

Ethics in Employment Mediation and Arbitration

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Abstract

The past decade has seen tremendous growth in the use of mediation and arbitration as alternatives to the litigation of employment disputes. This article discusses concerns about the ethical behavior of neutrals. The author concludes that as neutrals become "more transparent," the marketplace will be the best regulator of neutrals ethics.

For many years, labor and employment alternative dispute resolution was limited to collective bargaining mediation and arbitration. Mediators were shadowy figures who emerged haggard from all-night sessions with unions and management to stand at the side of a lectern while the parties announced their strike-averting agreement. Courts were not involved in the mediation process. Similarly, courts were only rarely involved in arbitration. There were motions to vacate awards, and a few isolated cases involving arbitrators showing apparent partiality towards a party.¹ Mediator and arbitrator ethics was not the subject of protracted debate in the legal community, as it has been recently. This debate springs from the differences between labor and employment alternative dispute resolution (ADR) as self-regulating systems.²

I will first examine labor mediation and arbitration as systems that have developed specific mechanisms to ensure adherence to ethical codes by neutrals. These mechanisms rely upon the same market forces that exist in employment mediation and arbitration. I will then examine how similar safeguards are evolving in employment mediation and arbitration, and suggest how they too will ensure the ethical behavior of neutrals.

Labor Mediation

Labor mediation is largely a self-regulating system populated by full-time mediators employed by, and responsible to, the agencies that provide their services to the disputing parties. Historically, labor mediation has been voluntary, with collective bargaining parties requesting mediators from federal or state agencies to assist them through an impasse in negotiations.³ The parties often knew the mediator from prior experience, or from the mediator's reputation in the labor-management community. If a party were uncomfortable with a particular mediator, it could learn more about the mediator from the agency or other users, or it could request another mediator. If a party believed the mediation was not succeeding, it could end the process by walking out. Because mediators were often expected to assist in selling the resolution to a political body or the union's membership, mediator confidentiality was not an issue. Parties were relatively unconcerned about mediators discussing specific obstacles to settlement with the appointing agencies, since

neither the mediators, nor their agencies, could decide the terms of the parties' agreement. Labor mediators were traditionally employed directly by the agencies that provided them to the parties. As salaried employees, they had no motivation to curry favor with either side in the hope of increasing their income. The agency that employed them was also responsible for providing continuing training, with the goal of assuring client satisfaction through competent service.⁴

In 1984 the Association of Labor Mediation Agencies and the Federal Mediation and Conciliation Service (FMCS) adopted the "Code of Professional Conduct for Labor Mediators," listing formal rules for the ethical behavior of agency-employed mediators. The organizations that employ mediators – either state agencies or FMCS -- enforce the code through employment sanctions or, in the case of *ad hoc* mediators, by removing them from their panels.⁵ This rarely happens, because the constant feedback among the parties and the agency about mediator performance tends to improve that performance.

Formal codes of conduct for mediators are not the primary means by which ethical mediator behavior is maintained. Instead, the marketplace of collective bargaining parties informs the agencies, often informally, about mediator behavior. The agencies are political entities that have an interest in satisfying their constituency. As a consequence, they are motivated to correct potentially unethical or incompetent behavior and terminate mediators who fail to meet ethical standards.

Labor Arbitration

Labor arbitrators, like labor mediators, are formally governed by a set of ethical standards. Three entities, the National Academy of Arbitrators (NAA), FMCS, and the American Arbitration Association (AAA), promulgated a "Code of Professional Responsibility for Arbitrators of Labor-Management Disputes" in 1975.⁶ The code is enforced in two ways. First, the agencies that supply names to parties seeking a labor arbitrator can remove an arbitrator from their list of names as a sanction for violating the code. Second, the NAA, through its Committee on Professional Responsibility and Grievances, investigates complaints against its members and can sanction or expel them for violating the code.⁷

The real enforcement mechanism for labor arbitrator ethics, however, is the marketplace. Unlike labor mediators, who are employed by the entities that supply lists of arbitrators to parties, labor arbitrators are independent contractors.⁸ As a consequence, market forces act directly upon labor arbitrators, rather than through an employer. Three factors have made the market an efficient regulator of labor arbitrator ethics:

1. the parties are free to choose jointly any arbitrator;
2. the labor arbitration process is transparent;⁹ and,
3. a labor arbitrator who engages in unethical behavior faces immediate financial consequences.

Labor arbitration is a field in which there are no formal barriers to entry. No government license, no governing body certification, and no educational degree are required to become an arbitrator. Labor lawyers on both sides, union officials, company labor relations directors, professors, and others see arbitration as an opportunity to build a second career using what they have learned in their practice of labor-management relations. Because arbitration is an

attractive profession, many attempt to enter the field.¹⁰ As a consequence, the supply of potential arbitrators always exceeds the demand. The marketplace determines who will successfully enter the profession and who will thrive.

Labor arbitrators traditionally issue an award accompanied by a reasoned opinion. Over time, arbitrators' abilities, intellectual tendencies, points of view, and analytical skills become known through their awards. Over the past 50 years, tens of thousands of arbitration awards have been published.¹¹ They are available in hundreds of bound volumes and on the Internet. In addition, lawyers within firms circulate awards, as do lawyers who represent the same side, either labor or management. National unions and large employers keep their own databases of arbitrations in which they were involved. More are available in private databases. Thus, many people on both sides can discover what an arbitrator did in a particular case.

