ASSOCIATION OF LABOR RELATIONS AGENCIES

THE FINAL REPORT OF

THE NEUTRALITY PROJECT

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In addition to agency support, three "outsiders" also made significant contributions to the Project. ALRA is particularly grateful to Professor Martin Malin, Director of the Institute for Law and the Workplace at the Chicago Kent College of Law, for his scholarship, counsel and skilled assistance as the Reporter for the Project. It is not an exaggeration to say that it would not have been accomplished without his involvement. ALRA also extends its thanks to Professor Malin's Research Assistant, Luke Glisan, of the Kent Law School class of 2006, for his invaluable assistance. The third individual is an "outsider" only in the most technical sense. John Truesdale retired in 2001 after a distinguished career as a staff attorney, Executive Secretary, Member, and Chair of the National Labor Relations Board. John is the ideal that this Project seeks to capture in its descriptions of the impartial public servant, and ALRA is pleased to dedicate this Report in honor of John Truesdale's long and remarkable career.

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MEDIATORS OPERATE UNDER ENABLING AUTHORITIES WHICH GENERALLY ENDORSE THE PURSUIT OF VOLUNTARY AGREEMENTS ON TERMS ACCEPTABLE TO BOTH PARTIES. MEDIATORS ARE GENERALLY FREE TO FACILITATE ANY PROPOSAL THE PARTIES MAY CHOOSE TO ADVANCE. MEDIATORS ARE NOT RESPONSIBLE FOR PROVIDING LEGAL ADVICE TO THE PARTIES OR FOR INTERPRETING THEIR ENABLING AUTHORITIES OR OTHER PROVISIONS OF LAW. AGENCIES SHOULD ESTABLISH POLICIES GUIDING MEDIATORS, WHERE A MEDIATOR KNOWS THAT THE TERMS DESIRED BY THE PARTIES ARE CLEARLY PROHIBITED BY THE ENABLING AUTHORITY.

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PREFACE

The Association of Labor Relations Agencies (ALRA) is an organization of local, state, provincial and national government agencies that are responsible for administering labor-management relations systems and services. ALRA promotes cooperative efforts to maintain high professional standards, to improve employer-employee relationships, to foster the peaceful resolution of labor-management disputes, and to facilitate the exchange of information regarding the administration and delivery of agency services.

The Neutrality Project pools the collective experience and expertise of ALRA's agencies on the subject most critical to their effectiveness – their neutrality. The success of ALRA agencies depends on the public and the parties they serve having confidence in the fairness of the process and the integrity of the agency.

The ALRA agencies operate under a wide range of statutes, executive orders, and regulations, described collectively in this volume as "enabling authorities". They generally declare a public policy favoring employee free choice with respect to representation for the purpose of collective bargaining, and provide frameworks for that representation when employees so choose. A hallmark of enabling authorities that have been successful in preventing or minimizing labor-management disputes over the long term is that they create dispute resolution mechanisms which are themselves neutral - rather than guaranteeing success to either labor or management - and delegate authority to specialized bodies (agencies) to administer those mechanisms. The "neutral third party" terminology sometimes heard is something of a misnomer to the extent it suggests that the ALRA agency is itself a party to any particular dispute between labor and management parties. Depending on their enabling authorities, ALRA agencies exercise quasi-judicial functions in adjudicating labor-management disputes, conduct process-neutral procedures that enable employees to express their choices on their representation, and facilitate collective bargaining processes by providing or enabling mediation and arbitration services.

The politically appointed members of ALRA agencies and their career staffs share a common purpose in carrying out the will of the people as expressed in their respective enabling authorities. They are dedicated to advancing the processes established by those enabling authorities, notwithstanding their professional backgrounds prior to assuming their roles within the agency. They are neither pro-union nor pro-management. Their obligation is to be impartial, and to appear to be so. Theirs, however, is not an obligation to remain still. Agency leadership and staff play an active role in mediation, investigation, administration or adjudication of labor-management disputes, and enforcement of regulatory mandates. They serve to protect and advance the process for resolving labor relations disputes without having (and without being perceived as having) a stake in the outcome. Their duty is to always act in accordance with the letter and spirit of the agency's enabling authority, without bias toward or against either side in the particular dispute.

This balanced approach to the law and to the parties is the subject of the Neutrality Project. The Project represents the combined efforts of scores of concerned public servants who understand that the effective administration of enabling authorities in the highly-charged as field of labor-management relations requires that the parties respect the integrity of government representatives.

We at ALRA see the Neutrality Project as a means of authoritatively restating the essential principles and practices on this critical subject. We intend to provide guidance for ALRA agencies and their personnel in carrying out their missions and this document should be particularly helpful in the orientation of new appointees and staff members. We also hope that our work product will be useful to parties and practitioners, to legislators and policymakers, to students and scholars, and to the public.

It bears remembering that this a restatement of principles, and not a handbook for agency operations. There are many and varied means of putting these principles into practice, and the fact that a given agency or agency representative uses a different approach to a problem than that described here is not itself suggestive of an improper practice or a lapse in neutrality.

Respectfully submitted, January 1, 2008.

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CHAPTER 1 - FOUNDATIONS OF NEUTRALITY

Section 1: IMPARTIALITY IS THE MOST ESSENTIAL ATTRIBUTE OF A LABOR RELATIONS AGENCY

Commentary:

It is likely that disputes between labor and management have existed in the workplace since the first employer hired the first employee, and that there will always be a potential for disputes between labor and management. Modern collective bargaining systems organize, channel, and regulate those inevitable conflicts within an obligation of good faith and principled standards, and with balanced rights that are intended to reduce or minimize disruptions of the economy and public services for the benefit of the general public.

Labor-management relations is one of the most highly-charged areas of human activity and government regulation. The old song verse "Which Side are You On" evidences how clearly and strongly views are held about labor relations disputes. Parties involved in these disputes are seldom dispassionate about their positions, or about adverse decisions by government agencies.

A government agency charged with assisting in the resolution of labor-management disputes must not have or be perceived as having a stake in the outcome of its proceedings. At the same time, the agency has responsibility for protecting the integrity of the dispute resolution mechanisms associated with the collective bargaining process, regardless of whether that the specific process being invoked is mediation, conciliation, fact-finding, investigation, administration, adjudication or enforcement. It is for this reason that the appropriate image for the agency is best characterized as one of impartiality. The agency's role must be marked by clearly-communicated and unwavering fidelity to the objectives and constraints of the enabling authority and by principled decision making.

Section 2: **AN IMPARTIAL LABOR RELATIONS AGENCY SEEKS TO EFFECTUATE THE PUBLIC POLICY EMBODIED IN THE LEGAL AUTHORIZATION FOR COLLECTIVE BARGAINING WITHIN THE LIMITS DEFINED BY THAT AUTHORIZATION AND WITH STRICT IMPARTIALITY AS TO THE OUTCOME OF ANY PARTICULAR DISPUTE.**

Commentary

Labor relations agencies administer a public policy that generally favors allowing employees to choose whether they desire collective representation, and promotes having a healthy collective negotiations process. ALRA agencies foster the processes of employee free choice and of collective bargaining where employees have opted for representation. They also foster an understanding and acceptance of these processes among constituents and the public. In so doing, agencies must act within the limits prescribed by their enabling authorities, and must be scrupulously neutral as to the results reached in negotiations or adjudications.

There is an inherent and unavoidable tension between an agency's role as protector of the legally authorized processes for resolving disputes and its need to be impartial with respect to the outcomes resulting from these processes. An agency's reputation for impartiality and the effectiveness of the collective bargaining system depend on how the agency navigates that tension.

