement is reached and approved before the Statement of Position is due, the Statement of Position need not be filed. Even if an election agreement is not reached, the Board agent should seek the parties' positions and explore agreement on all issues, including issues that need not be litigated in a pre-election hearing under the final rule.

B. Agreement to Vote Certain Individuals Subject to Challenge

The final rule leaves to regional directors' discretion what percentage of the unit with individual eligibility or inclusion issues may be deferred. The Board noted that it had uniformly held that a change affecting no more than 20 percent of the unit does not require a new election. On occasion, the Board has also permitted regional directors to defer resolution of the eligibility of an even higher percentage of potential voters. The Board expressed confidence that regional directors will consider that precedent in exercising their discretion under the final rule and said it would expect regional directors to typically exercise their discretion in favor of approving parties' stipulated election agreements in which up to 20 percent of the unit is to be voted under challenge.[14]

If the parties enter into an election agreement and also agree that certain classifications or job titles will vote subject to challenge, the agreement to vote those individuals subject to challenge should be part of the election agreement.

C. Time to Provide Voter List - §102.62(d)

Absent agreement of the parties to the contrary specified in the election agreement, the employer must provide the voter list to the regional director and the parties within 2 business days after the regional director's approval of the election agreement. Any agreement by the

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[14] See 79 Fed. Reg. 74388 fn. 373.

parties to extend the time for providing the list must be approved by the regional director, and it is expected that any extension will be brief.

D. Election Date

The Board has said that the election should be held at the earliest date practicable consistent with the Board's rules. At this point, because there is no experience processing cases under the final rule, it is not possible to express a standard in terms of a specific number of days from the filing of the petition to the election. Rather, I expect that regional directors will exercise their discretion and approve agreements where the date agreed upon by the parties is reasonably close to the date when an election would likely be held if it were directed. Factors that will influence the date when a directed election would occur include the number of likely days of hearing, the length of time required to write the decision, and whether the parties entitled to the voter list have waived some or all of the time to have the list. As suggested by the Board,[15] regional directors' discretion in selecting an election date should continue to be guided by the factors listed in CHM §11302.1: the desires of the parties, operational considerations, the desirability of facilitating employee participation, and the prompt and timely conduct of the election.

IV. HEARING PREPARATION

If the parties have not entered into an election agreement, the region should, where appropriate, conduct a pre-hearing conference at the regional office or by conference call for the purpose of further exploring the possibility of entering into an election agreement or narrowing the issues to be litigated at a hearing.

At this conference, the Board agent should explore the issues raised in the Statement of Position and attempt to obtain an election agreement. If an agreement is not possible, every effort should be made to narrow the issues for hearing and to reach written stipulations on the issues that are not in dispute, such as commerce, labor organization status, eligibility formulas, unit inclusions, and unit exclusions. These stipulations can either be read into the record or be introduced as exhibits during the hearing. The Board agent should also discuss with the parties the nature of the evidence to be presented and the order in which it will be elicited.

Prior to the hearing, the hearing officer should be certain to research the potential issues to ensure that he or she is fully aware of the applicable legal standards under the most current Board law. The NLRB Guide for Hearing Officers in Representation and Section 10(k) Proceedings and the Outline of Law and Procedure in Representation Cases are excellent starting points for such research, but such research should be supplemented with a review of the most current case law, particularized to the type of industry and employee classifications likely to be at issue.

The hearing officer should also determine whether the issues involve a presumption under Board law and identify which party has the burden of rebutting that presumption. A list of presumptions is provided in Section V.H., below. If a party raises statutory exclusions, such as

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[15] See 79 Fed. Reg. 74405.

§2(11) supervisory status, independent contractors, or agricultural workers, or exclusions based on policy considerations, such as managerial employee or confidential employee, the hearing officer should indicate, on the record, that the party seeking to exclude employees on these bases bears the burden of proof. *Ohio Masonic Home, Inc.*, 295 NLRB 390, 395 (1989) (as a general rule, if the unit is appropriate, the burden is on the party asserting the employee or the employee classification ineligible); *Sweetener Supply Corp.*, 349 NLRB 1122 (2007) (burden of proof rests on the party asserting ineligibility to vote); *Crest Mark Packing Co.*, 283 NLRB 999 (1987) (party claiming an exclusion because of confidential status has the burden of establishing that exclusion); *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001) (party claiming supervisory status has the burden of proving the status).

Before the hearing begins, the hearing officer should have a meeting with the regional director to review the Statement of Position and discuss the issues that have been raised.

V. HEARINGS

A. Final Rule Changes to Hearing Procedures

The final rule amendments regarding pre-election hearings include:

- §102.64(a) states that the purpose of the pre-election hearing is to determine if a question of representation exists and provides that disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted.

- §102.65(a) and (b) are amended to provide that regional directors will rule on motions to amend the petition or to intervene.

- §102.65(e)(3) is amended to state that if a motion for reconsideration based on changed circumstances or a motion to reopen the record based on newly-discovered evidence states with particularity that the granting thereof will affect the eligibility to vote of specific employees, the Board agent shall have discretion to allow such employees to vote subject to challenge even if they are specifically excluded in the direction of election and to challenge or to permit the moving party to challenge the ballots of such employees, even if they are specifically included in the direction of election in any election conducted while such motion is pending.

- §102.66(a) provides that any party shall have the right to call, examine, and cross-examine witnesses, and to introduce into the record, evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation.

- §102.66(b) provides that, at the beginning of the hearing, the Statement of Position (SOP) is introduced into the record and all other parties are required to respond to issues raised in the SOP before other evidence is received. The hearing officer will not receive evidence concerning any issue on which parties have not taken an adverse position, except that this will not preclude the receipt of evidence concerning the Board's statutory jurisdiction or limit the regional director's discretion to direct the receipt of evidence concerning any issue the regional director deems necessary, such as the appropriateness of the proposed unit.

- §102.66(c) provides that the regional director will direct the hearing officer regarding the issues to be litigated at the hearing.

- §102.66(d) provides that a party is precluded from raising or litigating any issue that it failed to raise in its timely Statement of Position or response, except that no party will be precluded from contesting or presenting evidence relevant to statutory jurisdiction. If the employer fails to timely furnish the lists of employees, the employer will be precluded from contesting the appropriateness of the proposed unit at any time and the eligibility or inclusion of any individuals at the pre-election hearing.

- §102.66(g) provides that, before the hearing closes, the hearing officer will solicit the parties' positions on the type, date(s), time(s), and location(s) of the election, the eligibility period and the name and contact information of the employer's on-site representative to whom the regional director should transmit the Notice of Election. The hearing officer will inform the parties of their obligations if an election is directed and of the time for complying with such obligations.

- §102.66(h) provides that, at the close of hearing, parties are permitted to make oral arguments on the record, but are permitted to file post-hearing briefs only with special permission of the regional director.

B. The Roles of the Regional Director and the Hearing Officer

The regional director will decide which issues will be litigated at the hearing, whether to allow intervention, amendments of the petition or the Statement of Position, or filing of post-hearing briefs, and whether to grant postponements or continuances of the hearing.

The hearing officer's role is to ensure a complete record as to issues relevant to a question concerning representation and any other issue the regional director has decided should be litigated at the pre-election hearing. The hearing officer may question witnesses and introduce documentary evidence, to the extent necessary, to ensure the record evidence is sufficient to enable the regional director to decide these issues. The hearing officer should also make sure the record does not contain irrelevant, duplicative, or otherwise unnecessary evidence. While the hearing officer must always be respectful to the parties and their representatives, he or she must also strive to ensure that the record is concise.

At the beginning of the hearing, the hearing officer should obtain the petitioner's response to the issues raised by the other party(ies) in their Statement(s) of Position. The hearing officer has discretion to ask each party to make an offer of proof as to the evidence that they would present in support of their position on any of the issues in dispute, but may not preclude a party from presenting that evidence without first obtaining the regional director's approval.[16] Once the regional director has determined which issues should be litigated, the hearing officer should identify these issues on the record. The hearing officer should also state on the record that a party seeking to rebut a presumption under Board law or to meet a burden of proof must present specific, detailed evidence in support of its position and that general conclusionary statements by witnesses will not be sufficient. *The Republican Co.*, 361 NLRB No. 15, slip op. at 8 (2014); *Lynwood Manor*, 350 NLRB 489 (2007); *Avante at Wilson, Inc.*, 348 NLRB 1056 (2006). The hearing officer will not receive evidence concerning any issue as to which parties have not taken adverse positions, except the hearing officer may receive evidence regarding the

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[16] See discussion below in Section V.I.

Board's jurisdiction, the appropriateness of the unit, or any other issue the regional director determines is necessary.