Moreover, the labor-management community shares knowledge about how arbitrators conduct hearings, meet time limits, and permit the parties to argue their case. Because labor law embodies a number of complex statutory schemes and a well-established jurisprudence, it is an area in which lawyers specialize. This specialization means a limited number of lawyers do the majority of work in the field. Labor lawyers have formed specialty groups within the American Bar Association, state bar associations, and local bar associations.¹² Through these associations, lawyers hear arbitrators make presentations on various topics and have the opportunity to discuss arbitrators with their colleagues.¹³ They learn which parties have used an arbitrator, whether an arbitrator has a solid background in labor law, and whether others think an arbitrator is any good.

In addition, there are professional groups comprised of lawyers that represent each side. For example, the New York Arbitration Group is comprised of management lawyers who meet to discuss arbitrators they have used and new entrants into the field. On the union side, there is the annual conference of AFL-CIO lawyers, at which lawyers from different areas exchange views on the abilities and predilections of arbitrators. A private service exclusively for management purports to rate arbitrators on the basis of reports it solicits from management lawyers. In short, there is transparency in labor arbitration because awards are published or circulated, and lawyers share knowledge about an arbitrator's analytical skill, background, and ability to run a hearing.¹⁴

As a result of this shared knowledge, aberrational decisions and improper arbitrator conduct are quickly known in the marketplace. If an arbitrator is viewed as having made an unfair decision, that fact quickly circulates within the relevant market.¹⁵ The decision can have an immediate and adverse effect on the arbitrator's selection in subsequent cases. Several such decisions may affect the arbitrator's ability to continue as a neutral.¹⁶ Together, freedom of choice, transparency, and market consequences have resulted in few questions or debates about ethical behavior among labor arbitrators.

Employment Mediation

A self-regulating marketplace has not yet developed in employment mediation and arbitration, and the lack of self regulation has led to significant debate among lawyers over mediator and arbitrator ethics. In addition, unlike in the labor mediation and arbitration marketplace, many employment mediators and arbitrators are lawyers who remain engaged in their legal practice while attempting to build a practice as neutrals. This trend has introduced a new element into the ethical mix.¹⁷ While labor mediation developed as a

unique field, employment mediation has developed alongside the mediation of other civil litigation. The ethical problems are generally the same for all mediation of civil litigation.

A significant percentage of employment mediation (at least in California, Texas, and Florida) is either court-annexed or agency-run.¹⁸ In California, certain trial courts have the power to require mediation prior to setting a trial date, while others simply tell counsel during the mandatory case management conferences to go and mediate.¹⁹ Because the parties have been told they must mediate, the courts and agencies have felt obliged to provide free, (or extremely cheap) mediators. Because the governmental entity is providing mediators, it feels obliged to provide some evidence of minimal competence and rules to define ethical behavior.²⁰

Unlike the labor agencies that provide free mediators, few courts have in-house mediators whom they train and pay. In many cases, they simply arrange with a local training organization to make training available and then require that training as a condition for being listed on the panel.²¹ Alternatively, they have adopted criteria for membership on their lists based upon a certain number of hours of training, generally without specifying which entities can provide the training. This reliance on training in place of demonstrated competence is a result of the lack of any generally accepted standards of mediator competence, or any generally accepted certification. Consequently, the courts have assumed that if an individual has taken a certain number of hours of training, that person is competent to mediate.²²

The standards of behavior for mediators promulgated by various entities generally cover six areas: voluntariness, impartiality, disclosure, competence, confidentiality, and compensation. Each of these areas requires some explanation and raises some questions for the neutral.²³

Voluntariness

There are two aspects to "voluntariness." First, any party is free to withdraw from mediation at any time. Second, the parties must reach a voluntary, uncoerced agreement. The "Model Standards of Conduct for Mediators" also states: "Parties shall be given the opportunity to consider all proposed options." These elements raise the following questions for the neutral: Is it ethically appropriate to participate in mandatory programs in which a court orders the parties to mediate? The California Dispute Resolution Council (CDRC) Standards differentiate between being mandated to the mediation process, which it deems acceptable, and a mediator mandating the extent to which a party must participate, which it deems unacceptable. This raises the question of what role, if any, a mediator should take in reporting what occurred in mediation to a court that mandated the mediation.²⁴ Most mediators believe that they should only indicate whether a party attended with the people the court asked to attend. If a mediator provides anything beyond that in a "report to the court," such as an assessment of party behavior, the mediator acquires coercive power. If a mediator can blame a party for unreasonable mediation behavior, the mediator has such coercive power.

The final consideration is the requirement in the Model Standards that parties be given an opportunity to consider "all proposed options." It is likely that the drafters saw this as an analog to the lawyer's responsibility to transmit offers of compromise and settlement to the client. The difficulty, as most veteran mediators know, is that some "proposed options" amount to a gratuitous insult. Conveying that "proposed option" may very well end the

mediation with one side walking out in anger. A useful alternative, employed by many veteran mediators, is to decline to carry the "proposed option" to the other side, but offer to reconvene a joint session so the party proposing the option can convey it while counseling that party on the likely response to the inflammatory option.²⁵ This way the mediator is not tainted by the insult, and can work to save the mediation if anger erupts.

Impartiality

There are three aspects to impartiality:

1. the mediator's own ability to remain impartial;
2. the appearance of impartiality; and
3. potential grounds for a reasonable person to call the mediator's impartiality into question.