An agency's duty is to aid in the resolution of labor disputes, and agency personnel should not be paralyzed into inaction out of a fear of being perceived as non-neutral. Agency personnel must, however, be careful not to cross the line between assisting the process and assisting particular parties.

Agency personnel must be mindful, in carrying out their roles, that they are part of a larger governmental body that plays a pivotal role in effectuating the public policy embodied in the agency's enabling authority. Agency personnel must carry out their roles in a principled manner, when viewed from the perspective of the agency as a whole, including the legal framework, regulations, guidelines, protocols and jurisprudence, regardless of any individual's personal or ideological proclivities.

Example:

A public sector collective bargaining statute prohibits strikes and related job actions and provides for nonbinding fact-finding as a final step in its impasse resolution procedures. In negotiations for a first contract, an employer offered terms that an objective observer would view as extremely harsh. Mediation did not produce much movement and the union demanded fact-finding. The fact finder concluded that the bases for many of the employer's proposals were faulty and recommended settlement close to the union's proposals on many issues. Nevertheless, the employer refused to move off its pre-fact-finding positions and unilaterally implemented its final pre-fact-finding offer.

Such a case sharply illustrates the need to safeguard the collective bargaining process with strict impartiality regarding the outcomes of that process. The need to safeguard the process is greatest where the process lacks a final method of impasse resolution, such as a right to strike or a right to proceed to interest arbitration. If the agency determines that the employer did not bargain in good faith (i.e., that it merely went through the motions with no intent to reach an agreement), then the agency should not shy away from finding the employer to have violated the law. On the other hand, the agency should not find a violation merely because it does not agree with the bargaining proposals made by the employer.

Section 3: **REGARDLESS OF AGENCY STRUCTURE, BOARD MEMBERS OR COMMISSIONERS ARE CHARGED WITH THE DUTY TO SERVE AS STATESPERSONS RATHER THAN PARTISANS, TO EMBRACE THE LABOR-MANAGEMENT RELATIONS PROCESS, TO OBSERVE RECUSAL STANDARDS, AND TO DECIDE DISPUTES WITH INTEGRITY, FROM THE LEGITIMATE PERSPECTIVE OF THE AGENCY.**

Commentary

Labor relations agencies have a variety of structures, both as specified in their enabling authorities, and as established by practice. Some enabling authorities specifically designate one or more members as representatives of employers, others as representatives of employees and still others as representatives of the public. Other enabling authorities are silent on such matters, but practices have evolved whereby an equal number of members are selected from the ranks of employer and labor advocates, usually with one or more additional members selected as representatives of the public. To the same end, some enabling authorities limit the number of members who may be associated with the same political party. Still other agencies do not have a tri-partite structure or a guarantee of balance, either by tradition or legal mandate. Regardless of whether a board member or commissioner is appointed as a labor representative, a management representative, or a member of a particular political party, all members must carry out their roles in a principled manner, viewed from the perspective of the agency as a whole, as discussed in Section 2, *supra*.

The standards governing recusal from agency cases when there is a either an actual conflict of interest or the appearance of a conflict of interest differ among jurisdictions, but members must know and strictly observe the standards in their jurisdiction. Members should seek guidance from agency counsel when they are unsure how the standards apply in a particular instance. Members must approach each case with open minds regardless of their backgrounds or predispositions, ready to rule on each issue and to use their valuable labor relations experience and expertise in a manner consistent with the enabling authority that they are charged to uphold and the facts of the case at hand in their full context. Their actions must be taken deliberately in good faith in their capacities as members, rather than as advocates for particular parties or ideologies.

To the extent that they can be achieved in a principled manner, unanimous decisions further the acceptability of the agency's decisions within the community and promote the agency's neutrality. Impartiality is measured over time by the reality of that impartiality, and by the perceptions of the parties and the public the agency serves.

Example

A tri-partite labor relations agency has before it two charges filed by an employee. One charge alleges that the union breached its duty of fair representation by failing and refusing to process grievances protesting an alleged denial of equal opportunities to work overtime and an alleged failure to abide by negotiated procedures for promotions. The

second charge alleges that agents of the employer retaliated and discriminated against the employee for filing the grievances. The record supports both: (1) a finding that the union breached its duty of fair representation and interfered with the employee's efforts to pursue grievances, and (2) that the employer retaliated and discriminated against the employee because of his protected activity.

A politically expedient way for the agency to resolve this case would be for the labor members to join with the neutral(s) in ruling against the employer while the employer members join with the neutral(s) in ruling against the union. Such an approach might allow the agency to reach the "right" result while the labor and employer members appear to remain loyal to their respective constituencies, but such an approach would be inappropriate. Members are not accountable to the communities from which they came. Rather, they are accountable to the enabling authority under which the agency operates, to the labor and management communities jointly, and to the public as a whole. Their obligation is to serve as agency officials, not as advocates for particular partisans or ideologies. Joining together in a unanimous decision ruling against both the employer and union would further the acceptability of the agency's decisions as a whole and, over the long term, promote the agency's impartiality and credibility.

Section 4: **LABOR RELATIONS AGENCIES SHOULD NOT SHY AWAY FROM EXERCISING THEIR DISCRETION WITHIN THE CONSIDERABLE ROOM FOR INTERPRETATION ENTRUSTED TO THEM, BUT SHOULD DO SO WITHIN THE BOUNDS OF THEIR LEGITIMATE AUTHORITY.**

Commentary

Labor relations agencies administer bodies of law that leave considerable room for interpretation. Phrases such as "concerted activity for mutual aid and protection" and "terms and conditions of employment" and "meet and confer in good faith" paint with broad brushes, and require the exercise of agency expertise and discretion in applying them to particular fact patterns and issues. In *Pattern Makers League v. NLRB*, 473 U.S. 95, 116 (1985), Justice White emphasized the discretion afforded to the National Labor Relations Board (NLRB) when he concurred in the Court's decision upholding the NLRB's interpretation that an employee has an absolute right to resign from membership in a labor organization, but made clear that alternative interpretations by the NLRB would also have received judicial deference:

> The Board has adopted a sensible construction of §§ 7 and 8 that is not negated by the legislative history of the Act. That Congress eliminated from the bill under consideration a provision that would have made certain restrictions on resignation unfair labor practices falls short of indicating an intention to foreclose the Board's reading. By the same token, however, there is nothing in the legislative history to indicate that the Board's interpretation is the only acceptable construction of the Act, and the relevant sections are also susceptible to the construction urged by the union in this case. Therefore, were the Board arguing for that interpretation of the Act, I would accord its view appropriate deference.

Labor relations agencies should safeguard the discretion entrusted to them by their enabling authorities, and must not abdicate their responsibility to provide principled and reasoned bases for the exercise of that discretion. For example, in *Meyers Industries, Inc.*, 268 N.L.R.B. 493 (1984), the NLRB overruled its prior doctrine of constructive concerted activity on the ground that the NLRA mandated that only activity engaged in with or on the authority of other employees was protected by section 7 of the NLRA. The Board maintained that the NLRA left no room for discretionary judgment, and did not state any reasons for its position that were grounded in labor relations policy. The D.C. Circuit reversed holding that the Board's interpretation of the NLRA was erroneous and that the Board had discretion to construe section 7 with respect to constructive concerted activity, and remanded the case so that the NLRB could exercise its discretion and explain the reasons behind its choices. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985). On remand, the Board exercised its discretion and explained why, as guardian of the statute, it had concluded that the individual employee's conduct was not protected. *Meyers Industries, Inc.*, 281 N.L.R.B. 882 (1986). The D.C. Circuit then affirmed, deferring to the NLRB's expertise, 835 F.2d 1481 (D.C. Cir. 1987).