C. Issues to be Litigated in a Pre-Election Hearing - §§102.64(a) and 102.66(a)

Issues relevant to a determination of whether a question concerning representation exists must be litigated at a pre-election hearing. The final rule grants regional directors discretion to defer litigation concerning individual eligibility or inclusion issues that do not significantly change the size or character of the unit until after the election, where appropriate, thereby giving regional directors tools to reduce litigation of issues that are unnecessary to decide before the election and that may be rendered moot by the election results or resolved by the parties after the election. Eligibility and inclusion issues concern either (1) whether an individual or group is covered by the terms used to describe the unit, or (2) whether an individual or group is within a particular statutory or policy exclusion or should not be in the unit. For example, if the petition calls for a unit of "production employees," excluding "guards and supervisors as defined in the Act," eligibility/inclusion issues would include: (1) whether employees who perform quality control functions are production employees; (2) whether Joe Smith is a production employee; (3) whether production foremen are supervisors; and (4) whether production employee Jane Doe is a supervisor.

As discussed more fully in the next section, some issues will continue to be decided prior to the election. The issue of whether there is an appropriate unit for an election, including unit scope questions,[17] must be decided prior to the election. Issues such as jurisdiction, labor organization status, and various election bars must also be decided before the election.

However, the final rule now provides that disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit "ordinarily" need not be litigated or resolved before an election is conducted. Such issues may be resolved after the election in a post election or unit clarification procedure, if necessary. The Board did not, however, define "ordinarily" or otherwise specify the percentage of unit employees whose unresolved voting eligibility is substantial enough to warrant pre-election litigation. In fact, the Board decided not to adopt a proposal that would have required that hearing officers bar litigation of disputes concerning the eligibility or inclusion of individuals comprising less than 20 percent of the unit. Rather than adopt a bright-line requirement, the Board decided to grant regional directors the discretion to make these decisions in a manner that is least likely to result in unnecessary litigation, while permitting litigation of eligibility/inclusion issues when in their judgment it is appropriate to do so.[18] In making these determinations, regional directors should consider factors such as: the percentage of the unit in dispute; the anticipated amount of time that will be needed to litigate the

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[17] Multi-facility and multi-employer issues are commonly referred to as unit scope issues. See discussion below in Section V.D.

[18] The Board noted that it strongly believed that regional directors' discretion would be exercised wisely if regional directors typically chose not to expend resources on pre-election litigation of eligibility and inclusion issues amounting to less than 20 percent of the proposed unit. On occasion, the Board has permitted regional directors to defer resolution of the eligibility of more than 20 percent of potential voters, though it recognizes that allowing 25 percent of the electorate to vote subject to challenge is not optimal. See 79 Fed. Reg. 74388 fn. 373.

eligibility/inclusion issue(s) (i.e., number of witnesses, etc.); the anticipated amount of time that will be needed to draft a decision on the issue(s) (i.e., the complexity and novelty of the issue(s)); the size of the unit; whether an eligibility/inclusion issue is the sole issue in dispute; whether inclusion or exclusion of a classification at issue might significantly change the size or character of the unit; the parties' positions on litigating the issue(s); and any other factors that the regional director deems relevant.

If multiple eligibility/inclusion issues together involve more than 20 percent of the unit, the regional director may identify a subset of the issues involving less than 20 percent of the unit and defer those issues while conducting a hearing on the remaining issues. In determining which issues to litigate, the regional director may attempt to determine which issue(s) can be handled most expeditiously at the hearing and in the decision. To this end, the regional director may in some situations instruct the hearing officer to request the parties to make offers of proof as to their positions on the issues and to identify the witnesses and evidence they would proffer at the hearing. The regional director could also request the hearing officer to determine whether the parties can agree as to which issues should be litigated and which should be deferred.

There may, of course, be situations in which there are eligibility/inclusion issues in the context of significant differences between the parties' positions as to the unit. In these situations, the regional director should base the determination as to the percentage of the unit affected by eligibility/inclusion issues on the size of the petitioned-for unit and any other unit in which the petitioner is willing to proceed to an election. Thus, if the petitioner asserts that it would be unwilling to proceed to an election concerning an employer's alternative unit, the regional director need not take into account the size of that unit. If, on the other hand, the petitioner is willing to proceed to an election in a unit proposed by the employer or another party, then the regional director will retain discretion to decide the most efficient means of structuring the litigation of eligibility/inclusion issues. In such a situation, the regional director may, of course, consider the relative percentage of eligibility/inclusion issues presented in each of the proposed units.

D. Specific Issues Appropriate for Pre-Election Hearing

As discussed below, issues that must be litigated in a pre-election hearing if in dispute include: (1) jurisdiction; (2) labor organization status; (3) bars to elections; (4) appropriate unit; (5) multi-facility and multi-employer issues; (6) expanding and contracting unit issues; (7) employee status of a significant portion of the unit; (8) seasonal employees; (9) inclusion of professional employees or guards with other employees in a unit; (10) eligibility formulas; and (11) craft and health-care employees. However, except for jurisdiction, preclusion will apply if any of these issues is not raised in the Statement of Position or disputed at the hearing.

1. Jurisdiction

A proper petition cannot be filed, and a question concerning representation (QCR) cannot arise under Section 9(c)(1) of the Act, unless the employees in the unit are employed by an employer covered under the Act. Issues relevant to whether the Board has jurisdiction over the employer must be litigated at the pre-election hearing. This would include establishing that the employer meets the Board's defined jurisdictional standards. See *Siemons Mailing Service*, 122

NLRB 81 (1959). When using the retail standards of gross volume of revenue, there must also be a showing of statutory jurisdiction, that is a demonstration of some flow of goods or services across state lines, valued greater than *de minimis*. This amount should be at a minimum $5,000, as set out in the Pleadings Manual §401.9(a). See also *J. M. Abraham, M.D.*, 242 NLRB 839 (1979), in which statutory jurisdiction was established by receipt of Medicare funds and *International Longshoremen & Warehousemen's Union (Catalina Island Sightseeing)*, 124 NLRB 813 (1959), in which regulation by another Federal agency under the commerce clause established statutory jurisdiction. The employer or any other party has the right to present evidence regarding *statutory* jurisdiction, even if they take no position on the issue and even if the employer has not provided commerce information.

Regions should continue to determine all jurisdictional issues during pre-election proceedings, through hearings if necessary. One such issue is whether the employer falls within the statutory exemption for any state or political subdivision. See *Natural Gas Utility District of Hawkins County, Tennessee,* 402 U.S. 600 (1971). Another issue is whether the employer is subject to the Railway Labor Act. See, e.g., *Spartan Aviation Industries, Inc.,* 337 NLRB 708 (2002); *Federal Express Corp.,* 317 NLRB 1155 (1995), where the Board may refer these cases to the National Mediation Board for advisory opinions, if appropriate, i.e., NLRB jurisdiction is sufficiently doubtful. An additional jurisdictional issue is whether the employer is a religious organization. See *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *Pacific Lutheran University*, 361 NLRB No. 157 (2014); *Catholic Social Services*, 355 NLRB 929 (2010). Finally, the region will need to decide prior to the election whether the employer is a horseracing or dog racing facility. See §103.3 of the Board's Rules and Regulations; *Prairie Meadows Racetrack and Casino*, 324 NLRB 550 (1997).

As set forth in CHM §11704.1, if an employer refuses a reasonable request by the Agency to provide information relevant to the Board's jurisdictional determination, jurisdiction will be found if the record establishes that the Board has statutory jurisdiction, even if no specific monetary jurisdictional standard is shown to be satisfied. *Tropicana Products, Inc.*, 122 NLRB 121, 123 (1958). See also *Continental Packaging Corp.,* 327 NLRB 400 (1998); *Major League Rodeo, Inc.*, 246 NLRB 743, 745 (1979). In this regard, the employer is required to provide a completed commerce questionnaire as part of its Statement of Position. If the employer does not submit a completed commerce questionnaire, the hearing officer must ensure that sufficient secondary evidence is available to determine whether the employer meets the standards for statutory jurisdiction. This includes evidence showing that the employer purchases goods and materials from out-of-state, sells its products to out-of-state entities, or performs work across state lines. Generally, the best source of such information is testimony of employee witnesses and documents provided by the petitioner. Information obtained from an employer's website may also be introduced into the record to establish jurisdiction. Thus, it is generally not necessary to issue a subpoena for commerce information where sufficient secondary evidence will be available to establish statutory jurisdiction. However, if there is doubt about the sufficiency of secondary evidence, the region should issue a subpoena as soon as possible.