The first aspect is internal. There are certain issues about which most people feel strongly there is a "right and wrong." To the extent that this feeling will impair a mediator's ability to listen to one side, or to report a position fairly to the other side, the mediator should not take the case.

The "appearance of partiality" standard for mediator conduct is more troublesome. Where the standards are enforced through sanctions, a charge that a mediator engaged in conduct that gave the "appearance of partiality" is difficult to evaluate. As veteran mediators know, it is sometimes necessary to play devil's advocate to convey the other side's convictions. And that could appear to an unhappy party, in retrospect, as partiality.²⁶ Thus, the rule creates a tension between the mediator's legitimate efforts to move the parties to resolution and the fear of subsequent attacks on the agreement or process by a party with buyer's or seller's remorse.

Disclosure

What a mediator should disclose is less controversial than how it is characterized. The Model Standards use the phrase "conflict of interest" and define it as "a dealing or relationship that might create an impression of possible bias." While the definition makes sense, the same phrase is used in ethics for attorneys where it has a different meaning and a well-developed body of law. As a consequence, some have jumped to the erroneous conclusion that a mediator has a "conflict of interest" because she formerly was a partner of one of the attorneys in the mediation, or she formerly represented one of the parties in the mediation. Neither of these relationships is a "conflict of interest" for a mediator, but both should be disclosed. In fact, the other side may want that mediator because of the former relationship, which could bring credibility and trust.

The CDRC Standards provide a more workable model for mediation disclosure. They do not posit that mediators have conflicts of interest, as lawyers understand that term. Instead, the Standards require disclosure of "potential grounds upon which a mediator's impartiality might reasonably be challenged." These include personal and professional relationships, as well as prior cases with one or both of the parties or their attorneys. Both the mediator and the parties have a continuing obligation to disclose. If either party asks the mediator to withdraw after a disclosure, he must do so.

Because mediation is voluntary, it is not clear that there are any appropriate sanctions for failures to disclose. If parties make a voluntary, uncoerced agreement, then the mediator's past relationships or cases are irrelevant. If one side learns a fact that makes it uncomfortable with the mediator, that side can simply withdraw from the mediation. Finally, it is difficult to posit a "repeat player bias" in mediators.²⁷ Because mediators do not have the authority to dictate the terms of an agreement, the only way they could influence a decision is by "beating up" on one side. This behavior is unlikely to be successful with a represented party, and it can adversely affect the mediator's reputation and acceptability.²⁸

Competence

A continuing question in mediation is whether parties want process or substantive expertise in their mediators.²⁹ Both sets of standards sidestep that question and simply require mediators to have adequate competence to meet the reasonable expectation of the parties. This criterion becomes more important when a court mandates mediation and provides a list of mediators, because the court may be thought to provide some assurance of competence. As previously noted, the courts rely chiefly on training as a competence indicator.

The real question for the mediator is: "What are these parties looking for?" Many mediators have a conference call with the parties prior to the mediation in order to ascertain details such as whether there will be pre-mediation briefs, whether the briefs will be shared with the other party, and who will attend. It is a good practice for the mediator to use this conference call to ascertain the parties' expectations about the mediation. It is important that the parties disclose, during this call, their assumptions about the mediator's experience and ability to promote agreement, to avoid misunderstandings at the mediation. In sum, the mediator must be sure there is a fit between his skill, style, and ability and what the parties expect.

Confidentiality

This is critical to mediation. The law of the jurisdiction controls post-mediation confidentiality. The ground rules established by the mediator and the parties control confidentiality during the mediation. Jurisdictions differ in the extent to which they will sustain the confidentiality of mediation communications against discovery efforts and use in litigation. California has a statutory scheme that makes evidence of what was said in mediation undiscoverable and inadmissible, while making the mediator incompetent to testify.³⁰ The National Commission on Uniform State Laws adopted a "Uniform Mediation Act" to provide a more limited privilege for certain mediation communications. Because the rules making mediation communications confidential vary, maintaining confidentiality is out of the hands of the mediator once the mediation is concluded. The CDRC Standards require the mediator to discuss statutory exceptions to confidentiality with the parties prior to mediation, so that their expectations are consonant with the laws of the jurisdiction.

Confidentiality during the mediation increases the chances of settlement. Each party must feel comfortable giving the mediator information it does not want the other side to know. It is critical for the mediator to establish the confidentiality rules with the parties at the first joint session. For example, in order to permit the parties to speak freely in private caucus with him, the mediator may adopt a practice of checking with the party at the end of the caucus to ask whether he can convey certain specific information. Anything that is not mentioned may not be conveyed. In this way, the mediator and party can be assured that there will be no inadvertent sharing of information the party deems confidential. The critical

issue for mediator ethics is to establish a specific method for preserving confidentiality during the mediation that is acceptable to the parties.