CHAPTER 2 – INDEPENDENCE

Section 1: **AGENCY OFFICIALS AND PERSONNEL OWE THEIR ALLEGIANCE TO THE ENABLING AUTHORITY ON WHICH THE AGENCY IS FOUNDED, AND MUST CARRY OUT THEIR FUNCTIONS INDEPENDENTLY OF POLITICAL INFLUENCES THAT WOULD DISTORT THAT ALLEGIANCE, REGARDLESS OF WHETHER THEY ARE ADJUDICATING, ADMINISTERING, INVESTIGATING OR MEDIATING.**

Commentary

A critical component in maintaining an agency's impartiality, both in appearance and in fact, is the agency's independence from external factors that are irrelevant to the principled resolution of the particular dispute that is before the agency. It is inappropriate for any person, party or official to exert political pressure on an agency, either directly or indirectly, to have a matter handled in a particular manner. The integrity and impartiality of an agency and the effectiveness of its services may be destroyed if the agency is not independent from political pressure.

Independence of agency officials is particularly important in public sector labor relations, where the authority that appointed agency members may be a named party to the dispute the agency is adjudicating or mediating. As the party to a pending case, that appointing authority's sole legitimate expectation is that the agency will treat it like any other party. Status as an appointing authority may not be used to influence the handling of the case.

Independence of agency officials is of paramount importance for agencies created by executive orders or regulations, as well as for agencies established by statutes. The importance of independence applies equally without regard to the nature or source of the agency's enabling authority.

Example

The State unilaterally implemented a policy requiring that all applicants for employment and for promotion sign a statement agreeing that any claimed debts to the State will be repaid through payroll deductions in an amount up to 10% of the employee's salary. The covered debts included, among other things, unpaid taxes and overpayments of welfare benefits. The policy did not contain, at least initially, a procedure by which an employee subject to the repayment agreement could dispute whether a debt really was owed, or the amount thereof. Several unions challenged the imposition of the repayment agreements on the ground that the compulsory agreements affected wages, which is a mandatory subject of bargaining. The State defended its actions, arguing that repayment of debt owed to the State was a "qualification" for employment and promotion which management could determine and impose unilaterally. The State argued that requiring bargaining over the repayment agreement would violate the State Personnel Director's statutory right to determine qualifications for employment.

> The labor relations agency must determine whether the repayment requirement is a "qualification" as claimed by the employer or a "condition of employment" as claimed by the unions. It must decide whether the evidence shows that the disputed policy was intended as an economic measure to collect monies from State employees and not as a test of character and reputation, as argued by the State. The record will support a finding that the policy does not fit the definition of a "qualification" for employment. As a matter of law, the labor relations agency can hold that as the agreements involved deductions from wages, a mandatory subject of bargaining, the State could not unilaterally impose this condition of employment without first bargaining.

As in this example, public sector agencies, in particular, may face politically sensitive cases that must be decided by members appointed by the employer. Agency acceptability and integrity depend on political impartiality, as well as labor relations impartiality, and decisions must be free of any reasonable perception of political bias or favoritism. A decision that rules for the State as employer must be as credible as a decision that rules against the State. That can only occur if the agency is committed to political impartiality in principle and independence in decision-making.

Section 2: **THE IDEAL AGENCY APPOINTEE IS SELECTED FOR KNOWLEDGE AND EXPERIENCE IN LABOR RELATIONS OR CAPACITY TO ACQUIRE EXPERTISE, AND NOT FOR IDEOLOGICAL PURITY OR POLITICAL LOYALTY.**

Commentary

Some enabling authorities require that agency appointees have expertise in labor relations. Regardless of whether a jurisdiction has such a mandate, the ideal agency appointee is selected for experience and background in labor relations rather than for loyalty to the political party of the official making the appointment. In some situations, particularly smaller jurisdictions, it may not be possible to appoint~~ing~~ only individuals with established backgrounds in labor relations. In these instances, ideal appointees will be individuals displaying the capacity to learn and the capacity to listen before reaching a decision, and they should, upon assuming office, educate themselves to develop the necessary expertise in labor relations.

It is never appropriate for an appointing authority to condition an appointment on the appointee's commitment to decide particular cases in a manner that contravenes the legal principles on which the agency is founded.

Section 3: **ADJUDICATIVE AGENCIES ARE QUASI-JUDICIAL IN NATURE, AND MUST OPERATE WITH A LEVEL OF INDEPENDENCE COMPARABLE TO THAT OF THE JUDICIARY.**

Commentary

Once members assume offices charged with exercising quasi-judicial functions, their relationships with the officials that appointed them or other political officials should be at arms length. The Ontario Court of Appeals succinctly stated the importance of such independence:

> [T]he Ontario Labour Relations Board in its quasi-judicial functions must of necessity maintain a public perception of independence from government if the public is to have any respect for its decisions. Indeed, it is difficult to imagine how any tribunal with quasi-judicial functions could maintain the appearance of integrity to those who appear before it, without some degree of independence.

Hewat v. The Queen in Right of Ontario, 37 O.R. (3d) 161, 169, 1998 Ont. Rep. LEXIS 115, at **21 (Ct. App. Ont. 1998).

Agency personnel faced with inappropriate attempts by appointing officials or others to influence the outcome of a particular case or the direction of agency decisions should rebuff them and report them to agency counsel or the designated ethics officer. Agency officials are trustees of the enabling authorities under which their agencies operate, and their agencies' reputations, and can only carry out their fiduciary obligations by safeguarding their independence.

Section 4: MEMBERS SHOULD STRIVE TO DECIDE MATTERS BEFORE THEM IN A PRINCIPLED MANNER THAT PRESERVES THE INTEGRITY OF THE AGENCY AS A WHOLE.

Commentary

Upon appointment, agency members become agents of their agencies' enabling authorities, and are no longer agents of particular political or ideological viewpoints. Giving great weight to the principle of stare decisis preserves agency integrity and promotes labor relations stability, a goal of the labor relations systems administered by ALRA agencies. A party who lost a case as a respondent yesterday must have a reasonable expectation that it will win on identical facts as a charging party tomorrow, and the reasonableness of that expectation should not be affected by a change in the composition of agency membership unless there is a principled basis for distinguishing the two cases.

In deciding a case, an agency writes the next chapter in the evolving body of law under the enabling authorities. Agency members should strive to decide each case in a manner that maintains the coherence and integrity of the body of law as a whole. Deviations from precedent should be based on principle, rather than on political expediency. Maintenance of a coherent body of decisional authority promotes integrity and public confidence in agency impartiality.

Independence from political or ideological expediency does not, however, mean isolation from philosophical change. Agency members must balance how a decision in a particular case fits within the body of law that has already developed against the principles that support moving the development of that body of precedent in a new or different direction. Agency members should realize that too frequent ideologically-based changes in agency doctrine will undermine the agency's effectiveness. No agency member should come into such a leadership role with a pre-established agenda to remake agency decisional precedents. Members should approach potential departures from established precedent as labor relations statespersons, rather than ideologically-based instruments of doctrinal overhaul.

The greater the degree to which interpretation and application of enabling authorities has been established, in terms of tenure of that body of law and parties' reliance on it, the greater the caution that should be exercised before changing it. If and when long-standing policies or precedents are changed, clear articulation of a weighty rationale for change helps to preserve an agency's reputation for integrity. The use of a transparent public deliberative and consultative process can protect the agency's integrity in the face of changes in agency direction in the development of the law. Focus groups and other input forums prior to rulemaking can provide such a deliberative and consultative process, but are not the only means of accomplishing changes in direction with integrity.