2. Labor Organization Status

If a party contends that an entity is not a labor organization within the meaning of Section 2(5) of the Act, or refuses to stipulate to such status, the regional director must resolve this issue.

The Act requires that to be deemed a labor organization, an organization need only: (1) have employees participate in its activities; and (2) exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, and terms and conditions of employment. *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959). Once the evidence adduced at the hearing establishes that these requirements have been met, the hearing officer should ensure that the record does not include unnecessary or irrelevant information concerning the labor organization.

Section 9(b)(3) issues as to whether a guard union admits nonguards to membership or is affiliated with an organization that admits nonguards to membership must be decided in pre-election proceedings. These issues may include determinations as to whether some of the employees in petitioned-for classifications are guards (see, e.g., *Boeing Co.*, 328 NLRB 128 (1999); *MGM Grand Hotel*, 274 NLRB 139 (1985)), as well as issues as to whether a union seeking to represent guards also represents nonguards (see *Burns International Security Services, Inc.*, 278 NLRB 565, 568 (1986); *Wells Fargo Guard Services*, 236 NLRB 1196 (1978)).

3. Bars to Election

All potential election-bar issues, including certification bar, contract bar, recognition bar, successorship bar, and election bar, must be litigated and resolved before an election can be conducted. Hearing officers must be thoroughly familiar with significant recent developments as to recognition bar and successorship bar.

In *Lamons Gasket Co.*, 357 NLRB No. 72 (2011), the Board overruled *Dana Corp.*, 351 NLRB 434 (2007), and returned to the recognition-bar rule of *Keller Plastics Eastern*, 157 NLRB 583 (1966), under which an employer's voluntary recognition of a union, based on a showing of majority support, bars any challenge to the union's representative status for a "reasonable period of time," in order to give the new bargaining relationship a chance to succeed. The Board defined "reasonable period of time" as no less than six months after the parties' first bargaining session and no more than one year.

In *UGL-UNICCO Service Co.*, 357 NLRB No. 76 (2011), the Board overruled *MV Transportation*, 337 NLRB 770 (2002), and returned to the successor-bar doctrine previously set forth in *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999). This doctrine provides that, when a successor employer recognizes the incumbent representative of its employees, that representative is entitled to represent the employees in collective bargaining with their new employer for "a reasonable period of time" without challenge to its representative status. The Board modified the successor-bar doctrine as articulated in *St. Elizabeth Manor* by holding that the required "reasonable period of bargaining" would depend on whether the employer has expressly adopted the existing terms and conditions of employment as the starting point for bargaining.

4. Appropriate Unit Issues

A finding of an appropriate unit must always be made before conducting an election. Accordingly, the hearing officer must be sure that the record will enable a finding to be made that a unit is appropriate for the purposes of collective bargaining. In determining the

appropriateness of the unit, the region should apply the presumptions discussed more fully below in Section H.

5. Multi-Facility and Multi-Employer Issues

Multi-facility and multi-employer issues, commonly referred to as unit scope issues, must be determined prior to conducting the election. Where an employer operates at multiple locations, issues involving which facilities should be included in a unit must be litigated at the pre-election hearing. See *Hilander Foods,* 348 NLRB 1200 (2006); *Prince Telecom,* 347 NLRB 789 (2006). However, presumptions that apply in these cases may make it appropriate to limit the presentation of evidence.

Issues involving the nature of the employing entity that must be litigated at the pre-election hearing include: whether a single-employer or multi-employer unit is appropriate, see *Donaldson Traditional Interiors*, 345 NLRB 1298 (2005); *Architectural Contractors Trade Association*, 343 NLRB 259 (2004); whether nominally separate entities constitute a single employer or alter ego, see *Lederach Electric, Inc.*, 362 NLRB No. 14 (2015); *Bolivar-Tees, Inc.,* 349 NLRB 720 (2007); *Mercy General Health Partners,* 331 NLRB 783 (2000); and whether independent entities have a joint-employer relationship, see *CNN America, Inc.* 361 NLRB No. 47 (2014); *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3rd Cir. 1982).[19] Also see *Oakwood Care Center*, 343 NLRB 659 (2004), in which the Board overruled *M.B. Sturgis, Inc.,* 331 NLRB 1298 (2000), and held that combined units of solely and jointly employed employees are multi-employer units and are statutorily permissible only with the consent of all parties.

6. Expanding and Contracting Unit Issues

If the employer contends that its business, or the applicable portion of its business, will be closing imminently, the regional director must make a pre-election determination on this issue. See *Hughes Aircraft, Co.,* 308 NLRB 82 (1992). Similarly, the regional director must make a pre-election determination regarding a contention that the petition should be dismissed because the bargaining unit is expanding and the employer does not presently employ a substantial and representative complement of employees. See *Yellowstone International Mailing,* 332 NLRB 386 (2000); *Toto Industries (Atlanta),* 323 NLRB 645 (1997). Frequently, resolution of these issues requires evidence presented at a pre-election hearing. On these issues, an employer's contention must be based on evidence that is more than speculative. *Canterbury of Puerto Rico*, 225 NLRB 309 (1976). Even if the regional director decides not to dismiss the petition based on evidence adduced at the hearing, unit expansion may affect the date on which the election is scheduled.

7. Employee Status

Issues as to whether individuals are employees within the meaning of Section 2(3) of the Act must be litigated at the initial hearing if they involve the entire unit and should likely be

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[19] On May 13, 2014, the Board invited the parties and interested *amici* to file briefs in *Browning-Ferris Industries*, Case 32-RC-109684, to address whether the Board should adhere to its existing joint-employer standard or adopt a new standard.

litigated if they concern classifications that constitute more than 20 percent of the unit.[20] These include determinations of: whether individuals are statutory employees or independent contractors, *Porter Drywall, Inc.*, 362 NLRB No. 6 (2015); *FedEx Delivery*, 361 NLRB No. 55 (2014); whether individuals are "agricultural employees," see *Pictsweet Mushroom Farm*, 329 NLRB 852 (1999); *Cal-Maine Farms*, 307 NLRB 450 (1992), enfd. 998 F.2d 1336 (5th Cir. 1993); and whether graduate students who serve as teaching assistants and research assistants are employees, see *New York University*, 356 NLRB No. 7 (2010); *Brown University*, 342 NLRB 483 (2004); *Boston Medical Center Corp.*, 330 NLRB 152 (1999). As to the employee status of disabled clients, see *Brevard Achievement Center*, 342 NLRB 982 (2004).

8. Seasonal Operations

Whether the employer is a seasonal operation is an issue that must be litigated at the pre-election hearing because that impacts the date when an election is held. See, *Bogus Basin Recreation Assn.*, 212 NLRB 833 (1974); *Brookville Citrus Growers Assn.*, 112 NLRB 707 (1955). On the other hand, issues concerning the reasonable expectation of future employment of a small number of seasonal employees may be deferred to post-election proceedings. See, e.g., *Macy's East*, 327 NLRB 73 (1998); *Maine Apple Growers*, 254 NLRB 501, 502-503 (1981).

9. Professional Employees and Guards

Certain other issues also must be decided before the election. If a party contends that certain individuals are professional employees and those individuals are to be included in an appropriate unit of nonprofessional employees, the issue of whether they are professional employees must be decided before the election because professional employees must be given an opportunity to decide whether to be included in a nonprofessional unit, which requires special balloting procedures. *Sonotone Corp.*, 90 NLRB 1236 (1950). However, if a party contends an individual is a professional and the appropriate unit description excludes professionals, the contested individual can vote subject to challenge.

Additionally, if a party contends that one or more of the employees in the petitioned-for non-guard unit are guards, or vice-versa, this issue must be decided before the election to ensure that the unit does not run afoul of Section 9(b)(3). See, e.g., *Madison Square Garden*, 333 NLRB 643, 644 (2001). However, the issue of whether a particular employee should be excluded from a non-guard unit as a guard may be deferred to the post-election stage.

10. Eligibility Formulas

If a party contends that a different eligibility formula than the Board's standard formula must be used, this matter must be addressed before the election. See *Davison-Paxon Co.*, 185 NLRB 21, 24 (1970) (formula for most part-time employees); *Marquette General Hospital*, 218 NLRB 713, 714 (1975) (healthcare industry); *Steiny & Co.*, 308 NLRB 1323 (1992) (construction industry); *Kansas City Repertory Theatre*, 356 NLRB No. 28 (2010) (employees with irregular employment in the entertainment industry).

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[20] See discussion above regarding the percentage that may be left to challenge.