Compensation

The Model and CDRC standards require the mediator to disclose all fees, charges, and costs prior to the mediation, and both forbid contingent fees. While both require that fees be “reasonable,” the real determinant of fees is the marketplace. The only ethical issue for mediators occurs in those jurisdictions where court-annexed programs require the mediator to provide a certain number of hours free, or for a token payment, before charging a fee. Some parties have complained that the mediator slowed the mediation progress simply to generate a fee. While that may or may not be true, any system that requires the mediators to provide free (or almost free) services before they can charge creates a potential dilemma for them.³¹

As most mediators know, some parties are better prepared to efficiently negotiate a settlement than others. They can move quickly through mediation to a resolution. The ethical mediator will not attempt to influence that movement for selfish purposes. On the other hand, some parties are far from ready to settle, and the mediator must do a fair amount of reality testing before they can move towards settlement. And some parties require catharsis before they can settle. These mediations tend to take longer. Ordinarily, a mediator uses his or her judgment to determine what pace will most likely result in a durable settlement.³² But that judgment may be called into question if a slower-paced mediation is both in the parties’ settlement interest and the mediator’s financial interest. Thus, compensation systems that combine pro bono and market rate mediation create a situation in which the mediator’s ethics may be challenged.

Mediators have a number of options for avoiding this potential ethical dilemma. First, they can decline to participate in the combination programs.³³ If one separates his pro bono work from his compensated work, there is no potential ethical problem. Second, those mediators who participate in combination programs should attempt to provide the parties a detailed and realistic assessment, during the mediation, of whether the case is likely to be settled and how long it will take. Parties have the option to go forward in cases where the chances of settlement are limited. The mediator can help the parties move as far as possible during the pro bono period. When that time is up, the mediator can decline to provide further free services and the parties can decide whether they want to continue with paid services. By making a realistic prediction early in the case, based upon observations about the dynamics of the case, the mediator can avoid being accused of manipulating the process just to charge a fee.

Where mediation is not court-annexed, the market for employment mediators is similar to the market for labor arbitrators. Parties regulate employment mediation ethics by choosing which mediator to employ. Although there are no written awards to study, a great deal of informal information sharing takes place. For instance, the Consumer Attorneys of California meet each year to discuss, rate, and share experiences of neutrals among their members. Presumably, insurance and defense attorney organizations do the same. Plaintiff employment lawyers have also become an important constituency in national, state, and local bar association labor and employment law sections. Here they have access to information about employment mediators similar to the information traditionally shared about labor arbitrators. In the non-court annexed segment of the employment mediation practice, the same market forces that effectively regulate labor arbitrator ethics act to regulate employment mediator ethics. The parties know the abilities and reputations of

many mediators and can freely choose the one they prefer. Any ethical failures, lack of skill, or perceived biases are quickly found out, and they have immediate financial consequences.

Employment Arbitration

Employers may require arbitration agreements as a condition of employment. Employment arbitrators have the power to make binding, essentially unreviewable decisions, sometimes on statutory issues. In the absence of a well-defined marketplace there has been a significant focus on the ethical behavior of employment arbitrators.³⁴ The AAA and American Bar Association (ABA) have promulgated standards for arbitrators of commercial disputes. In addition, in its "National Rules for the Resolution of Employment Disputes" ("Rules"), the AAA establishes standards of disclosure, qualifications, and transparency for employment arbitration. The "Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship," ("Protocol") promulgated by the ABA, AAA, NAA, National Employment Lawyers Association (NELA), and Society of Professionals in Dispute Resolution (SPIDR), provides minimum standards for procedural fairness that an arbitrator should enforce in employment arbitration. AAA, Judicial Arbitration and Mediation Service (JAMS), and other providers of neutrals have adopted the Protocol. Finally, in 1997 the NAA adopted "Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems."³⁵ In state law, the California legislature has enacted specific disclosure requirements for arbitrators and subjected them to the same disqualification standards as judges.³⁶ It is useful to examine the California disclosure and disqualification statutes and these other national standards to understand the ethical concerns that affect employment arbitrators.

The three major ethical concerns for employment arbitrators are qualifications, disclosure, and ensuring fairness in the process. For the most part these concerns reflect an immature market that is in the process of developing towards the efficiency and familiarity that is found in labor arbitration.

Qualifications

The employment relationship is heavily regulated through both state and federal laws forbidding various forms of discrimination (e.g. sex, race, disability) and requiring certain benefits (e.g. Family and Medical Leave Act, Fair Labor Standards Act). The employment relationship is also, for most people, one of their most important legal relationships. In order to arbitrate employment disputes competently, the arbitrator must be knowledgeable about both the legal framework and the nature of the employment relationship. Both the Protocol and the Rules require arbitrators to be experienced and knowledgeable in employment law.³⁷ The Protocol also notes the importance of being skilled in conducting hearings, although the Rules omit this.³⁸ This skill is important to parties who choose arbitration because they want an expeditious, cost-effective process. Civil litigators and retired judges, even those with substantive legal knowledge, may need training in the differences between arbitration and litigation to develop arbitration knowledge and skills.

There are two ways in which qualification requirements are asserted. For organizations such as AAA that provide lists of arbitrators, potential arbitrators are subjected to a credential and reference review before they are placed on the employment panel.^{39,40} There is no certification process for those who hold themselves out as employment arbitrators independent of organizations that provide panels. While there is no unique ethical code

requiring accuracy in stating qualifications, or a willingness to provide potential parties specific information about one's qualifications, both would seem intuitively to be essential to ethical behavior.