Section 5: **AGENCY STAFFS HAVE A DUTY TO ACT IN A PRINCIPLED MANNER AND PRESERVE THE AGENCY'S INTEGRITY, BUT MUST DO SO IN A MANNER THAT GIVES DUE DEFERENCE TO THE ROLE OF THE AGENCY'S POLITICAL APPOINTEES.**

Commentary

It is inappropriate for political authorities or others to pressure the staff of a labor relations agency concerning the outcome in any particular case. When faced with attempts to exert inappropriate pressure, staff members are obligated to rebuff them or report them to agency counsel or ethics officer.

A key function of some agency staff is to provide appointed members with the advice necessary to facilitate their duties to maintain the agency's integrity. For example, staff charged with advising members should apprise them about the degree to which a particular body of precedent is well-established, the degree to which parties have come to rely on a particular body of precedent, and the effects that contemplated changes of policy or precedent are likely to have on labor relations in general. Staff should realize, however, that they are not the appointees of the elected governmental leaders and their role is to implement the decisions made by those appointees.

Section 6: **MEDIATION AGENCIES HOUSED IN EXECUTIVE DEPARTMENTS OR MINISTRIES NEED NOT OPERATE COMPLETELY AT ARMS LENGTH FROM SECRETARIES, MINISTERS OR OTHER DEPARTMENT HEADS, BUT MUST STILL ENSURE THAT THE AGENTS CARRYING OUT THE AGENCY'S FUNCTIONS MAINTAIN THE INDEPENDENCE NECESSARY TO PRESERVE AGENCY INTEGRITY.**

Commentary

When exercising mediation functions, labor relations agencies need not maintain the same arms length relationship with their appointing authorities that is required of agencies exercising quasi-judicial functions. Thus, an appointing authority can properly advise the head of a mediation agency that intervention in and resolution of a particular labor dispute is a high priority for the administration. Thereafter, however, the labor relations agency must carry out its mediation function independently of political pressure, and it would be inappropriate for an appointing authority or any other individual to pressure the agency to mediate in such a way as to achieve a particular outcome of a given labor dispute. Furthermore, the agency head within the labor relations agency should protect agency acceptability by serving as a buffer between appointing authorities and front-line mediators, to insulate the mediators from political pressures.

Section 7: **AGENCIES SHOULD NOT TAKE IDEOLOGICAL POSITIONS ON PENDING OR PROPOSED LEGISLATION BUT MAY PROVIDE TECHNICAL ADVICE AND MAY ADVISE THE LEGISLATURE ON THE ADEQUACY OF FUNDING AND THE CONSEQUENCES OF INADEQUATE FUNDING ON MANDATED AGENCY ACTIVITIES.**

Commentary

Proposed changes in the enabling authority of a labor relations agency are almost always highly controversial. Even when appearing on their own behalf before the legislature, agency personnel should realize that they will be regarded as speaking for the agency.

It is generally not appropriate for a labor relations agency to take an ideological position on pending or proposed legislation, and doing so can create an appearance of partiality. The implications of this appearance of partisanship can have disastrous consequences for the agency's image as the neutral administrator of dispute resolution mechanisms.

It follows naturally that agency members and staffs should refrain from taking public positions on proposed legislation or proposed amendments to other enabling authority. It is appropriate, however, for an agency to provide fiscal estimates and technical advice to the legislative and executive bodies responsible for establishing the enabling authorities the agency will administer. Such a role is in keeping with the agency's role as technical expert in the field. Technical advice can include explaining how a proposal is likely to operate or integrate with existing provisions of the agency's enabling authority, pointing out technical flaws in an existing procedure that may not be operating as intended, and addressing the adequacy of agency funding and the consequences of inadequate funding for legislatively-mandated activities.

CHAPTER 3 - CONFLICTS AND THE APPEARANCE OF CONFLICTS OF INTEREST

Section 1: **ETHICS AND IMPARTIALITY ARE AFFIRMATIVE VALUES WHICH AGENCY PERSONNEL MUST COMMUNICATE IN EVERYTHING THEY DO. THE AFFIRMATIVE COMMUNICATION OF THESE VALUES, THE ON-GOING ACCEPTABILITY OF THE AGENCY AND ITS FULFILLMENT OF ITS MISSION CRITICALLY DEPEND ON AVOIDING CONFLICTS OF INTEREST AND THE APPEARANCE OF CONFLICTS OF INTEREST.**

Commentary

The impartiality of an agency is greater than the sum of the individuals who serve as the agency's members and staff. Consequently, agency personnel should affirmatively communicate this value in all interactions with parties subject to the agency's jurisdiction and with the public.

Agency personnel should recognize that labor relations agencies differ from many other public bodies. Labor relations agencies deal with a limited clientele who frequently have on-going relationships with each other and with the agency. Positive on-going relationships serve agency missions which include promoting the peaceful settlement of labor-management disputes.

Agency personnel should always be mindful that little things potentially mean a great deal. Agency personnel must comply with the technical rules of their jurisdictions governing gifts and favors but must also recognize that even conduct that complies with the technical rules may give the appearance of partiality or otherwise impede agency acceptability. An agency's reputation for impartiality can be lost as easily in an advocate's hospitality suite as in an agency's hearing room. Even in ministerial matters, written communications should be addressed to both parties simultaneously.

When engaging in activities which further the agency's mission outside the context of specific cases, agency personnel should always ensure that they communicate an ethic of impartiality. For example, agency personnel who agree to provide training or to speak at a function sponsored by one clientele group should be willing to provide a similar service to constituents who sit on the opposite side of the bargaining table. When speaking at a clientele group's function, the agency representative should, where accurate, refer to having made or being scheduled to make a similar presentation to the opposing clientele group's meeting.

While the values of impartiality set forth in this Chapter apply with equal force to all agency personnel, there is a substantial difference between the roles of a mediator and other agency personnel, and this leads to different applications of those values. As an example, the effective performance of mediation will often require extensive ex parte contacts, and that is expected and proper. In the same vein, the lack of any power of compulsion in most mediation models does not relieve a mediator of the duty to disclose apparent conflicts, but may result in a

substantially different analysis of whether recusal is mandated. These and other distinctions are more fully explored in Chapter 4.

While this Chapter illustrates the application of the governing principles with caselaw from the United States, these principles are, in general, equally applicable in Canada. As Brown and Evans state in *Judicial Review of Administrative Action in Canada* at 11-4 to 11-11(loose-leaf, updated July 20076):

> The rule against interest and bias is designed to ensure that statutory decision-makers are not subject to improper influences or consideration when performing their duties and that they base their decisions on an assessment of the evidence and the statute in question. . . . Accordingly, an adjudicator who is not impartial either because of a pecuniary interest or because of some improper predisposition to the outcome of the matter will, if challenged, be disqualified. [citing in a footnote *Energy Probe v. Canada (Atomic Energy Control Board)* (1985) 11 Admin. L. R. 287 AT 302 FCA), leave to appeal to SCC refd (1985), 15 D.L.R. (4th) 48(n). And see *Benedict v. Ontario* (2000) 51 O.R.(3d) 47 (Ont. CA);. . .]
>
> As well, the rule against bias is designed to preclude conduct by officials that will undermine public confidence in the integrity of the decision-making process, and hence reduce the legitimacy of decisions. Thus, the law requires not only that adjudicative decision-makers be impartial in fact, but also that they appear to be impartial, so that parties can have confidence that their participation in the process was meaningful which in turn will enhance the acceptability of the resulting decision. [footnote omitted] . . . Accordingly, the rule against bias asks the question whether in all the circumstances, there is a "reasonable apprehension of bias." [citing in a footnote *Szilard v. Szasz*, [1955] S.C.R. 3; *Newfoundland Telephone Co. v. Newfoundland Public Utilities Board*, [1992] 1 S.C.R. 623.]
>
> . . . . .
>
> Although the categories of relationships, events, and conduct that may give rise to a reasonable apprehension of bias are never closed, some of the more common include:
>
> > Kinship, friendship, partisanship, particular professional or business relationship with one of the parties, animosity towards someone interested [and a] predetermined mind as to the issue involved . . . (citing in a footnote *Energy Probe v. Canada (Atomic Energy Control Board)* (1985) 11 Admin. L. R. 287 at 302 per Marceau J. (FCA), leave to appeal to SCC refd (1985), 15 D.L.R. (4th) 48(n).
>
> Whether any particular set of circumstances will disqualify a decision-maker on the ground of reasonable apprehension of bias depends on the following general test:
>
> > The apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that is "what would an

informed person, viewing the matter realistically and practically – and having thought the matter through – conclude". [citing in a footnote, *Committee for Justice and Liberty v. Canada (National Energy Board)* (1978) 1 S.C.R. 369 at 394095, per de Grandpre J. dissenting.

