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Developing Standards of Professional Responsibility for Arbitrators in Mandatory Employment Arbitration Proceedings

Barry Winograd†

INTRODUCTION

The curtain rose on a new era of employment law with the U.S. Supreme Court’s 1991 decision in Gilmer v. Interstate/Johnson Lane Corp.¹ approving mandatory arbitration of statutory discrimination claims. The Gilmer case has had significant policy and practice implications in the decades that followed, including a multi-front legal battle over efforts to reform, if not eliminate, mandatory proceedings arising out of employer-promulgated agreements that are a condition of employment. After a brief review of this recent history, this Article offers a proposal for heightened standards of professional responsibility for arbitrators serving in these cases.

This proposal is drawn from work already undertaken by a special committee of the National Academy of Arbitrators (“NAA”). The NAA is

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an organization with a primary interest in the arbitration of labor-management disputes under collective bargaining agreements. However, NAA members also have long served as neutrals in resolving other employment disputes in the non-union setting. The proposal outlined below is presently being considered for adoption by the NAA as a set of guidelines ("the Guidelines") for arbitrators serving in mandatory employment arbitration cases.

I.

RECENT HISTORY OF ARBITRATION DOCTRINE AND REFORM

As a starting point in this analysis, the U.S. Supreme Court is unlikely to change its direction on arbitration issues. The Court in the past several years has reiterated that it will enforce mandatory arbitration in a variety of settings, even if there is protective state legislation or an administrative procedure available for aggrieved individuals.

The Supreme Court's perspective has fueled the legal debate after \textit{Gilmer}, which has continued virtually nonstop in law journals and the popular press. This includes critical commentary about changes in jurisprudence in the 1980s and 1990s that forms the background to the \textit{Gilmer} decision under the Federal Arbitration Act ("FAA"). Among other points, this commentary has expressed apprehension about the potential adverse impact of mandatory arbitration on public law dealing with discrimination and employee rights. Contrasting views have argued that, compared to the courts, mandatory employment arbitration offers greater and more effective access to employees seeking resolution of their claims.

Since \textit{Gilmer}, debate also has extended to empirical assessments. Some research suggests that claimants have experienced favorable decisions at rates comparable to civil trials. However, research also suggests

\begin{itemize}
\item 2. \textsc{Nat'L Acad. of Arbitrators}, http://naarb.org \citeyearpar{natl_acad_arbitrators}, \textit{last visited} Feb. 24, 2014.
\item 4. \textsc{9 U.S.C.} \textsc{\S} 1 (2012). For a few of the many articles on these developments, see, for example, Katherine V.W. \textsc{Stone}, \textit{Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s}, 73 \textsc{Denv. U. L. Rev.} 1017 (1996); Margaret L. Moses, \textsc{Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress}, 34 \textsc{Fla. St. U. L. Rev.} 99 (2006); David S. Schwartz, \textit{Mandatory Arbitration and Fairness}, 84 \textsc{Notre Dame L. Rev.} 1247 (2009).
\item 5. \textit{See generally} Theodore J. St. Antoine, \textit{Mandatory Arbitration: Why It's Better Than It Looks}, 41 \textsc{U. Mich. J. L. Reform} 783 (2008) (observing that similarly situated employees achieve similar or even better outcomes in mandatory arbitration proceedings than in court).
\item 7. \textit{See, e.g.}, Theodore Eisenberg \& Elizabeth Hill, \textit{Arbitration and Litigation of Employment Claims: An Empirical Comparison}, 58 \textsc{Disp. Resol. J.} 44 (2003); David Sherwyn, Samuel Estreicher &
significant concerns about mandatory arbitrations, such as more limited damage recoveries, less success for unrepresented plaintiffs, and undue influence for repeat employer participants.8

In addition to legal scholarship, there have been challenges in the courts to the enforcement of mandatory arbitration agreements. In the decade after Gilmer, federal cases established that excessive employer control over the arbitration process would be viewed as a violation of basic principles of due process and fairness undermining statutory protections for employees.9 Under state law, the unconscionability doctrine has been advanced as a means of protecting employee rights, applying the proviso contained in section 2 of the FAA that bars enforcement of arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract."10

These decisions aside, problems have persisted on the judicial front and the Supreme Court has expanded the reach of mandatory arbitration in the employment context. As one example, the U.S. Supreme Court in Circuit City Stores v. Adams11 rejected an effort to exclude employees from coverage under the FAA by applying a narrow construction to exclusionary language in section 1 of the statute that precludes enforcement for "contracts of employment . . . of workers engaged in foreign or interstate commerce."12 In 14 Penn Plaza v. Pyett, the Supreme Court gave a green light to collective bargaining agreements permitting unions to waive an individual's right to litigate a discrimination claim in court and to authorize individual arbitration instead.13

Opponents of mandatory arbitration also face problems in other areas of the law. For example, mandatory arbitration opponents were defeated when the U.S. Supreme Court approved class action waivers in consumer agreements as a bar to anti-trust class actions, even where the facts demonstrate it would be too costly to effectively vindicate a complaint in an individual arbitration.14 One observer of arbitration developments, critical