Disclosure

The Rules⁴¹ and California law cover three disclosure subjects:

1. *Relationships*. This covers both attorney-client relationships with any party or lawyer, and any professional or "significant personal relationship" that the arbitrator "or his or her spouse or minor child living in the household has or had with any party ... or lawyer for a party."⁴²
2. *Case Experience*. Under the California statute, an arbitrator is required to disclose any prior or pending cases with either a party to the current case, or a lawyer in the current case, or a law firm with which a lawyer in the current case is associated. Arbitrators are also required to disclose all past arbitrations, including the results, identification of the prevailing party, the names of the attorneys involved, and the amount awarded.⁴³
3. *Interests*. Under California law, the arbitrators are required to make all of the disclosures required of a judge, and disqualify themselves for all the same reasons as a judge. These reasons include circumstances in which "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. Bias or prejudice towards a lawyer in the proceeding may be grounds for disqualification."⁴⁴ A party may enforce these requirements through a vacature motion.⁴⁵

Ensuring Fairness in the Process

The employment arbitrator has a critical - but secondary - role in ensuring fairness in the arbitration. The courts, by defining the permissible terms of an imposed arbitration agreement, exercise the primary role. Two decisions illustrate the limitations courts have placed on imposed employment arbitration agreements, as of this writing. In *Cole v. Burns Intern. Security Services* 105 F.3d 1465 (D.C. Cir. 1997), the court upheld an imposed employment arbitration agreement. It found an imposed employment arbitration agreement lawful if it: "(1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum." *Cole* at 1482 Building on *Cole*, the California Supreme Court adopted those minimum standards and added the requirement of "a modicum of bilaterality" in the agreement. *Armendariz v. Foundation Health Psychcare Services, Inc.* 24 Cal. 4th 83; 6 P.3d 669; 99 Cal. Rptr. 2d 745 (2001). These minimum standards of fairness in an imposed employment arbitration agreement are enforced by the courts, not arbitrators.

Nonetheless, the AAA and other major providers of arbitrators have generally declined to administer employment arbitration cases where the agreement does not meet the requirements of the Protocol. Moreover, in an unadministered case where there has been no court challenge to the agreement, arbitrators can refuse to serve if the agreement fails to meet the requirements of the Protocol, or *Cole* and *Armendariz*. Alternatively, the arbitrator can require the application of AAA rules, or the Protocol, as a condition for arbitrating the case. While there is no specific ethical standard requiring an arbitrator to refuse cases falling

below these procedural standards, many established arbitrators would not legitimize through participation in a process they deemed essentially unfair. As I discuss below, this is as much a marketplace issue as an ethical issue.

Employment arbitrators' primary role in ensuring procedural fairness is through exercising their discretion to permit appropriate discovery, control hearings, and render a written award. The questions that the arbitrator faces in these areas are more of judgment than of ethics. For example, the arbitrator must determine how much discovery is necessary for a fair hearing consistent with the expeditious nature of arbitration. Similarly, in controlling the hearing, the arbitrator must not allow a party with deep pockets to take the upper hand through costly motions, unnecessary witnesses, and unneeded experts. Finally, the arbitrator must write a clear award that inspires in both parties confidence that they were heard and their arguments considered. In cases involving statutory claims, the arbitrator must set forth sufficient reasoning on the relevant legal principles to allow whatever degree of review the courts determine is necessary. In so doing, the arbitrator must remain aware that he or she is deciding a specific case, and that the parties may not wish to pay for a legal treatise. That is where arbitral judgment becomes important.

In my view, the formal aspects of these three areas -- qualifications, disclosure, and ensuring fairness in the process -- will become less important as guarantors of employment arbitrator ethics as the market for employment arbitration matures.⁴⁶ These "ethical" requirements are an artifact of an immature market. Because courts enforce them, they are less efficient than market mechanisms for regulating employment arbitrator ethics. An examination of some of the arguments against employment arbitration and employment arbitrators will demonstrate how a mature market in employment arbitration will ensure ethical behavior by employment arbitrators.

Two objections to the qualifications of employment arbitrators frequently arise.⁴⁷ Both stem from opposition to the imposed arbitration of statutory cases.⁴⁸ First, the assumption is that labor arbitrators are not knowledgeable in employment law and do not have the competence to decide statutory cases. Second, it is asserted that a jury can more fairly decide employment cases because its members are drawn from the same socioeconomic strata as plaintiffs.

Some labor arbitrators are highly knowledgeable about statutory employment law, some are not. Many law professors and former labor and employment law practitioners act as labor arbitrators. They are likely to be quite knowledgeable about employment law, including Title VII and state laws prohibiting discrimination. The Protocol recognized that many labor arbitrators did not have that expertise, and addressed the need to train them. In fact, for the last three years, an organization known as the Alliance For Education in Dispute Resolution has been training NAA members in statutory employment law.⁴⁹ Many retired judges advertise themselves as arbitrators with employment law expertise. Undoubtedly, some of them have had significant experience in adjudicating employment cases and are well qualified to decide statutory issues.⁵⁰

The second qualification issue is whether employment arbitrators are as socio-economically suited to hear these cases as juries. Not all are. But the same issue of class has been present in labor arbitration for half a century. Many of the most prominent labor arbitrators are professors, full-time neutrals, or retired management lawyers. Their continuing acceptance indicates that they must be sufficiently empathetic to working people to be deemed fair. Indeed, at least one analysis of the results of employment arbitration, as compared to litigation, strongly suggests that an employee has a better chance of prevailing

on an employment claim in arbitration, albeit for a lesser amount. In risk-adjusted terms, employment arbitrators may provide better recoveries to employees than juries.⁵¹

The Employment Arbitration Market

The market will ultimately determine whether someone is qualified as an employment arbitrator, much as it does in labor arbitration. We are beginning to see the employment arbitration market develop as the labor arbitration market did. First, there are an increasing number of people holding themselves out as employment arbitrators. As *Cole* held, any imposed agreement must provide for a neutral arbitrator. While many employers have been choosing one of the three competing major ADR providers (AAA, JAMS, and the Center for Public Resources), at some point the courts may determine that the parties must be free to choose any mutually acceptable arbitrator. Indeed, employers faced with a request to choose from outside an ADR provider's list may simply agree, just to avoid litigation. As long as the arbitrator is chosen mutually, there is no disincentive to casting a wider net. Thus, it is likely that the employment arbitration market will move away from specific lists and towards full freedom of choice in selecting an arbitrator.