Section 2: AGENCY PERSONNEL SHOULD REFRAIN FROM ENGAGING IN EX PARTE CONTACTS OR GIVING THE APPEARANCE OF EX PARTE CONTACTS CONCERNING MATTERS PENDING BEFORE THEM.

Commentary

An adjudicator's actual receipt of ex parte communications or the appearance of such undermines the perception of impartiality. The party excluded from the communication may reasonably question whether the recipient of the communication has been biased by it. Agency adjudicators must take care to avoid ex parte communications. Where such communications are inadvertently received, they should be shared with the excluded party. For example, when the representative of one party sends an e-mail to an agency adjudicator without copying the opposing representative, the adjudicator should respond to the e-mail with a copy to the opposing representative politely but firmly instructing the sender to copy the opposing representative on all communications, including e-mails.

Even the appearance of ex parte contacts in seemingly innocuous settings may undermine the appearance of impartiality. For example, if one representative offers an agency adjudicator a ride to the airport at the conclusion of a hearing, the adjudicator should not accept the ride unless the opposing representative consents to it after being assured that objection will not be held against her and the opposing representative is assured by the adjudicator and the representative offering the ride that there will be no discussion of the case. Similarly, if while a proceeding is pending, an adjudicator is approached by one representative in a restaurant or airport snack bar, the adjudicator should politely but firmly ask the representative to sit elsewhere or should move himself.

As indicated in the Commentary to Section 1, above, mediation often requires extensive ex parte communications to be effective. Consideration of ex parte communications by mediators is deferred until Chapter 4.

Section 3: **AGENCY PERSONNEL SHOULD DISCLOSE MATTERS THAT MIGHT LEAD A REASONABLE PERSON TO INQUIRE FURTHER.**

Commentary

There is a rich tradition of liberal disclosure among neutrals involved in resolving labor-management disputes. Disclosure furthers openness and transparency and protects an agency's reputation for impartiality and integrity. When matters which might lead a reasonable party to inquire further are not disclosed, a party which discovers the information later may infer nefariousness where none exists.

For example, an adjudicator's impartiality could not be reasonably questioned merely because the adjudicator and the advocate representing one of the parties have served together on the board of a charitable organization unrelated to labor relations. However, the party opposing the advocate's client would not be expected to know of such prior relationship and might reasonably want to inquire further into it. In such a situation, the prior relationship should be disclosed.

Disclosure by agency personnel serves a different function than disclosure by labor arbitrators. Arbitrators are selected by and accountable to the parties. They derive their authority from the parties' agreement to be bound by the decision of the arbitrator that the parties mutually selected. When arbitrators disclose additional information that was not generally known, parties may, in light of such disclosure, reconsider their decision to select the particular arbitrator. Under these circumstances, an arbitrator faced with a timely objection is obligated to step aside.

Agency personnel, however, are not selected by the parties and are not accountable to the parties. They are accountable to the statutes they administer and to the public at large. Disclosure furthers openness and transparency, rather than more informed selection by the parties. Consequently, post-disclosure objections to agency personnel's continued involvement in a case should not automatically result in recusal. The relevant inquiry remains whether an individual's impartiality may reasonably be questioned.

Section 4: **AGENCY PERSONNEL MUST RECUSE THEMSELVES WHENEVER THEY ARE UNABLE TO SAY WITH CONFIDENCE THAT THEY CAN ACT FAIRLY AND IMPARTIALLY IN A PARTICULAR MATTER.**

Commentary

A threshold question that all agency personnel must confront in every case is whether they can preside fairly and impartially. Having confidence in one's ability to be fair and impartial is essential. Even if the circumstances do not *per se* mandate recusal, an individual must remove himself or herself from any case where the individual does not feel confident that he or she can preside impartially. For example, as developed below, the involvement of an individual's former employer or law firm in a matter may not *per se* disqualify the individual. Nevertheless, in a particular case, an individual may consider the former relationship "too close for comfort." In such instances, agency personnel are obligated to step aside.

Section 5: **AGENCY PERSONNEL MUST RECUSE THEMSELVES WHENEVER THEY KNOW THAT THEIR IMPARTIALITY MAY REASONABLY BE QUESTIONED.**

Commentary

It is not sufficient that agency personnel have confidence in their own ability to preside impartially. They also must be perceived as impartial. Justice must not only be done -- it must also be seen as being done.

The parties, as autonomous actors, are entitled to respect which includes a reasonable assurance that their disputes are resolved on the merits and not corrupted by irrelevant factors. Parties are denied that assurance when a reasonable person would question the impartiality of the agency personnel assigned to process a case.

Agency personnel also have a responsibility to safeguard the agency's reputation for integrity. Recusal when a party could have a reasonable basis to question their impartiality is essential to maintaining the agency's reputation.

Agency personnel must remove themselves from a case whenever there is bias or the appearance of bias regardless of whether the source of the bias arose out of the proceeding itself or was independent of the proceeding. Much information acquired in the course of a proceeding, however, will not provide a reasonable basis for questioning the impartiality of agency personnel. Opinions arising during the course of the proceeding serve as a basis for recusal only where they display such deep-seated antagonism or favoritism that a reasonable person would conclude that fair judgment is not possible. *See Liteky v. United States*, 510 U.S. 540 (1994).

Section 6: **AGENCY PERSONNEL MUST RECUSE THEMSELVES WHENEVER THEY, A CLOSE RELATIVE, A MEMBER OF THEIR HOUSEHOLD OR A CLOSE FRIEND HAVE OR COULD HAVE AN INTEREST THAT COULD BE DIRECTLY AFFECTED BY THE PROCEEDING.**

Commentary

Even though agency personnel believe that they can discharge their responsibilities fairly or impartially, a reasonable person would question their impartiality where they, a close relative or a member of their household have an interest that could be directly affected by the proceeding. For example, agency adjudicators should recuse themselves whenever a party is an entity of which the adjudicator, a close relative or a member of the adjudicator's household is a shareholder or other partial owner.

The appearance of a conflict of interest similarly arises where a close relative or member of an agency official or employee's household is an employee or representative of one of the parties. Thus, agency adjudicators should recuse themselves where their spouse is an officer of a union involved, a member of the bargaining unit involved, employed by a law firm representing one of the parties involved, or a manager of the employing entity directly involved in the proceeding.

Agency personnel must initiate their own exclusions, or at least make full disclosures and exclude themselves on the request of any party, whenever the appearance of a conflict of interest arises due to one of the employees or representatives in a dispute being a close friend or having a personal antagonism to the person assigned to conduct the proceedings.

On the other hand, agency personnel need not recuse themselves where their potential interests in the outcome of a proceeding are so indirect or attenuated that a reasonable person would not question their impartiality. For example, personnel of a public sector labor relations agency need not recuse themselves from hearing cases in which the state or province is a party merely because they are residents of that state or province. Along these same lines, agency personnel need not remove themselves from cases involving one or more parties that the individual has ruled for or against while serving as an impartial resolver of labor-management disputes.