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8. See Colvin, supra note 6.
11. 532 U.S. 105, 1308-11 (2001). On remand, the employment arbitration agreement nevertheless was deemed unconscionable. See Circuit City Stores v. Adams, 279 F.3d 889 (9th Cir. 2002).
of judicial inaction, appealed for statutory and professional regulation to improve the quality and fairness of mandatory arbitration proceedings.\textsuperscript{15}

Apart from legal writing and judicial challenges, opponents have sought relief in legislative and administrative forums, but with limited success. The most significant legislative drive has died on the vine, year after year. The Arbitration Fairness Act, which has been introduced in Congress for several sessions, seems to be going nowhere.\textsuperscript{16} In an administrative forum, the Equal Employment Opportunity Commission issued a policy declaration in 1997 disapproving mandatory arbitration agreements for discrimination cases, but this position statement lacks the authority of a formal rule.\textsuperscript{17}

For its part, the National Labor Relations Board ("NLRB") has ruled that mandatory arbitration agreements cannot prohibit the right to file charges with the agency.\textsuperscript{18} More recently, the NLRB held that arbitration programs barring employees from seeking class-wide relief interfere with the right under federal labor law to engage in protected, concerted activity.\textsuperscript{19}

So far, however, the appellate courts disagree with this position.\textsuperscript{20}

II.

THE GAP IN PROFESSIONAL STANDARDS

A major gap in the field of mandatory employment arbitration concerns professional and ethical standards for arbitrators. There is a precedent for such standards. Decades ago, a code of professional responsibility was adopted for arbitrators of labor-management disputes arising out of collective bargaining relationships.\textsuperscript{21} This code, the product of a three-party project involving the NAA, the American Arbitration Association ("AAA"), and the Federal Mediation and Conciliation Service, deals largely with arbitration of traditional labor law disputes under


\textsuperscript{16} The legislative proposals introduced in 2013 are S.B. 878 and H.R. 1844; see also Malin, \textit{The Arbitration Fairness Act}, supra note 15.


\textsuperscript{20} See D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 362 (5th Cir. 2013); see also Owen v. Bristol Care, Inc., 702 F.3d 1050, 1051 (8th Cir. 2013).

collective bargaining agreements and does not provide a comprehensive set of standards for non-union employment arbitration.

Aside from a code for labor arbitrators, designating agencies such as the AAA have had ethical rules for commercial arbitration in place for many years. These long-standing rules cover voluntary, bilateral arbitration agreements in a wide variety of business fields, but are not designed for the mandatory cases we now encounter.\(^{22}\) The AAA's ethical rules were developed with a committee of the American Bar Association decades ago, with only modest revision since.

Following *Gilmer*, the organizations with administrative responsibility for such disputes have attempted to regulate the administration of non-union employment cases. An early post-*Gilmer* development in the mid-1990s was the Due Process Protocol.\(^{23}\) The Protocol was drafted under the auspices of the American Bar Association’s labor section with contributions from individuals associated with different groups in the employment field, including plaintiff and defense counsel, as well as leaders in the NAA. The Protocol spelled out minimum standards for mandatory arbitration proceedings, among them protection of statutory rights, bilateral selection of arbitrators, and fair hearing procedures. Similarly, the AAA and the Judicial Arbitration and Mediation Service (“JAMS”) have both adopted employment arbitration rules to ensure minimum standards of fair procedure, including employer fee responsibilities for plans promulgated as a condition of employment.\(^{24}\) At times, however, agency actions reveal conflicting forces at work, as in rules that have been approved for class-action proceedings.\(^{25}\)

California took a major step in developing rules for arbitration a decade ago when it established several ethical standards to regulate the conduct of arbitrators and appointing agencies.\(^{26}\) The California standards


impose broad disclosure obligations on arbitrators and appointing agencies for all types of contractual proceedings, provide parties with disqualification rights, and permit awards that violate those rights to be vacated.27 The California standards, however, have not been adopted nationally, are preempted in certain fields, such as the securities industry,28 and are not crafted to address specific problems arising in employment cases.

For the NAA, its history with negotiated, voluntary arbitration systems for labor-management disputes under collective bargaining agreements has spurred the organization to go on record as favoring voluntary arbitration.29 Nevertheless, recognizing that mandatory arbitration is now firmly in place in the non-union setting, the NAA has proposed practice recommendations for arbitrators and procedural reforms to be incorporated in legislation, if any is forthcoming.30

III. PROPOSED GUIDELINES FOR PROFESSIONAL STANDARDS

To fill the regulatory gap for arbitrator conduct in mandatory employment arbitration proceedings, members of a special committee of the NAA have proposed formal Guidelines to establish standards of professional responsibility for arbitrators. Although the Guidelines as presently proposed are subject to organizational modification and approval, several principal elements have evolved through internal discussion.

If the Guidelines are adopted by the NAA later in 2014, individual arbitrators will be encouraged to advise parties in employment cases of the arbitrator’s commitment to adhere to the Guidelines. In addition, the Guidelines can be adopted by other agencies and organizations active in the field, such as the AAA and JAMS. Advocates and law firms also can press arbitrators to adhere to the Guidelines as a requirement for appointment.