Second, increasing transparency is facilitating this transition. Employment arbitrators are required to write reasoned awards. AAA currently plans on making them available in a database.⁵² Other providers and arbitrators are likely to follow suit. This trend toward transparency will enable anyone interested in a particular employment arbitrator to read his or her decisions to decide if he or she is qualified. As the body of awards grows, transparency will increase. Some employment arbitrators will develop a reputation for competence within the relevant market. As a result, they will be chosen more frequently to hear new cases. Those who do not demonstrate the requisite competence are unlikely to be chosen again.

Similarly, as more and more employment cases are being arbitrated, employment arbitration will become a specialty area. More plaintiff lawyers will find it in their interest to join groups such as NELA or its local affiliates, as well as the labor and employment sections of bar associations. Employment lawyers will learn more about potential employment arbitrators, exchange experience and awards, and develop a sound basis for choosing employment arbitrators. Their experience in those organizations will parallel the history of labor arbitration. They will meet arbitrators, hear them speak, and learn about their analytical skills, backgrounds, and competence in running hearings. While there will still be a need for specific disclosures in a particular case, there will be less need for the disclosure of remote and insubstantial connections.

The greatest change will come in the area of providing procedural fairness – both actual and perceived. One of the plaintiff employment bar's major objections is that a "repeat player advantage" inheres in employment arbitration. The bar asserts that this advantage will inevitably lead employment arbitrators to decide cases more favorably to employers than to individuals, because employers are likely to choose the same arbitrator in a future case. There are three flaws in this argument.

First, this repeat player phenomenon exists in litigation as well as arbitration. This fact was pointed out over a quarter of a century ago.⁵³ The reasons for this advantage include familiarity with the legal system, the ability to bring greater resources to bear on a case, and greater substantive and procedural knowledge. In addition, a defendant can always settle, rather than litigate, a weak case. Thus, a well-advised repeat defendant should win a

higher percentage of cases, having settled all those he or she was likely to lose. In fact, they do in labor arbitration. Management tends to win more labor arbitrations. Having learned what types cases are likely to be successful in labor arbitration, experienced management can settle those cases they are more likely to lose, as well as some equivocal cases. Only a few disputes will go to arbitration.⁵⁴ That is how a repeat player can increase his or her success in civil litigation, labor arbitration, and employment arbitration.

Second, there is a difference between a repeat-player *advantage* and a repeat-player *bias*. To assert there is a *bias* is to impute bad motives to employment arbitrators. Given the current disclosure requirements, it is difficult to understand how an employment arbitrator who curried favor with employers would not be found out. At least with AAA, plaintiff's counsel will know all the decisions the arbitrator made. As more employment arbitrations occur with increasing transparency, it would be economically foolish for an employment arbitrator to favor corporations over individuals. That arbitrator would be left without a practice.

Third, plaintiff employment lawyers are becoming repeat players. While individual plaintiff employment lawyers may only occasionally arbitrate cases, if they belong to NELA or one of its affiliates, they will have the advantage of the group's knowledge.⁵⁵ Undoubtedly NELA will train its members in how to arbitrate a case. With a transparent process and a market made up of repeat players on both sides, employment arbitrators will be subject to the same market forces as labor arbitrators. They will either meet the market's expectations for competent, ethical behavior or they will fail.

Conclusion

The employment arbitration market is maturing. While there are currently adequate legal and ADR organization safeguards to ensure ethical arbitrator behavior, they will soon be superseded by an efficient self-regulating market that ensures the quality of employment arbitrators, much as the market has ensured the quality of labor arbitrators. When that occurs, employment arbitrator ethics will no longer be speculatively maligned. Instead, they will be known and assured.

¹ One important commercial arbitration case about arbitrator ethics, *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 89 S.Ct. 337 (1968), involved the arbitrator's obligation to disclose any past financial dealings with a party that might create an impression of possible bias.

² The focus of this note is solely on the ethics of neutrals. Advocate ethics are covered by Bar Codes of Professional Responsibility.

³ The first state agency providing mediation, the New York State Mediation Board, was established in 1887. Currently, some state statutes require mediation as a condition precedent to formal fact-finding or interest arbitration, making it somewhat involuntary.

⁴ This is not to suggest that all labor-management mediators are equally competent or acceptable to the parties. But agency training provides some assurance that the agency – at least – deems them competent to provide services. Since the agencies are governmental and ultimately politically responsible, they have an incentive to provide effective services.

⁵ Most labor mediators are employed either by FMCS or state employment relations agencies. FMCS has statutory responsibility for private sector labor disputes that arise under the National Labor Relations Act. It relies exclusively upon its full-time employees as mediators. The state agencies have responsibility primarily for public sector labor-management disputes in their state. Some state agencies supplement their full-time mediators by using mediators from panels they train and maintain. These *ad hoc* mediators provide additional resources for peak workloads and for politically difficult disputes in which the mediator may serve as a lightning rod to take the blame for a mutually unpalatable resolution. By using an *ad hoc* mediator in the latter circumstances, the agency preserves the acceptability of its full time mediators.

