A Response to the Arbitrators' Panel on the Code of Conduct

article

By Thomas F. Bush

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At the recent Fall Conference of ARIAS·U.S., panels of arbitrators had the opportunity to express their views on a variety of topics. Few views were more provocative than those offered by a panel on the ARIAS·U.S. Code of Conduct. In a nutshell, these arbitrators do not like the comments to the Code. They view these comments as reflecting an unnecessarily strict set of rules. Better to relegate these comments to the status of "guidelines," they said, and leave to each arbitrator the responsibility to interpret and apply the more broadly phrased canons in accordance with his or her own best judgment. They also regard the imposition of specific ethical rules as a gratuitous insult. "Ethics are morality," said one of the panel members, and specific rules should not be imposed on ARIAS-certified arbitrators, who can be relied upon to conduct themselves properly.

I am acquainted with no arbitrator certified by ARIAS whose ethical judgment I would question, but I hold a different view of the Code of Conduct. Ethics for professionals like arbitrators are not morality. They are not rules for distinguishing good from bad behavior. Rules of ethics serve to give people assurance that they can place trust and confidence in professionals whose conduct they cannot always observe and whom they might not know well enough to have confidence that they will act properly.

Consider an ethical situation that lawyers commonly face. I might be asked to represent a client on a matter adverse to an existing client of the firm. I have not been involved, and will not be involved, in the representation of that existing client. It will be represented by lawyers in another office. I am confident that neither my representation of the proposed new client nor the other lawyers' representation of the existing client will be compromised in any way, and I am certain that the confidences of both clients will be maintained. In this situation, my representation of the new client is not inherently bad behavior.

Nonetheless, under the ethical rules governing the legal profession, I cannot take on the representation unless both the new and the existing client give their consent, following a full disclosure of relevant facts. If one of them declines to consent, the representation is barred, even if it poses no threat of real harm. The point of the ethical rule is that without informed prior consent, clients have no effective means to ensure that I will make a sound judgment on whether the representation poses a threat of real harm or that I will conduct the representation in a manner that will avoid such harm. The judgment of the legal profession is that clients should not be required to put complete faith in lawyers acting properly outside of their view.

The same considerations arise with arbitrators. The deliberations and decision-making of arbitrators take place outside of the presence of parties and their lawyers, and their decisions essentially are unreviewable, save for the very narrow grounds available under the Federal Arbitration Act. Parties to arbitration must place a high degree of trust in arbitrators to resolve disputes fairly. Frequently, the parties' lawyers know the members of a panel well enough to assure their clients that these individuals deserve their trust. However, the number of ARIAS certified arbitrators now exceeds 240. No lawyer knows all of them, or even most of them, well enough to be able to vouch for the arbitrators' impartiality and fairness in every case.

Furthermore, a party or lawyer might know an individual arbitrator well enough to question his or her ability to act fairly, but it can do very little to prevent the arbitrator from serving on its panel. Presumably each party will select, as its own party-appointed arbitrator, an individual in whom it has sufficient confidence to act fairly, but it has no role in selecting the other party's arbitrator. Although each party does participate in selecting the umpire, neither can be assured that the individual ultimately selected will

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be someone that it knows to be deserving its trust, especially when the final selection is made by a coin toss. And once the panel is assembled, the parties have very little means to challenge its makeup. The Federal Arbitration Act allows a party to challenge an award on the grounds of "evident partiality" of one or more arbitrators, but that is a very high standard, and a challenge under it is available only after the completion of the arbitration.

Hence the problem: the arbitration process requires a company to entrust the resolution of its dispute to the unobservable and unreviewable decision-making of three individuals, two of whom the company did not select and in whom the company might not have full confidence. This problem can lead to a temptation to treat an unfavorable decision of the panel as the product of bias rather than a fair and reasoned resolution of the dispute. The problem can also discourage companies from submitting their disputes to arbitration.

Ethical rules spelling out how arbitrators should respond to specific situations, such as those found in the comments to the Code of Conduct, can help address this problem. Companies and their lawyers can review these rules. If they are satisfied that the rules are adequate, then a commitment by arbitrators to follow the rules can give them greater assurance in the integrity of the arbitration process. Moreover, if arbitrators address ethical issues openly with reference to the Code's comments, parties can have greater confidence that ethical issues have been addressed properly.

From this perspective, the rules expressed in the comments to the Code of Conduct are not subject to criticism on the ground that they prohibit conduct that is not necessarily bad or that they restrict the discretion of arbitrators on ethical issues. The primary question for any particular rule is whether it serves to enhance the confidence of parties in the arbitration process and does so without imposing an unreasonable burden on the arbitrators or the parties. Where the answer to that question is yes, the rule should be accepted. ▼

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