27. See Ovitz v. Schulman, 35 Cal. Rptr. 3d 117 (2005). In this respect, California law may be at odds with federal practice in reviewing arbitration awards. See, e.g., Freeman v. Pittsburgh Glass Works, LLC, 709 F.3d 240 (3d Cir. 2013) (affirming trial court’s refusal to set aside arbitration decision because the facts did not establish “evident partiality” under 9 U.S.C. § 10(a)(2) (2012)); Merit Ins. v. Leatherby Ins., 714 F.2d 673 (7th Cir. 1983) (reversing trial court’s decision to set aside an arbitration award under Fed. R. Civ. P. 60(a) when the arbitrator had a prior business relationship with the principal of one of the parties).

28. See, e.g., Credit Suisse First Boston Corp. v. Grunwald, 400 F.3d 1119, 1136 (9th Cir. 2005); Jevne v. Superior Court, 111 P.3d 954, 971 (2005).


30. Id.

In advancing these standards, members of the NAA involved in their development are mindful that, as a general, threshold principle, arbitrators following the Guidelines will remain subject to applicable federal and state law and administering agencies' rules, where those laws and rules govern the course and conduct of a proceeding.

Among the Guidelines being considered within the Academy are the following:

1. To assure procedural fairness and minimum standards of due process, arbitrators must be attentive to employer-promulgated arbitration plans that are a condition of employment. An arbitrator must insist upon correction of any deficiency, or decline to take the case.

2. Arbitrators must make a reasonable effort to address public law governing the workplace when it is at issue. An arbitrator unwilling or unable to do so, based on personal inclination or insufficient experience, should refuse an appointment.

3. Arbitrators must know the source of an appointment. Once informed, an arbitrator must decline to take a case from a panel created by one party or when only one side has selected the arbitrator.

4. After appointment, and as a continuing duty, arbitrators must promptly provide a written disclosure to the parties recounting any personal, professional, financial, or social relationship to a party, representative, or known witness. The nature and extent of the relationship must be described, and this duty extends to past and present connections. The disclosure obligation also applies to an advocate’s law firm and to an employer, as well as to other arbitrators when there is a tripartite panel. Further, arbitrators must disclose service in past proceedings, or in another neutral dispute resolution capacity, with the parties or their representatives.

5. Within a reasonable time after a disclosure, arbitrators should permit parties an automatic disqualification of an arbitrator without specific cause needing to be shown, and must otherwise abide by applicable law or agency procedures regarding objections to service.

6. Prehearing discovery must permit the fair and full exploration of issues consistent with the circumstances of the case, while also maintaining the expedited nature of arbitration.
7. Ex parte communications are prohibited, including any communications with one party regarding compensation or disclosure of a prospective award.

8. One party may be solely responsible for the arbitrator's fees in accord with applicable law, agency rules, or agreement of the parties.

9. Monetary deposits for arbitrator fees may be required as a condition of going forward with an arbitration. Fee deposits must be secured and set aside until fees are earned.

10. Arbitrators must give notice to all parties, and an opportunity to respond, if an arbitrator believes a case should be decided on the basis of a rationale or position not previously presented.

11. Arbitrators cannot publish an award without the consent of the parties.

12. A post-award clarification regarding the merits of a decision can only be provided if both parties have provided consent to clarify.32

The Guidelines listed above are not offered as a complete set, although they should be sufficient as a starting place. In the future, other issues can be reviewed based on a track record assessing initial implementation of the Guidelines. One potential issue might be whether arbitrators should provide notice to parties at the time of selection of an intent to accept—or not accept—subsequent appointment in another case with the same advocates or parties while the original appointment is in effect. Another example is whether there are ethical implications affecting the consideration of motions for summary judgment in proceedings in which the extent and scope of discovery is limited. A third example might be how an arbitrator should handle a case when an advance deposit is not paid, including whether non-payment should be treated as a material breach of an arbitration agreement resulting in dismissal of the arbitration and the option to pursue further relief in court.

Ultimately, a question for those active in the field is whether the Guidelines should, at some point, be transformed into an enforceable code. If the Guidelines evolved into a code, the NAA could enforce the code against its arbitrator-members, though not against advocates. If the code

32. Barry Winograd, Member, Nat'l Acad. of Arbitrators, Remarks at the Berkeley Journal of Employment and Labor Law's Forced Arbitration: A Symposium (Feb. 27, 2014) (presenting these Guidelines, which were pending before the NAA).
was widely adopted, administrative agencies and organizations could subject arbitrators to discipline.

CONCLUSION

While there are issues to be addressed in the future, several members of the NAA's special committee believe that we need not wait to take initial steps to fill an important regulatory gap. Further, a set of professional standards with points such as those described above hopefully will find substantial support in the employment law community of practitioners and organizations. Granted, there are current laws and rules that apply to mandatory proceedings, but these laws and rules do not fully address arbitrator conduct and do not preclude heightened standards of professional responsibility in the field. In the absence of reform legislation, improved professional standards can insure greater confidence that those serving as decision-makers in mandatory employment arbitration cases are adhering to fair procedures for the protection of all parties.