⁶ In subsequent years the National Mediation Board, the New York Public Employment Relations Board, and other public agencies adopted resolutions that required arbitrators on their panels to be governed by the Code.

⁷ In the last 25 years, the NAA investigated all complaints against its members and suspended 6 members – all for the same offense – egregiously late Awards. The NAA also provides its members, upon request, written rulings interpreting the Code so they can conform their behavior to its requirements.

⁸ AAA, FMCS, and state labor relations agencies generally provide lists of arbitrators, upon request, to parties who have disputes they wish to arbitrate.

⁹ The process is “transparent” for two reasons: the reasoned awards written by labor arbitrators are widely disseminated and the arbitrators themselves – as repeat players – become well-known in the marketplace.

¹⁰ Being an arbitrator is attractive for a number of reasons. The work can be intellectually challenging and socially valuable. Arbitrators are reasonably well compensated, they control their calendars, and the parties generally treat them deferentially during a case.

¹¹ At one time, the FMCS sent all awards issued by its panel members to publishers. (It ceased doing this some years ago). Some arbitrators (usually newer ones hoping to establish a reputation), with the permission of the parties, send their awards to publishers. Some parties submit awards to publishers because they believe the award illustrates a principle they hope will become precedential. The Bureau of National Affairs, Commerce Clearing House, LRP, Inc., and the AAA all publish labor arbitration awards. Although the publishers are sometimes criticized for publishing aberrant awards of new arbitrators – simply because they are more interesting – even those awards can lead the parties to a more informed choice of arbitrator.

¹² The ABA has a Section on Labor and Employment Law as do many other state and local bar associations.

¹³ Some members of these organizations are not specialists in the field. They either aspire to be in the field, or do some work in the field and use the professional associations as a means of keeping current on both the law and “common knowledge” of practitioners in the field.

¹⁴ Entities that provide lists of arbitrators also provide biographies indicating which industries an arbitrator has worked in, which panels he is on, which contracts name him as a neutral, his fees, his professional associations, and his degrees.

¹⁵ Some markets are regional, as northern California, or New York metropolitan area, while others are industry based, such as railroads or airlines.

¹⁶ One of the most popular misconceptions is that arbitrators always “split the baby” in order to avoid losing acceptability. There may be some arbitrators who do so that and are specifically chosen for cases where that is what

the parties want. If they exist, these arbitrators are a distinct minority. Most parties value a clear decision that allows them to conform their behavior to the requirements of the collective bargaining agreement. A clear decision that is politically unacceptable to one side may affect the arbitrator's selection by that side for a period of time. But veteran arbitrators know that they can count on being selected by the lawyer on that side at some future date when his client needs a tough, clean decision. Arbitrators with reputations for making well-supported, clear decisions tend to have long careers.

¹⁷ By contrast, in order to be a member of the NAA an arbitrator must have no current representational or consultative relationships with labor or management. All past relationships must be disclosed when seeking membership.

¹⁸ The California trial-level courts and some of the appellate courts have mediation programs. In addition, the EEOC and the California Department of Fair Employment and Housing have mediation programs for which they provide mediators.

¹⁹ Despite the lack of explicit authority to require mediation, counsel generally accede to a court's "suggestion". They go out, try mediation, and come back only if the case has not settled.

²⁰ The AAA, ABA, and the Society of Professionals in Dispute Resolution have jointly promulgated "Model Standards of Conduct for Mediators." The California Dispute Resolution Council (CDRC) has promulgated "Standards of Practice for California Mediators," which have been adopted by many California courts. Local courts, such as the Los Angeles Superior Court, have adopted "Guidelines for Neutrals" as part of their local rules.

²¹ Since the mediators are not employees of the court, this system makes great sense. On the other hand, where the mediation program involves in-house mediators, as with the Ninth Circuit Court of Appeals, the court does its own training.

²² This description represents what has occurred in the California courts. Florida courts have an extensive statutory scheme for certifying and disciplining mediators, who then become eligible for placement on lists of court-approved mediators. Other states have their own schemes.

²³ There is a proposed addition to the ABA Model Rules of Conduct, Rule 2.4, that would govern lawyers who serve as third-party neutrals. The proposed rule addresses itself to the potential confusion a non-represented party may have with a lawyer-mediator. It requires distinguishing between the lawyer's role as a neutral and as a representative of a party.

²⁴ California law prohibits mediators from making any report, assessment, evaluation, finding, or recommendation to a court. Cal. Ev. Code Sections 703.5 and 1121. That law has been upheld in *Foxgate Homeowner's Ass'n, Inc. v. Bramalea California, Inc.*, 26 Cal. 4th, 1, 2001 Cal. LEXIS 4233, 108 Cal. Rptr. 2d 642 (July 9, 2001).

²⁵ In a mandated mediation the "proposed option" may simply be an expression of the party's unwillingness to mediate the case. Most mediators would explore that possibility with the party.

²⁶ Behavior that might at the time seem appropriate, such as attempting to convince a party not to walk out, may in retrospect be characterized as an improper attempt to coerce the party into agreement.