11. Craft and Health-Care Employees

A determination as to whether a petitioned-for craft unit is appropriate should also be made prior to the election. See *Mirage Casino-Hotel,* 338 NLRB 529 (2002); *Bartlett Collins Co.,* 334 NLRB 484 (2001). A determination must also be made as to whether the employer is an acute-care hospital such that the health-care unit rules apply.[21]

E. Issues That May Be Deferred for Post-Election Resolution

As discussed above, at the regional director's discretion, litigation and resolution of issues as to whether certain classifications are included in the unit may be deferred until after the election, if the petitioned-for unit or the unit in which the election will be conducted is an appropriate unit and the number of individuals in the disputed classification(s) would not significantly change the size or character of the unit.[22] For example, if the employer contends that its only two quality control employees must be added to a petitioned-for unit of 50 production and maintenance employees, the regional director may direct that these employees vote subject to challenge rather than take evidence about them at the pre-election hearing.

The final rule generally divides eligibility/inclusion issues into two categories: whether individuals in an appropriate unit are ineligible because they are not employees as defined by the Act or are excluded by Board policy, and whether individuals fall within the terms used to describe the unit. Prior to the final rule, if parties did not agree to vote disputed supervisors subject to challenge, pre-election hearings would be held on this issue, even if they only involved a single individual or a miniscule portion of the unit, and even if the regional director or Board did not necessarily need to resolve those issues. Because these issues do not directly impact on whether there is a question concerning representation, regional directors may now decide not to permit litigation of them at the pre-election stage.

Moreover, the regional director may decide not to permit litigation of supervisory status prior to the election even if a party asserts that pro-union conduct by a supervisor tainted the petition or the showing of interest. See, e.g., *Terry Machine Co.*, 356 NLRB No. 120 (2011); *Harborside Healthcare,* 343 NLRB 906 (2004). Allegations of supervisory taint of the petition or showing of interest are normally determined through an administrative investigation conducted by the regional director independent of the pre-election hearing.

Because a petition filed by a supervisor cannot raise a valid question concerning representation, a dispute with respect to whether the individual filing a petition is a supervisor must be resolved at the pre-election stage, typically in an administrative investigation. *Modern Hard Chrome Service Co.*, 124 NLRB 1235, 1236 (1959).

Managerial employees present similar issues. Generally, these issues only affect a single individual or an insignificant portion of the unit and may be deferred until after the election. See *The Republican Co.,* supra. However, if the petitioned-for unit or a major portion of that unit is assertedly managerial, a hearing must be held to ascertain managerial employee status before the

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[21] §103.30 of the Board's Rules and Regulations.

[22] See footnote 17 above.

election. See *NLRB v. Yeshiva University,* 444 U.S. 672, 682-683 (1980); *Pacific Lutheran University*, supra.

Another statutory exclusion issue that can be deferred until after the election is whether an individual is employed by his or her parent or spouse. See *NLRB v. Action Automotive*, 469 U.S. 490 (1985); *Peirce-Phelps, Inc.*, 341 NLRB 585 (2004). Further, although not excluded by statute, Board policy also excludes confidential employees from bargaining units. See *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 US 170 (1981). Similar to supervisory and managerial issues, these issues of individual eligibility can be deferred until after the election.

Issues concerning whether individual employees or relatively small groups of employees fall within an appropriate unit may also be deferred until after the election. One such issue is whether an employee is an office clerical or a plant clerical. See *Kroger Co.,* 342 NLRB 202 (2004); *Caesar's Tahoe,* 337 NLRB 1096 (2002). Another is whether a "dual-function" employee should be included. See *Bredero Shaw,* 345 NLRB 782, 786 (2005).

Additional issues that can be deferred until after the election are whether an individual should be excluded as a "temporary" employee (see *Marian Medical Center,* 339 NLRB 127 (2003)) and whether an individual should be included in the unit as a regular part-time employee or excluded as a casual employee (see *Arlington Masonry Supply, Inc.,* 339 NLRB 817, 819 (2003)).

Hearing officers should ensure, to the extent feasible, that the record contains the names and job classifications of the individuals whose eligibility to vote or inclusion in the unit is being deferred, in order to facilitate their opportunity to vote through the challenge procedures.

F. Parties' Right to Introduce Evidence that Supports Their Contentions and Is Relevant to the Existence of a QCR - §102.66(a)

The final rule provides that any party shall have the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce evidence of the significant facts that support the party's contentions *and* are relevant to the existence of a question concerning representation. Hearing officers are no longer required to permit parties to fully litigate all eligibility issues prior to the direction of an election, meaning parties no longer have a right to litigate an individual's inclusion or eligibility. In explaining this rule change, the Board overruled *Barre-National Inc.,* 316 NLRB 877 (1995), where the Board held that employers have a right to litigate, before the election, the status of certain individuals it contended were supervisors.[23] In sum, the final rule does not limit any party's right to present evidence in support of their contention, so long as it is relevant to determining whether a QCR exists. The Board also overruled cases relying on the holding of *Barre National,* such as *North Manchester Foundry*, 328 NLRB 372 (1999). Moreover, in presenting evidence in support of its contention, a party has no right to present irrelevant evidence. *Mariah, Inc.*, 322 NLRB 586 fn. 1 (1996).

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[23] 79 Fed. Reg. 74386.

G. Consequences of a Party's Failure to Take a Position on an Issue - §102.66(d)

After a Statement of Position is received into evidence, the other parties respond to each issue raised in the Statement. The regional director has discretion to permit parties to amend their Statements of Position or their responses in a timely manner for good cause. Good cause would not normally include situations where the party knew or should have known of the issue at the time the petition or Statement of Position was filed. Good cause may include situations of changed circumstances, but should be raised at the time the party learned of the change. If the regional director permits a party to amend its Statement of Position, the other parties should respond to each amended position.

A party generally may not raise any issue, present any evidence relating to any issue, cross-examine any witness concerning any issue, or present argument concerning any issue that the party failed to raise in its timely Statement of Position or failed to place in dispute in response to another party's Statement of Position or response. However, if a party's Statement of Position does not raise an issue of the eligibility or inclusion of a particular individual, and that individual's status is not specifically addressed in the decision and direction of election, that party could still challenge the individual at the election. In addition, no party is precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction and the regional director has the discretion to direct the receipt of evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the regional director determines that record evidence is necessary. If the party contends that the proposed unit is not appropriate in its Statement of Position, but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party may not raise any issue or present any evidence or argument about the appropriateness of the unit. If the employer fails to timely furnish the lists of employees required to be included as part of the Statement of Position, the employer also may not contest the appropriateness of the proposed unit at any time and may not contest the eligibility or inclusion of any individuals at the pre-election hearing.

H. Presumptions Regarding Bargaining Units

Nothing in the Act requires that the unit for bargaining be the *only* appropriate unit or the *most* appropriate unit. *Bartlett Collins Co.*, 334 NLRB 484 (2001); *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950), enfd. 190 F.2d 576 (7th Cir. 1951). In determining appropriate units, the Board has established, either through case law or rulemaking, the following presumptions related to appropriate units:

- **Employer-wide unit**: Employer-wide unit presumptively appropriate. See, e.g., *Greenhorne & O'Mara, Inc.*, 326 NLRB 514, 516 (1998);
- **Single plant unit:** Presumptively appropriate unless it has been so effectively merged into a more comprehensive unit, or is so functionally integrated, that it has lost its separate identity. *Hilander Foods,* 348 NLRB 1200, 1200 (2006); *J & L Plate*, 310 NLRB 429 (1993);

- **Acute-care hospital units**: Board's healthcare rules establishing eight appropriate units through rulemaking (§103.30), 29 C.F.R. Sec. 103.30 (1990), upheld *American Hospital Association v. NLRB*, 499 U.S. 606 (1991);
- **Craft-wide unit**: *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966) (setting forth factors for determining when craft-wide unit is appropriate);
- **Plant-wide unit**: *Airco, Inc.*, 273 NLRB 348 (1984); *Livingstone College*, 290 NLRB 304 (1980) (all nonprofessionals in a college/university setting);
- **Service and maintenance unit**: *Laurel Associates, Inc.*, 325 NLRB 603 (1998);
- **Single-employer unit**: *Central Transport, Inc.*, 328 NLRB 407 (1999);
- **Single-store unit in retail industry**: *Haag Drug Co.*, 169 NLRB 877 (1968); *Sav-On Drugs*, 138 NLRB 1032 (1962);
- **Single-terminal unit**: *Alterman Transport Lines*, 178 NLRB 122 (1969); *Groendyke Transport*, 171 NLRB 997 (1968);
- **System-wide unit for public utility**: *Deposit Telephone Co.*, 328 NLRB 1029 (1999); *Colorado Interstate Gas Co.*, 202 NLRB 847 (1973);
- **Readily identifiable group of employees**: Where employees in a petitioned-for unit constitute a readily identifiable group that share a community of interest, the burden is on the non-petitioning party to demonstrate that any additional employees it seeks to include share "an overwhelming community of interest with the petitioned-for employees." *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011).