Section 7: **AGENCY PERSONNEL MUST RECUSE THEMSELVES FROM ANY CASE WHERE THEY HAVE APPLIED FOR OR ARE OTHERWISE BEING CONSIDERED FOR EMPLOYMENT WITH A PARTY OR THE LAW FIRM OR OTHER REPRESENTATIVE OF A PARTY IN THE PROCEEDING.**

Commentary

When an agency member or agency employee has applied for or is being considered for any form of employment or consultancy with a party to a proceeding, the employee or board member must not participate in the proceeding. There is nothing short of complete isolation of the individual from the proceeding which will preclude a reasonable person from questioning the individual's impartiality in such circumstances.

Illustrative is *Voeltz v. John Morrell & Co.*, 564 N.W.2d 315 (S.D. 1997). An administrative law judge presided over an adjudication of a claim for workers compensation against Morrell. After the hearing concluded but before the decision was issued, the ALJ responded to a blind newspaper ad seeking a Director of Workers Compensation. A representative of Morrell responded, inviting the ALJ to apply for the position. Subsequently, the ALJ was interviewed for the job. Shortly after the interview, the ALJ informed Morrell that she did not wish to discuss the job further while the case was pending before her. After issuing her decision, which was favorable to Morrell, the ALJ advised Morrell that she was able to discuss the position. Morrell eventually offered the position to the ALJ, who accepted it. The South Dakota Supreme Court observed that the ALJ "apparently believed forestalling an offer from Morrell was a sufficient, ethical course of action in this case." *Id.* at 319. The court rejected that notion, holding that "an unacceptable risk of bias . . . [was] clearly present when an ALJ is negotiating employment with a party to a pending case." *Id.* Thus, the concern ran deeper than the status of the transaction at any particular moment and the court ordered that the matter be remanded to the agency for a new hearing.

Similarly, in *Chicago, Milwaukee, St. Paul and Pacific RR Co. v. Washington State Human Rights Commission*, 557 P.2d 307 (Wash. 1977), the Washington Supreme Court held that the Railroad was denied due process when one member of a tribunal hearing a discrimination complaint against the Railroad simultaneously had an application for employment pending before the Commission which was prosecuting the complaint. The court reasoned:

> There is no direct evidence that Ms. Ammeter was prejudiced or motivated in favor of the Commission and we do not suggest that she performed her duties as a tribunal member in less than an exemplary manner. It is the fact of her pending application for a job with the very Commission appearing before the tribunal as advocate that strips the proceeding of the appearance of fairness.

Id. at 313.

Section 8: **AGENCY PERSONNEL MUST RECUSE THEMSELVES FROM ANY MATTER IN WHICH THEY WERE INVOLVED AS A PRINCIPAL, REPRESENTATIVE OR WITNESS PRIOR TO JOINING THE AGENCY, BUT AGENCY PERSONNEL ARE NOT AUTOMATICALLY OR PERMANENTLY DISQUALIFIED FROM ACTING IN MATTERS INVOLVING THE INDIVIDUAL'S FORMER EMPLOYER OR CLIENT OR BECAUSE A PARTY IS REPRESENTED BY THE INDIVIDUAL'S FORMER LAW FIRM.**

Commentary

A reasonable person would justifiably question the fairness and impartiality of a person acting in a matter if that person was involved in the same matter prior to joining the agency. Such a change in roles is clearly distinguishable from prior involvement in the matter on behalf of the agency in a neutral capacity which does not automatically disqualify the individual from acting further in the matter. Agencies should employ effective screening procedures to ensure that agency personnel are not assigned to cases in which they were involved prior to joining the agency.

Prior experience in labor-management relations and the dispute resolution mechanisms associated with collective bargaining is an asset for agency personnel and should not be turned into a handicap by imposing a long-term exclusion of experienced personnel from serving in cases involving their former colleagues or adversaries. *Cf. FTC v. Cement Institute*, 333 U.S. 683, 702 (1948). Subject to specific rules that may apply in a particular jurisdiction (such as a rule precluding agency personnel for a specific period of time after joining the agency from involvement in matters in which their former employers, clients or law firms were involved), agency personnel should be permitted to bring their accumulated experience and expertise in resolving disputes involving their former employers, clients or law firms, so long as other concerns about ethics, fairness and impartiality are met. For example, the former chief labor lawyer for a state or province or the former in-house attorney for a union would not be permanently disqualified from involvement in a case before the agency in which their former employers were parties, provided that they had not been involved in the matter in their prior positions.

Section 9: **AGENCY PERSONNEL WHO CONCURRENTLY SERVE AS ADVOCATES MUST RECUSE THEMSELVES FROM ANY CASE IN WHICH THEIR EMPLOYER OR CLIENT IS A PARTY AS WELL AS FROM ANY CASE WHICH HAS A DIRECT EFFECT ON THEIR EMPLOYER OR CLIENT'S PENDING MATTERS. HOWEVER RECUSAL IS NOT MANDATED MERELY BECAUSE THEIR EMPLOYERS OR CLIENTS WILL BE BOUND BY THE PRECEDENT ESTABLISHED IN A CASE.**

Commentary

Many labor relations agencies are established as tri-partite in nature, with specific board members or commissioners designated or recommended by labor or management. Agency members filling these positions often serve part-time while continuing to serve as advocates for employers or employee organizations subject to the agency's jurisdiction. Where their employers or clients are parties to an agency proceeding, such individuals have an interest that could be directly affected by the proceeding and should remove themselves from any participation in the proceeding.

Illustrative is *Central Missouri Plumbing Co. v. Plumbers Local 35*, 908 S.W.2d 366 (Mo. App. 1995), which concerned the Missouri Labor and Industrial Relations Commission's determination of the prevailing wage rate for plumbers in Cole County, Mo. The Missouri Division of Labor Standards issued an order setting the rate. Pursuant to the statutory procedure, Local 35 filed an objection to the rate with the Commission. The statute required that one member of the Commission be an individual "who on account of his previous vocation, employment, affiliation or interests shall be classified as a representative of employees." That member was the president of Local 35. The court held it was improper for him to participate in the agency's consideration or decision of the case. It observed:

> The Commissioners of the Labor and Industrial Relations Commission . . . occupy quasi-judicial positions. Each one is to bring a particular perspective, representative of a particular constituency, to the Commissioner's determination. But all of them must also, as quasi-judicial officers, strive to conscientiously apply the law.

Id. at 370. The court held that it was improper for the president of Local 35 to sit on the case and that he should have disclosed his union position and either recused himself or obtained from all parties consent to his participation. *Id.* at 371.

Agency personnel who concurrently serve as advocates must also recuse themselves when their employers or clients are not parties to a specific case but the outcome of the case will likely affect pending matters to which their employers or clients are parties. An analogous situation arose in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986). Aetna refused to pay part of Lavoie's medical insurance claim and the Lavoies sued for breach of contract and for the tort of bad faith refusal to pay an insurance claim. After losing twice in the trial court and having both losses reversed by the Alabama Supreme Court, the Lavoies proceeded to a jury trial. The

jury returned a verdict of $3.5 million in punitive damages which Aetna appealed to the Alabama Supreme Court. The Alabama Supreme Court affirmed by a vote of 5 to 4, in an unsigned per curium opinion.