²⁷ The “repeat player bias” is an assertion that a neutral will favor the party most likely to select the neutral in a future case. Thus, it is sometimes asserted that a mediator might favor a large corporation over an individual plaintiff, since the former is more likely to need a mediator in the future.

²⁸ A forceful “reality check” is not always inappropriate. Sometimes that is precisely what counsel wants for the client from a mediator.

²⁹ See, Brand, *Learning to Use the Mediation Process-A Guide For Lawyers*, 47 *Arbitration Journal* 6 (December 1992); reprinted in Craver & Brunet, eds *Alternative Dispute Resolution* (MICHIE, 1997)

³⁰ See, Cal. Ev. Code Sections 1115 *et seq.* and Section 703.5. There are narrow exceptions for criminal and other specific behavior that occurs during mediation.

³¹ Any professional working at an hourly rate can be accused of working slowly to increase compensation; taking three hours to do two hours work. The client expects to compensate the professional, but often questions the actual amount owed. In the court annexed programs parties may believe that the free hours represent the court’s opinion on how long the mediation should take. If the mediator only gets compensated when the mediation extends beyond those hours, the mediator has a financial incentive to prolong the mediation. Thus, the parties may believe the mediator is working slowly in order to get paid.

³² Many mediators use a *per diem* fee so that it is clear they have no interest in prolonging the mediation.

³³ Court-annexed programs that rely upon unpaid volunteer mediators may soon discover a paucity of volunteers. Many of these programs rely upon lawyers who hope to develop a paying mediation practice by providing free services to demonstrate their skills to potential clients. However, very few lawyers have succeeded at creating new careers. As it becomes clear that working free for the courts is not a probable way to develop a paid mediation practice, there are likely to be fewer volunteers. This lack of volunteers will result in the court programs becoming untenable, or in the courts being obliged to hire their own full-time, in-house mediators.

³⁴ The opponents of employment arbitration posit a lack of ethical behavior on the part of employment arbitrators as a reason to prohibit all pre-dispute arbitration agreements, whether voluntary or imposed.

³⁵ This document provides detailed guidance for NAA members, covering whether to accept a case, pre-hearing consultation, the hearing, and the Opinion and Award. The Guidelines go farther than the Protocol (which they supplement) in ensuring due process in imposed statutory employment arbitration.

³⁶ Cal. Code of Civ. Pro. Section 1281.9. The major impetus for this 1994 legislation, amended in 1997, was from California plaintiff lawyers, whose major concern was employment arbitration. In the 1998 and 2000 legislative sessions, they introduced bills to prohibit all employment arbitration agreements, voluntary or imposed. Section 1281.9 excludes collective bargaining arbitration. Ultimately, the legislature passed a bill requiring the Judicial Council to make additional rules, to be enforced through vacature. Those Rules of Court have been the subject of significant litigation.

³⁷ Rules, Rule 11; Protocol, C. 1 and 2.

³⁸ Protocol, C.1.

³⁹ Parties are also provided arbitrator panel cards containing information about the arbitrator’s background and experience, so they can judge the qualifications themselves.

⁴⁰ While disclosure is discussed below, in the interest of full disclosure the author notes that he is a member of the AAA's Employment Panel.

⁴¹ In California, the Rules are interpreted to require statutory disclosure.

⁴² CCP Section 1281.9(a)(4).

⁴³ The disclosure requirement does not apply to collective bargaining cases and permits substituting "claimant" or "respondent" for the name of an individual (but not corporate) party that is not a party in the current case. CCP Section 1281.9(a)(2).

⁴⁴ Cal. Code of Civ. Pro. Section 170.1(a)(6)(C).

⁴⁵ Cal. Code of Civ. Pro. Section 1286.2(f)

⁴⁶ The legal framework – what can and cannot be imposed in an employment arbitration agreement – defines the boundaries of the market.

⁴⁷ The same objections are made about commercial or securities industry arbitrators. My focus in this article, however, is on employment arbitration.

⁴⁸ Plaintiff lawyers often characterize employment arbitration as an employer scheme to deny jury trials in cases involving Title VII rights. The area of employment arbitration, however, is much broader than that criticism suggests. In 1999, the AAA administered 2200 cases under its Employment Rules. Only 13% involved statutory claims. Of the total, only half involved arbitration schemes imposed by employers. Currently, the vast majority of employment arbitrations do not involve statutory claims.

⁴⁹ The Alliance includes Cornell University, the W.J. Usery, Jr. Center for the Workplace at Georgia State University, MIT, UCLA and other schools, as well as the NAA and ABA. The training in statutory employment law is part of its employment mediation training. In addition, the NAA has held specific trainings for its members in statutory employment law and arbitrating statutory claims. Similarly, the AAA has trained its Employment Panel members in statutory employment law.

⁵⁰ It is impossible to know the retired judges' actual experience from an advertisement. Some may consider a single employment case as conferring expertise, while others may claim that expertise only if they have had multiple cases.

⁵¹ See, Maltby, L. "Private Justice: Employment Arbitration and Civil Rights," 30 *Columbia Human Rights Law Review* 1 (Fall, 1998)

⁵² Certain information will be redacted in the interest of privacy.

⁵³ See, Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974)

⁵⁴ Smart unions engage in a similar analysis. Both, however, may be obliged to take a specific case they know is a loser because of internal political pressures. They simply need an arbitrator to make the unpalatable decision.

⁵⁵ This trend is similar to what occurs for lawyers with only an occasional labor client. By joining bar sections they keep current, trained, and knowledgeable.