I. Offers of Proof at the Hearing - §102.66(c)

Before the hearing, the regional director and the hearing officer will discuss potential hearing issues and the issues, if any, on which the director would like the parties to provide an offer of proof. The regional director will direct the hearing officer about the issues to be litigated at the hearing. A hearing officer may also require parties to make offers of proof as to any or all such issues. If the regional director determines that the evidence described in this offer of proof is insufficient to sustain the proponent's position, the evidence shall not be received.

Offers of proof are often utilized as tools to focus and define issues and provide a foundation to accept or exclude evidence. Section 102.66(c) provides that the offer of proof may take the form of a written statement or an oral statement on the record identifying each witness the party would call to testify concerning the issue and summarizing each witness's testimony.

J. Objections to the Conduct of the Hearing and Special Appeals - §102.65(c)

The final rule eliminated special appeals to the Board of actions or rulings by the hearing officer or the regional director. Instead, special appeals may only be filed with the regional director and with the regional director's permission. Parties may request special permission to appeal a hearing officer's ruling or to seek reconsideration of a regional director's ruling,

including rulings rejecting offers of proof.[24] However, if a request for review is filed and granted, the Board will review the hearing officer's rulings and the regional director's actions, regardless of whether a request for special permission to appeal has been filed. Thus, a party need not seek special permission to appeal a hearing officer's ruling to preserve an issue for review after the hearing.

Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, may be stated orally or in writing, accompanied by a short statement of the grounds of such objection, and will be included in the record. No such objection is waived by further participation in the hearing.

Neither the filing, nor the granting, of a request for special permission to appeal from a ruling of the hearing officer will stay the hearing unless otherwise ordered by the regional director.

CHM §11203 contains helpful directives for handling special appeals from hearing officers' rulings:

- Parties may not directly appeal rulings of the hearing officer, except by special permission of the regional director.
- Parties have an automatic exception to unfavorable rulings made by the hearing officer when the entire record is considered by the regional director.
- Requests for special permission to appeal should be made promptly, in writing, and served on the regional director and other parties.
- If a party seeks an adjournment in order to prepare its request for special permission to appeal, the hearing officer may grant a minimal time to prepare and transmit a special appeal and resume the hearing immediately thereafter, or may deny the request for adjournment and direct the party to prepare and file the special appeal during a break in the hearing.

To minimize the filing of special appeals, the hearing officer should consult with regional management during the hearing about any potentially significant procedural and substantive issues upon which, consistent with the rules, the ruling will be made by the hearing officer, as opposed to the regional director.

K. Notices To Show Cause Issued Before the Hearing

A notice to show cause, sometimes issued before a pre-election hearing, elicits the functional equivalent of an offer of proof and permits the regional director to determine whether to conduct a hearing. *Mueller Energy Services, Inc.*, 323 NLRB 785 (1997) (through responses to a notice to show cause, regional director properly determined that a contract bar existed and no hearing was required). A notice to show cause may be issued instead of a notice of hearing if

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[24] See, 79 Fed. Reg. 74426 fn. 526, where, in discussing adverse rulings on offers of proof, the Board noted that "parties retain the right to present their arguments directly to the regional director through a request for special permission to appeal."

the regional director determines there is not reasonable cause to believe that a question concerning representation exists.

L. Requirement That Hearings Continue From Day to Day - §102.64(c)

The hearing will continue from day to day until completed unless the regional director concludes that extraordinary circumstances warrant otherwise. As the term "extraordinary circumstances" suggests, regional directors should not, in most cases, look favorably upon parties' requests for continuances beyond the next day. For example, a party's request to gather additional evidence typically would not meet the standard of "extraordinary circumstances." Moreover, a regional director would not normally agree to a request made during a hearing that is based on facts known to the requesting party prior to the hearing, if those facts were not brought to the region's attention. If the regional director decides that extraordinary circumstances warrant a continuance to a non-consecutive day, this continuance should be for the briefest possible time.

A party requesting a continuance to a non-consecutive day should do so at the earliest feasible time. The requests may be made in writing or orally on the record. The requesting party must seek the other party's position on the matter. The hearing officer will apprise the parties verbally of the regional director's ruling.

M. Motions to Intervene or to Amend the Petition - §102.65(a) and (b)

All motions, including motions for intervention, must be in writing or made orally on the record during the hearing. Motions are filed with the regional director, or if made during the hearing, with the hearing officer.

A person seeking to intervene in a proceeding must make a motion for intervention, stating the grounds upon which it claims to have an interest in the proceeding. The regional director, or the hearing officer at the specific direction of the regional director, may permit intervention to the extent and upon such terms as the regional director deems proper. The intervenor will then become a party to the proceeding.

The hearing officer will rule either orally on the record or in writing on all motions filed at the hearing or referred to the hearing officer, except that the hearing officer will rule on motions to intervene and to amend the petition only as directed by the regional director. All motions to dismiss petitions will be referred for appropriate action at such time as the entire record is considered by the regional director or the Board.

N. Other Information at the Hearing

Prior to the close of hearing, the hearing officer will solicit the parties' positions on the type, date(s), time(s), and location(s) of the election, and the eligibility period. No litigation of these issues is permitted. The hearing officer should also inquire whether ballots or notices are required in another language because potential voters speak another language and do not read English. If a party contends that foreign language notices or ballots are required, the record should reflect the basis of the claim and the approximate number of employees needing the foreign language notices or ballots. See CHM §11315.

The hearing officer must advise the parties what their obligations will be if an election is directed, such as the content and format of the voter list, and will inform the parties of the time for complying with such obligations. The hearing officer will also solicit the name, address, email address, facsimile number, and phone number of the employer's on-site representative to whom the regional director should transmit the Notice of Election, if an election is directed.

At the hearing, the hearing officer should encourage parties to state positions on all issues and explain the basis for their positions, and particularly elicit from the petitioner its position on proceeding to an election in any alternate unit which may be found appropriate. The hearing officer should ensure that all relevant off-the-record discussions are summarized and that the parties affirmatively agree to those summaries on the record.

The hearing officer should ensure that, to the extent feasible, the record includes the job titles and the names of all individuals who will vote subject to challenge. In addition, the hearing officer should ask the parties entitled to receive the voter eligibility list if they wish to waive some or all of the 10-day period that they are entitled to have the list. See *Ridgewood Country Club*, 357 NLRB No. 181 (2012).

O. Oral Arguments and Briefs

At the close of hearing, parties are permitted to make oral arguments on the record. The hearing officer will provide parties a reasonable period of time to prepare their oral arguments. Parties are permitted to file post-hearing briefs *only* with special permission of the regional director. The regional director specifies the time for filing such briefs and may limit the subjects to be addressed in post-hearing briefs. The regional director's ruling on whether briefs will be permitted will be stated on the record by the hearing officer.

In determining whether briefs may be filed, factors which may be considered include:

- Number and complexity of issues;
- Whether significant issues are presented that are factual, legal or both;
- Whether the law is in flux, settled, or recently changed;
- Whether the case presents issues that are of first impression, unusual, or novel; and
- The parties' positions on the necessity for providing written briefs.

Hearing officers should encourage the parties to address, in their oral arguments, specific issues in dispute and case citations in support of their positions. Additionally, a party may offer into evidence a brief, memo of points and authorities, or other legal arguments before the hearing closes so long as that filing does not delay the proceeding.

P. Hearing Officer Report of Pre-Election Hearing

As soon as practical after the hearing closes, the hearing officer should prepare a pre-election hearing officer's report using the hearing officer report form. The report is devoid of any recommendation, but includes the following information: (1) a summary of the oral arguments and the cases relied on by the parties in support of their positions; (2) the classification(s) and the number of employees in issue; (3) any stipulations reached by the parties

including those employees who the parties agree will vote subject to challenge; (4) any eligibility or inclusion issues and the number of employees in contention; (5) whether the regional director precluded the introduction of evidence, and the basis for the exclusion; and (6) the parties' positions about the election details, including the payroll period, the need for foreign language Notices and ballots, use of eligibility formulas, and the preferred type (manual, mail, or mixed), date, time, and place of the election.

VI. PRE-ELECTION DECISIONS

A. Final Rule Changes for Pre-Election Decisions

The final rule makes the following changes to the contents of a pre-election decision:

- §102.67(b) provides that the regional director ordinarily will specify the election details in the direction of election and will transmit the direction of election and the notice of election to the parties by email, facsimile, or overnight mail (if neither an email address nor a facsimile number was provided).