While the case was pending in the Alabama Supreme Court, the justice who authored the per curiam opinion filed bad faith refusal to pay law suits against two other insurers: one for failure to pay for the loss of a mink coat and a class action on behalf of all Alabama state employees (including the other members of the Alabama Supreme Court) for an alleged intentional plan to withhold payment on valid health insurance claims. The U.S. Supreme Court held that the justice's failure to recuse himself from the *Lavoie* case violated Aetna's due process rights. The Court reasoned:

> When Justice Embry cast the deciding vote, he did not merely apply well-established law and in fact quite possibly made new law . . .
>
> The decision under review firmly established that punitive damages could be obtained in Alabama in a situation where the insured's claim is not fully approved and only partial payment of the underlying claim had been made. Prior to the decision under review, the Alabama Supreme Court had not clearly recognized any claim for tortious injury in such circumstances; moreover, it had affirmatively recognized that partial payment was evidence of good faith on the part of the insurer. [citation omitted] The Alabama court also held that a bad-faith-refusal-to-pay cause of action will lie in Alabama even where the insured is not entitled to a directed verdict on the underlying claim, a conclusion that at least clarified the thrust of an earlier holding. [citation omitted] Finally, the court refused to set aside as excessive a punitive damages award of $3.5 million. The largest punitive award previously affirmed by that court was $100,000 . . . . [citation omitted].
>
> All of these issues were present in Justice Embry's lawsuit again Blue Cross. His complaint sought recovery for partial payment of claims. Also, the very nature of Justice Embry's suit placed in issue whether he would have to establish that he was entitled to a directed verdict on the underlying claims that he alleged Blue Cross refused to pay before gaining punitive damages. Finally, the affirmance of the largest punitive damages award ever (by a substantial margin) on precisely the type of claim raised in the Blue Cross suit undoubtedly "raised the stakes" for Blue Cross in that suit, to the benefit of Justice Embry. Thus, Justice Embry's opinion for the Alabama Supreme Court had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case.

Id. at 823-24. Thus, adjudicators must remove themselves whenever a case will establish legal precedent that may directly impact pending litigation in which that adjudicator is a party. Similarly, adjudicators concurrently serving as advocates must recuse themselves where the case will establish legal precedent that may directly impact pending litigation involving their employer or client.

On the other hand, it must be recognized that agencies structured to have equal numbers of members designated by labor and management are intended to benefit from the expertise that those advocates bring to bear on agency decisions. Consequently, a requirement that such advocates disqualify themselves from any action that would set a precedent binding on their employers or clients could effectively disqualify them from all cases before the agency and undermine the rationale behind the tri-partite structure. The critical issue for agency personnel who also serve as advocates is whether the effect of a particular case on their employers or clients is so direct that their impartiality could reasonably be questioned or so attenuated or speculative that their participation would not be suspect.

Section 10: **AGENCY PERSONNEL REQUIRED TO RECUSE THEMSELVES MUST DO SO AS SOON AS POSSIBLE AFTER THEY BECOME AWARE OF CIRCUMSTANCES THAT WOULD LEAD A REASONABLE PERSON TO QUESTION THEIR IMPARTIALITY, REGARDLESS OF THE STATE OF THE PROCEEDING AT ISSUE.**

Commentary

Agency personnel usually will be aware of matters requiring their recusal from the outset of their involvement in a case. They should take action to remove themselves, or to at least make inquiry and offer to remove themselves, as soon as possible. It is not good practice for agency personnel to wait until one of the parties advances an inquiry or objection, as that type of conduct is capable of being misinterpreted as an attempt to slip one by the parties.

Where agency personnel first become aware of disqualifying matters after the case has begun, they remain obligated to recuse themselves promptly, regardless of how far along the case has come. For example, in *Voeltz v. John Morrell & Co.*, *supra*, the ALJ learned after the hearing had concluded but before she issued her decision that the company whose blind ad she had responded to was a party in a matter pending before her. Although her recusal probably would have disrupted the proceedings, her recusal was nonetheless required. *See also Teslaar v. Bender*, 365 F. Supp. 1007 (D. Md. 1973) (approving recusal of hearing examiner after one party completed its case).

An Illinois case illustrates that it is never too late to be concerned about the ethics of impartiality. In *Bd. of Educ. v. IELRB,* 518 N.E.2d 713 (Ill. App. Ct. 1987), during negotiations for a new collective bargaining agreement, an employer sought to exclude certain secretaries from the bargaining unit. The union opposed the proposal but the parties agreed to exclude the secretaries while the union filed a unit clarification petition with the Illinois Educational Labor Relations Board. The union did so and the hearing officer ordered the secretaries included in the unit. The employer filed exceptions and the IELRB, by 2 to 1 vote, reversed the hearing officer and held that the secretaries were confidential employees. After the IELRB issued its decision, one of the Board members in the majority who had previously been a management advocate, moved to recuse himself because he had participated in the underlying collective bargaining negotiations; he further indicated that he had forgotten about this prior work and that it had been brought to his attention since the decision issued. The IELRB then vacated its prior decision and held that because the two remaining Board members were equally divided, the hearing officer's decision would stand but without precedential value. The Illinois Appellate Court upheld the IELRB's action.

Section 11: **WHERE DOUBTS EXIST CONCERNING WHETHER A PARTICULAR AGENCY EMPLOYEE OR OFFICIAL SHOULD RECUSE, THE MATTER SHOULD BE REFERRED TO AN AGENCY OFFICIAL OTHER THAN THE ONE WHOSE RECUSAL HAS BEEN SOUGHT.**

Commentary

Referral of a question of recusal to a different agency official strengthens the credibility of the ultimate decision reached. Good agency practice would designate a specific agency official, such as a general counsel, as the person to handle all such referrals.

Section 12: **THE DOCTRINE OF NECESSITY MAY ALLOW AGENCY PERSONNEL TO PARTICIPATE IN MATTERS IN WHICH THEY WOULD OTHERWISE BE RECUSED WHERE THERE IS NO OTHER CHOICE, BUT THE DOCTRINE SHOULD BE INVOKED SPARINGLY AND WITH SAFEGUARDS AGAINST BIAS OR THE APPEARANCE OF BIAS TO THE EXTENT AVAILABLE.**

Commentary

The rule of necessity basically states that if all are disqualified, none are disqualified. The U.S. Supreme Court discussed the rule extensively in *United States v. Will*, 449 U.S. 200 (1980). The case involved a class action brought on behalf of all federal judges attacking the constitutionality of appropriation acts for four fiscal years, on the ground that the acts' taking away automatic cost of living salary adjustments violated the Constitution's prohibition on reducing the compensation of Article III judges. The Supreme Court characterized the rule of necessity as "a well-settled principle at common law that . . . 'although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise.'" *Id.* at 213 (quoting F. Pollack, *A First Book of Jurisprudence* 270 (6th ed. 1929)).

Whether an agency should invoke the rule of necessity depends on the circumstances of a particular case. Often, the rule will be invoked as an added justification for agency personnel to preside where other justifications are primary. For example, the rule may justify an agency considering unfair labor practice charges against a state or province even though all board members or commissioners are residents of the state or province. However, the primary justification is the attenuated nature of their interest in the outcome of the proceeding by virtue of their residency.

Before invoking the rule of necessity, the agency should examine alternatives such as empanelling a substitute board. Where there is no authority to empanel a substitute board, the law of a particular jurisdiction may allow the agency to sit as a matter of necessity. *See Emerson v. Hughes*, 90 A.2d 910, 915 (Vt. 1952) ("Under [the rule of necessity] . . . an administrative officer exercising such functions may act in a proceeding wherein he is disqualified by bias or prejudice if his jurisdiction is exclusive and there is no legal provision for calling in a substitute."). Even in such cases, the agency should consider obtaining an advisory ruling from a special independent review officer. The utility of such a procedure in safeguarding the agency's reputation for integrity is illustrated by a comparison of several cases.