- §102.67(c) provides that a party may file a request for Board review of a regional director's pre-election decision at any time following the decision until 14 days after a final disposition of the proceeding by the regional director. A request for review will not operate as a stay of any action by the regional director unless specifically ordered by the Board.

- §102.67(l) provides that, absent extraordinary circumstances, within 2 business days after issuance of the direction of election, the employer must provide the regional director and the parties a list of the full names, work locations, shifts, job classifications, and contact information (including home address, available personal email addresses, and available home and personal cellular telephone numbers) of all eligible voters and, in a separate section of the list, the same information for any employees directed to vote subject to challenge.

B. Expediting Pre-Election Decisions

Consistent with the Board's longstanding emphasis on expeditiously resolving questions concerning representation, expediting the issuance of pre-election decisions continues to be a priority. Therefore, regions should adopt practices that ensure that decisions are issued promptly.

One common practice that regions should follow is ensuring that Board agents assigned to draft pre-election decisions only work on drafting the decisions until completed. When necessary to ensure expedited issuance of a decision, regions should request to use the interregional assistance program for decision writing. If the Board agent assigned to draft a decision has other scheduled work, that work should either be deferred or reassigned. In addition, the assignment of the Board agent for decision drafting should be made once the hearing opens. This early assignment permits that agent to address other work and begin preliminary research on issues that are expected to be the subject of the hearing.

C. Direction of Election - §102.67(b)

A new element of most pre-election decisions is the inclusion of election details, including the type of voting, and the date(s), time(s), and location(s) of the election, as well as the eligibility period. The regional director ordinarily will not need to solicit party positions regarding election details after the close of the hearing because the hearing officer will have solicited those details prior to closing the hearing, and the decision will specify the type of voting, and the date(s), time(s), and location(s) of the election. However, in some cases, it may be appropriate for the director to consult with the parties concerning election details after the decision has issued, notwithstanding the parties' prior positions, for instance when the unit found appropriate differs substantially from the unit advocated by either party. In these limited circumstances where election details are worked out after issuance of the decision, the Board agent will attempt to reach the parties as expeditiously as possible to obtain their positions before the region specifies the type, date, time, and place of the election.

The decision will set the election for the "earliest date practicable" consistent with the Board's Rules. In accordance with CHM 11302.1, the date selected should balance the desires of the parties and operational considerations, along with the desirability of facilitating employee participation and of conducting a prompt and timely election. The election date, therefore, will be based on the circumstances of the case, including whether the parties entitled to receive the voter list waive the right to use the voter list for some or all of the 10-day period, and whether the notice and ballots must be translated into one or more foreign languages.[25] The Board has noted that, consistent with current practice, an election shall not be scheduled for a date earlier than 10 days after the date by which the voter list must be filed and served on the parties, unless this requirement is waived by the parties entitled to the list.

Absent extraordinary circumstances specified in the direction of election, the direction of election will state that the employer must provide the voter list to the regional director and the parties within 2 business days after issuance of the direction of election. A showing of extraordinary circumstances may be met by an employer's "particularized demonstration that it is unable to produce the list within the required time limit due to specifically articulated obstacles to its identification of its own employees."[26] The mere fact that the employer is decentralized, that the workforce is large, that a party may propose a multi-site unit, or that the employer relies on a third-party payroll company, does not warrant a blanket exception from the two-business day timeframe set forth in the final rule.[27]

When the regional director issues a decision and direction of election in a unit larger than that requested by the petitioner, and the petitioner or an intervenor has indicated its willingness to participate in such an election, further processing of the petition is conditioned on the petitioner or an intervenor having an adequate showing of interest in the unit as directed. If the petitioner or an intervenor already has a sufficient showing of interest in the enlarged unit, the

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[25] In deciding whether foreign language notices or ballots are necessary, the regional director will consider the factors set forth in CHM 11315.1.

[26] See 79 Fed. Reg. 74354-74355.

[27] See 79 Fed. Reg. 74355.

regional director should so indicate in the Decision and Direction of Election. If the petitioner or an intervenor does not have a sufficient showing of interest, the direction of election should be conditioned on the petitioner or an intervenor making an adequate showing of interest in the unit as directed. The petitioner or an intervenor may be given a reasonable period of time to secure the additional showing of interest, normally 2 business days after the issuance of the Decision and Direction of Election, or such further time as the regional director may allow based on sufficient justification. After a determination is made as to whether the petitioner or an intervenor has an adequate showing of interest in the enlarged unit, the Board agent will inform the employer in writing either of the employer's obligation to serve the voter list on the parties and the regional director within 2 business days of this notification, or that the petition has been withdrawn or will be dismissed due to an insufficient showing of interest.

D. Requests for Review - §102.67(c) – (j)

Requests for review of the regional director's pre-election decision can be filed at any time after issuance of a decision until 14 days after a final disposition of the proceeding by the regional director. The 14-day period commences when a regional director dismisses a petition, issues a certification of representative or results, or orders challenged ballots to be opened and counted. The Board will grant a request for review only where compelling reasons exist.

Accordingly, a party need not file a request for review of a decision and direction of election before the election in order to preserve its right to contest that decision after the election. Instead, a party can wait to see whether the election results have mooted the basis of an appeal. The request for review of the pre-election decision may be combined with a request for review of the regional director's decision on objections/challenged ballots. The grant of a request for review does not stay the regional director's action unless the Board specifically orders otherwise.

The final rule clarifies that when objections and challenges have been consolidated with an unfair labor practice proceeding for purposes of hearing and the election was conducted pursuant to a stipulated election agreement or a direction of election, a request for review of the regional director's decision and direction of election will be due at the same time as the exceptions to the administrative law judge's decision are due.

A party requesting review may also request extraordinary relief in the form of a stay, expedited consideration of a request, or impoundment of one or more ballots from the Board as described in §102.67(j). Relief will be granted only upon "a clear showing that it is necessary under the particular circumstances of the case."

VII. ELECTION PREPARATIONS AND ELECTION - §102.67(b) and (k)

A. Final Rule Changes for Election Preparations and the Election

The final rule makes the following changes to election preparations and elections:

- §§102.67(b) and (k)) provide that, along with the decision and direction of election, the Region will email or fax to the parties and their designated representatives Notices of Election, which the employer is required to post. The employer must also distribute the notice electronically if the employer customarily communicates with its employees electronically.

- §§102.67(b) and (l) provide that the Notice of Election will identify employees who will vote subject to challenge by, for example, listing their job titles, shifts, work locations, and other descriptive factors.

B. Notice of Election - §§102.62(e) and 102.67(k)

When the election agreement is approved, the region will immediately notify the parties and their designated representatives by electronic means if possible. Together with the election agreement, the regional director will transmit a letter specifying the voter list requirements, such as the due date, content, approved electronic format, and the required means of transmitting the voter list to the parties and to the regional director. The regional director will also promptly transmit the Notice of Election to the parties and their designated representatives by email, facsimile, or by overnight mail if no facsimile number or email address was provided. In addition, at the time the Notice of Election is transmitted, the region will send the parties a new form describing the election and post-election procedures in representation cases.

Similarly, if the election is directed, ordinarily the Notice of Election will be emailed or faxed to the parties, along with the decision and direction of election. If a party provides neither an email address nor a facsimile number, the regional director will send the decision and notice to the party by overnight mail.

If the election agreement or the direction of election provides for individuals to vote subject to challenge, the election notice will advise employees that some individuals will vote subject to challenge because their eligibility has not been determined. The notice usually will not name these employees, but rather will refer to their job titles, shifts, work locations, and other descriptive factors. The notice will provide as follows:

> **OTHERS PERMITTED TO VOTE:** At this time, no decision has been made regarding whether (insert classification(s)) are included in, or excluded from, the bargaining unit, and individuals in those classifications may vote in the election but their ballots shall be challenged since their eligibility has not been determined. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

The final rule requires employers to post the notice of election in conspicuous places in the workplace, including all places where notices to employees in the unit are customarily posted) at least three full working days (excluding Saturdays, Sundays and holidays) prior to 12:01 am on the day of the election. The employer is also required to distribute the notice electronically to unit employees if it customarily communicates with employees in the unit electronically, either by email or by posting on an employer intranet site or both. If the employer customarily communicates with only some of the unit employees electronically, the employer is to distribute the notice of election to that subset of the unit. The employer's failure to properly post or distribute the notice of election is grounds for setting aside the election whenever proper and timely objections are filed. However, a party may not object to the nonposting if it is responsible for the nonposting, and likewise may not object to the nondistribution of the notices if it is responsible for the nondistribution.

C. The Voter List - §§102.62(d) and 102.67(l)

The employer must provide the regional director and parties named in the decision an alphabetized list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters, accompanied by a certificate of service on all parties. The employer must also include in a separate section of that list the same information for those individuals who, according to the election agreement or direction of election, will be permitted to vote subject to challenge. When feasible, the employer must electronically file the list with the regional director and electronically serve the list on the other parties.

To be timely filed and served, the list must be *received* by the regional director and the parties within 2 business days after approval of the election agreement or the direction of election unless a longer time was specified in the agreement or in the direction of election. **The region will no longer serve the voter list.** The employer's failure to file or serve the list within the specified time or in the proper format is grounds for setting aside the election whenever proper and timely objections are filed. However, the employer may not object to the failure to file or serve the list in the specified time or in the proper format if it is responsible for the failure.

The employer must submit the voter list in an electronic format approved by the General Counsel, unless the employer certifies that it does not have the capacity to produce the list in the required format. I have concluded that, for ease of use of the data by the parties entitled to the list before the election, the lists must be filed in common, everyday electronic file formats that can be searched. Accordingly, unless otherwise agreed to by the parties, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at *www.nlrb.gov/what-we-do/conduct-elections*.

The Board stated that it is presumptively appropriate for the employer to produce multiple versions of the list where the data required is kept in separate databases or files, so long as all of the lists link the information to the same employees, using the same names, in the same order and are provided within the allotted time.[28] If the employer provides multiple lists, the list used at the election will be the list containing the employees' job classifications.

The parties may not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.[29]

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[28] See 79 Fed. Reg.74356.

[29] See discussion below in Section XI.

D. Challenges at the Election

In an election conducted pursuant to an election agreement, the parties will be responsible for making the agreed-upon challenges. In a directed election, the Board agent conducting the election must challenge anyone who has been permitted by the regional director or the Board to vote subject to challenge. To assist in identifying those individuals and to avoid post-election issues, the employer is required to include, in a separate section of the voter list, the names of such employees along with the same information for those employees voting subject to challenge as the required information for all other employees.

VIII. POST-ELECTION PROCEDURE AND DECISIONS

A. Final Rule Changes to Post-Election Procedures

The final rule includes changes to both Board procedure and the issuance of decisions involving post-election matters. The changes include the following:

- §102.69(a) provides that, when filing objections to an election, a party must also file an offer of proof in support of its objections, which identifies its witnesses and summarizes their testimony. A party filing objections must also serve a copy of the objections, but not the offer of proof, on all other parties and include a certificate of service when filing the objections.

- §102.69(c)(1)(i) provides that, where challenges and/or objections are determined administratively without a hearing in a stipulated or regional director directed election, the regional director may issue a certification of the results of the election, including a certification of representative where appropriate, which shall be final unless a request for review is granted.

- §102.69(c)(1)(ii) provides that where a post-election hearing on challenges and/or objections is conducted, it shall be scheduled for 21 days from the tally of ballots or as soon as practicable thereafter, unless the parties agree to an earlier date.

- §102.69(c)(1)(iii) provides that a hearing officer's post-election report will be directed to the regional director. A party may file exceptions with the regional director, who would then issue a decision that will be final unless a request for review is granted by the Board in a stipulated or directed election case.

- §102.69(c)(2) provides that all appeals from a regional director's post-election decision will be discretionary, consistent with the standard of review now applied in reviewing pre-election decisions.

B. Filing Objections - §102.69(a)

Within 7 days after the tally of ballots has been prepared, any party may file objections to the conduct of the election or to conduct affecting the results of the election. The objections must be submitted within this time frame, regardless of whether the challenged ballots are sufficient to affect the results of the election. The objections must contain a short statement of the reasons for the objections and be accompanied by a written offer of proof identifying each witness the party would call to testify concerning the issue and summarizing the witness's testimony. Upon a showing of good cause, the regional director may extend the time for filing the offer of proof. The party filing the objections must serve a copy of the objections, but not the

written offer of proof, on each of the other parties to the case, and include a certificate of service with the objections.

C. Processing Objections and/or Challenges - §102.69(b) and (c)

Ordinarily, regional directors should not conduct investigations where affidavits are taken before deciding whether to set challenges or objections for hearing. Instead, the regional director should simply evaluate each objection and the accompanying offer of proof to determine whether the evidence described in the offer of proof "could be grounds for setting aside the election if introduced at a hearing." Similarly, if a party has challenged a voter, the regional director should evaluate the challenge and the parties' positions and supporting evidence to determine if the evidence "raises substantial and material issues." If the applicable standard is met, the objection and/or challenge should be set for hearing. The notice of hearing will be transmitted to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided). Where there are related objections and charges, regions should follow the procedures outlined in CHM §11407.

If the subject matter of the objections involves regional or Board agent misconduct that would require that a hearing officer outside the regional office be assigned to hear the matter, the case should be transferred to another region before an order directing a hearing issues so that exceptions to the hearing officer's report will be reviewed by the out-of-region director.

D. Post-Election Hearings - §102.69(c)

If the regional director decides to issue a notice of hearing on the objections or challenges or both, the hearing will be scheduled for 21 days from the tally of ballots or as soon as practicable thereafter, unless the parties agree to an earlier date or unless the regional director consolidates the hearing with an unfair labor practice proceeding before an administrative law judge.

In any proceeding involving a consent election where the representation case has been consolidated with an unfair labor practice proceeding for hearing, after issuing a decision the administrative law judge will sever the representation case and transfer it to the regional director for further processing. If there was no consent election, the administrative law judge's recommendations on objections and/or challenges that have been consolidated with an unfair labor practice proceeding will be ruled upon by the Board if exceptions are filed.

The hearing will continue from day to day until completed unless the regional director concludes that extraordinary circumstances warrant otherwise. At the hearing, any party will have the right to appear in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the objections and determinative challenges that are the subject of the hearing. The hearing officer may rule on offers of proof without consulting with the regional director. Post-hearing briefs may be filed only upon special permission of the hearing officer and within the time set by the hearing officer and addressing the subjects permitted by the hearing officer.

E. Burdens of Proof in Post-Election Issues

With post-election objections, the objecting party bears the burden of proof relative to its objections. *Crown Bolt, Inc.*, 343 NLRB 776, 777 (2004). The objecting party's burden encompasses every aspect of a prima facie case. *Sanitas Service Corp.*, 272 NLRB 119, 120 (1984). The burden of proof is on the objecting party to prove its case because a Board-conducted representation election is presumed to be valid. *NLRB v. WFMT*, 997 F.2d 269 (7th Cir. 1993); *NLRB v. Service American Corp.*, 841 F.2d 191, 195 (7th Cir. 1988); *Progress Industries*, 285 NLRB 694, 700 (1987).

With challenges to the ballots cast by voters, generally, the party seeking to exclude or disenfranchise an employee or employee classification has the burden of proof to sustain the challenge. *Ohio Masonic Home, Inc.*, 295 NLRB 390, 393 (1989). That general assignment of the burden of proof has been followed in the situations described below:

- **Agricultural employee status/exemption:** *AgriGeneral L.P.*, 325 NLRB 972 (1998).
- **Confidential employees**: *Crest Mark Packing Co.*, 283 NLRB 999 (1987).
- **Disabled workers** - employment principally characterized as rehabilitative: *Goodwill Industries of North Georgia, Inc.*, 350 NLRB 32, 39 (2007).
- **Dual-function employee** - if employee falls into a classification excluded from the unit, burden falls on party seeking the inclusion as a dual-function employee: *Harold J. Becker Co., Inc.*, 343 NLRB 51, 52 (2004).
- **Independent contractor status:** *BKN, Inc.*, 333 NLRB 143, 144 (2001).
- **Laid-off employees** - reasonable expectancy of recall: *The Pavilion at Crossing Pointe*, 344 NLRB 582, 584 (2005).
- **Leave** - employees on sick or disability leave - presumed eligible and party contesting eligibility must affirmatively show the employee has resigned or been discharged: *Vanalco, Inc.*, 315 NLRB 618 (1994).
- **Managerial status:** *Allstate Insurance Company*, 332 NLRB 759 (2000); *Montefiore Hospital and Medical Center*, 261 NLRB 569, 572 fn. 17 (1982).
- **Not-on-list and other Board challenges** - party seeking to exclude or disenfranchise: *Sweetner Supply Corporation*, 349 NLRB 1122 (2007); *Golden Fan Inn*, 281 NLRB 226, 230 fn. 24 (1986).
- **Office clerical:** *The Kroger Company*, 342 NLRB 202, 203 (2004).
- **Professional employee status** - party seeking to rebut presumption in certain classifications has burden of proof: *Pontiac Osteopathic Hospital*, 327 NLRB 1172 (1999).
- **Quit before election** - challenging party must demonstrate that the voter manifested a clear intent to quit before the election: See *Orange Blossom Manor*, 324 NLRB 846, 847 (1997); cf. *Foote & Davies, Inc.*, 262 NLRB 238, 238 (1982).

- **Strikers** - economic striker abandoning interest in struck job: *Ms. Desserts, Inc.*, 299 NLRB 236, 237 (1990).
- **Strikers' jobs eliminated** - employer's burden to prove ineligibility: *Omahaline Hydraulics Co.*, 340 NLRB 916, 917 (2003).
- **Strikers - replacement presumed permanent** - party seeking to rebut presumption has burden: *O.E. Butterfield, Inc.*, 319 NLRB 1004 (1995).
- **Supervisory status:** *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712 (2001).

F. Exceptions to Hearing Officer Reports - §102.69(c)(1)(iii)

In all cases, exceptions to hearing officers' reports are filed with regional directors instead of the Board. Any party may, within 14 days from the date of the issuance of a hearing officer's report, file with the regional director exceptions to the hearing officer's report, and a supporting brief, if desired. Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the regional director may allow, a party opposing the exceptions may file an answering brief with the regional director.

Briefs in support of exceptions and answering briefs may not exceed 50 pages, excluding the subject index and table of cases and authorities, unless permission is obtained from the regional director by motion, setting forth the reasons for exceeding the limit, filed not less than 5 days (including Saturdays, Sundays, and holidays) before the date the brief is due. If a brief exceeds 20 pages, it must contain a subject index with page references and an alphabetical table of cases and authorities. All documents filed with the regional director must be double-spaced and on 8 ½ by 11-inch paper, and be printed or otherwise legibly duplicated.

G. Regional Director Decisions in Post-Election Proceedings - §102.69(c)(2)

If exceptions are filed to the hearing officer's report, the regional director will issue a decision, taking into account the exceptions and either affirming or rejecting the conclusions of the hearing officer. The regional director may also remand the case to the hearing officer for further hearing, if he or she deems it necessary. Whether or not exceptions to hearing officers' reports are filed, regional directors' decisions should include, where appropriate, a certification of results, including a certification of representative. If the regional director's decision orders ballots to be opened and counted, the request for review language included in the decision in a directed or stipulated election case should explain that requests for review to the decision and direction of election and the director's decision to open and count must be filed with the Board within 14 days of issuance of the regional director's post-election decision. To help protect voter secrecy, the region should not open and count until the time for filing a request for review has passed and no request was filed or the Board has ruled on the request for review. A post-election decision that directs a second election does *not* constitute a final disposition by the regional director, and parties may file a request for review at a later date.

When issuing decisions after receiving exceptions to post-election hearing officers' reports, regional directors should carefully review the hearing officer's report and the exceptions and briefs in support. The approach taken in a particular case depends largely on the hearing

officer's report, the nature of the exceptions, and the difficulties of the issues. A regional director's decision might be a pro forma adoption if the hearing officer's report covers the issues thoroughly, the exceptions basically repeat arguments made to the hearing officer, and those arguments are properly analyzed by the hearing officer's report. However, in other cases, regional directors may decide to specifically address the exceptions or elaborate on the hearing officer's report.

H. Board Review of Regional Director's Post-Election Decisions - §§102.62(b) and 102.67

The final rule makes the process for obtaining Board review of regional directors' dispositions of *post*-election disputes parallel to that for obtaining Board review of regional directors' dispositions of *pre*-election disputes.[30] As is currently the case, if a consent election has been held, the decision of the director is not subject to Board review. In cases involving stipulated election agreements and directed elections, the Board may grant or deny requests for review, and if the Board denies the request for review, the denial constitutes affirmance of the actions of the regional director. The Board's granting a request for review of a regional director's post-election decision will be discretionary, consistent with the standard of review now applied in reviewing pre-election decisions. A party seeking review from a regional director's post-election decision must identify a significant, prejudicial error or some other compelling reason for Board review, just as the current rules require with regard to a request for review of a regional director's pre-election decision.[31]

When no objections are filed and there are no determinative challenges, the certification should issue immediately after the expiration of the 7-day period for filing objections. However, if the election was directed, the certification will contain instructions on how to file a request for review of the regional director's pre-election decision, if not previously filed.

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[30] Requests for Review of pre-election and post-election disputes may be filed separately or as one document. Papers filed with the Board must be typewritten or otherwise legibly duplicated on 8½ - by 11-inch plain white paper, with margins no less than one inch on each side; in a typeface no smaller than 12 characters-per-inch (elite or the equivalent); and be double spaced (except for quotations and footnotes).

[31] The final rule does not change the standard for granting requests for review. §102.67(d) describes the requirements as follows: *Grounds for review.* The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

> (1) That a substantial question of law or policy is raised because of: (i) The absence of or (ii) A departure from, officially reported Board precedent.
> (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
> (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
> (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

IX. BLOCKING CHARGES - §103.20

The final rule provides that whenever a party to a representation proceeding files an unfair labor charge and desires to block the processing of the petition, or whenever any party to a representation proceeding desires that its previously filed unfair labor practice charge block the further processing of a petition, the party must request that the petition be blocked and must simultaneously file a written offer of proof in support of the charge that contains the names of the witnesses and a summary of each witness's anticipated testimony. Accordingly, under the final rule, the regional office will no longer block a representation case unless the party filing the unfair labor practice charge requests that the petition be blocked and simultaneously files the required offer of proof. Form NLRB-5546 may be used to request to block a petition and to provide the offer of proof. The rule also requires the charging party requesting to block the processing of a petition to promptly make its witnesses available.

X. ELECTION CERTIFICATIONS

Consistent with the current requirement set forth in CHM §11474, when individuals in a particular classification are voted subject to challenge either by agreement of the parties in an election agreement or by direction of the regional director or the Board, and the challenges are not determinative of the election results, the certification will state that the challenged classifications are neither included in nor excluded from the bargaining unit, inasmuch as no determination was made regarding the disputed placements. The language to be added where the election was directed will be:

> However, (*unit category*) is neither included in nor excluded from the bargaining unit covered by this certification, inasmuch as the [regional director] [Board] did not rule on the inclusion or exclusion of (*unit category*) and ordered them to vote subject to challenge and resolution of their inclusion or exclusion was unnecessary because their ballots were not determinative of the election results.

The language to be added where the election was conducted pursuant to an election agreement will be:

> However, (*unit category*) is neither included in nor excluded from the bargaining unit covered by this certification, inasmuch as the parties did not agree on the inclusion or exclusion of (*unit category*) but agreed to vote them subject to challenge and resolution of their inclusion or exclusion was unnecessary because their ballots were not determinative of the election results.

XI. USE OF VOTER LIST - §§102.62(d) and 102.67(l)

The final rule specifically provides that parties shall not use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters. For example, parties may use the voter list information to campaign and communicate with employees about the election, to investigate eligibility issues and/or objections, and to prepare for a post-election hearing on determinative challenges and/or objections or a unit clarification proceeding involving unresolved eligibility or inclusion issues that were not determinative of the results of the election. Similar usage of the list in connection with re-run elections and unfair

labor practice investigations and hearings is also permitted. Some examples of violations of this restriction are (1) selling the list to telemarketers, (2) providing it to a political campaign, or (3) using the list to harass, coerce, or rob employees.[32]

A party may decide to raise allegations of misuse by filing objections to the election or an unfair labor practice charge. A party may also choose to seek to have the attorney or other representative responsible for this alleged breach disciplined for engaging in misconduct under §102.177 of the Board's Rules and Regulations.

The Board concluded that case-by-case adjudication is the appropriate way to consider circumstances in which a remedial order is appropriate so that it can tailor its order to the specific misuse and ensure that the remedy it imposes is effective.[33]

XII. CONCLUSION

It is my sincere hope that this guideline memorandum assists in the implementation of the final rule, which allows us to better effectuate the policies and purposes of the Act as they relate to representation case processing. I thank the field personnel for their commitment in adopting and implementing the changes and for their efforts to inform the public about the changes. I intend to continually re-evaluate the procedures set forth above to ensure they are achieving the goals of fairly, efficiently, and expeditiously resolving questions concerning representation. In carrying out this re-evaluation, I assure you that I will solicit the views of the NLRB staff, practitioners, representatives, and the public, and that I will consider all suggestions when making a determination about further guidance to the field and the public.

If you have questions related to this memorandum, please direct them to your Deputy or Assistant General Counsel.

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[32] 79 Fed. Reg. 74358.

[33] 79 Fed. Reg. 74359.