In *Gibson v. Berryhill,* 411 U.S. 564 (1973), members of the Alabama Optometric Association filed charges before the Alabama Board of Optometry seeking to revoke the licenses of optometrists employed by a corporation on the grounds, *inter alia*, that the optometrists were aiding and abetting the corporation in the unlawful practice of optometry. Two days later, the Board filed suit against the corporation to enjoin its alleged unlawful practice of optometry. The Board stayed its license revocation proceedings pending outcome of the law suit. The trial court agreed with the Board and enjoined the corporation from practicing optometry and from employing licensed optometrists. The Board then reactivated the license revocation proceedings.

The charged optometrists sued to enjoin the license revocation hearings and a three-judge district court issued the injunction. The U.S. Supreme Court affirmed.

The Court expressly based its affirmance on the district court's finding of bias. The district court had found that the Board was comprised of only optometrists who were in private practice for their own accounts and that the license revocation proceedings were designed to revoke the licenses of all optometrists in the state who worked for corporations such as Lee Optical. "[S]uccess in the Board's efforts would possibly redound to the personal benefit of members of the Board, sufficiently so that in the opinion of the District Court the Board was constitutionally disqualified . . ."*Id.* at 578. The Supreme Court simply stated, "As remote as we are from the local realities underlying this case and it being very likely that the District Court has a firmer grip on the facts and of their significance to the issues presented, we have no good reason on this record to overturn its conclusion and we affirm it." *Id.* at 579.

In contrast, two courts have distinguished *Gibson* as not applying where the interested commissioners appointed an independent hearing officer to hear the case and where the commission's decision was subject to independent judicial review. *Massangale v. Okla. Bd. of Examiners in Optometry*, 30 F.3d 1325 (10th Cir. 1994) (optometrists in practice for themselves sitting on case seeking to discipline optometrists working for corporations); *Ford Motor Co. v. Arkansas Motor Vehicle Commission*, 161 S.W.2d 788 (Ark. 2004) (automobile dealer members of the Motor Vehicle Commission sitting in a case challenging Ford's rejection of a Ford dealer's sale of its dealership to another party); *but see Yamaha Motor Corp. v. Riney*, 21 F.3d 793 (8th Cir. 1994) (holding commissioner of Arkansas Motor Vehicle Commission who was President of the Arkansas Motorcycle Dealers' Ass'n and a Harley Davidson dealer could not constitutionally sit on case concerning whether Yamaha violated a state statute in not compensating its dealer at the retail parts price for warranty work the dealer performed).

Jurisdictions differ over whether the doctrine of necessity allows an otherwise disqualified agency member to cast a tie-breaking vote. *Compare Bd. of Ed. v. IERLB, supra*, with *Barker v. Sec'y of State*, 752 S.W.2d 437 (Mo. App. 1988). The alternative is to affirm the ruling of the subordinate official by an equally-divided vote on a non-precedential basis. Even where legally permissible in a particular jurisdiction, the affected member must still decide whether to participate, taking into consideration whether the individual can decide the issue with integrity, and, if so, whether the degree and appearance of conflict, weighed against the importance of the issue to be decided, militates in favor of participation, notwithstanding the likelihood of lessened acceptability of the result.

Section 13: **AGENCIES MAY ESTABLISH TIME LIMITS FOR PARTIES TO OBJECT TO PARTICULAR PERSONNEL PARTICIPATING IN THEIR CASES. PARTIES WHO FAIL TO COMPLY WITH SUCH TIME LIMITS WITHOUT GOOD CAUSE WAIVE THEIR OBJECTIONS. PARTIES MAY ALSO EXPRESSLY WAIVE THEIR OBJECTIONS. EVEN WHERE PARTIES HAVE WAIVED THEIR OBJECTIONS, AGENCY PERSONNEL REMAIN OBLIGATED TO RECUSE THEMSELVES WHENEVER THEY CANNOT SAY WITH CONFIDENCE THAT THEY CAN ACT FAIRLY AND IMPARTIALLY.**

Commentary

Many of the rules concerning recusal are designed to prevent the appearance of bias even though there is no bias in fact. Parties may waive objections of the participation of agency personnel in situations where such participation may give the appearance of bias. Waivers may be express or may result from failure to object in a timely manner. It is important, however, to distinguish between recusal for matters that may give the appearance of bias and recusal because personnel cannot say with confidence that they are able to preside fairly and impartially. In the latter situation, agency personnel remain obligated to step aside even though the parties have waived objections and could not base an appeal on the objections that were waived.

Section 14: **TO AVOID GIVING AN APPEARANCE OF PREJUDGMENT, AGENCY PERSONNEL SHOULD NOT MAKE PUBLIC STATEMENTS ABOUT MATTERS PENDING BEFORE THEM.**

Commentary

Public statements about pending matters should be avoided because they can give the appearance of prejudgment and can lead to recusal in circumstances where recusal might otherwise not be required. For example, in *Cindarella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970), the FTC charged Cindarella with false advertising, including making false claims that it was a college and that its courses would qualify students for jobs as flight attendants. After a lengthy hearing, the hearing examiner dismissed the complaint and FTC complaint counsel appealed to the full Commission. With the appeal pending, the FTC Chairman gave a speech to the Government Relations Workshop of the National Newspaper Association in which he challenged newspapers to refuse to accept advertisements that appeared to be deceptive. Among the examples of clearly deceptive ads he cited were those offering college educations in five weeks and those promising prospective students that they could become flight attendants by attending charm school. The court held that the speech evidenced prejudgment of the case and that the FTC Chair should have recused himself.

Similarly, in *Charlotte County v. IMC-Phosphates Co.*, 824 So. 2d 298 (Fla. App. 2002), the Florida Court of Appeal issued a writ of prohibition disqualifying the Secretary of the Florida Department of Environmental Protection from ruling on the appeal of an ALJ's decision to grant a permit to conduct phosphate mining that the county had opposed. On the day the ALJ issued the decision, the Secretary issued a statement that provided:

> We have felt all along that our actions were fully consistent with state laws and Department rules. The public can feel comforted in the knowledge that a totally impartial arbiter has found that the will of their elected representatives is being carried out by the executive branch. The professionals at DEP have dedicated their careers to protecting the environment and their good-faith efforts have been affirmed. As the same time, we constantly look at ways to do better in all areas. As we pledged to the Chairman of the House Natural Resources and Environmental Protections Committee, Rep. Harrington, an internal review of the phosphate mining process is ongoing. With the guidance now provided by Judge Stampelos, that review can now be targeted and accelerated. In the end, we hope to have a process that will serve the public even better.

Id. at 300. The court ordered the Secretary disqualified from hearing the county's appeal from the ALJ's decision. The court reasoned:

> The timing and content of Secretary Stuhs' statements are of particular significance to our conclusion that Charlotte County is entitled to have the secretary recused. At the time the statements in question were made, the secretary was not acting in the role of investigator, prosecutor or a person responsible for determining probable cause. The statement was made on the day the ALJ issued the recommended order and the statement specifically addressed the merits of the ultimate decision whether the agency had

> followed the applicable law in granting the permit. The statement given at this time was not mandated as part of any of the secretary's statutory duties, but can only be classified as a statement made as part of his political duties. A gratuitous statement such as this is far different from an agency making a statutorily mandated preliminary determination involving different standards of proof and persuasion than those involved in the ultimate decision.

Id. at 301.

CHAPTER 4 – SPECIAL CONSIDERATIONS REGARDING MEDIATION

A substantial difference between the roles of mediators and the roles of other agency personnel has been touched on in previous chapters. While mediators are expected to conduct themselves impartially and with the same close attention to even-handed public service as all other agency personnel, fundamental differences in roles between government mediators on the one hand, and the policy makers and adjudicators in an agency on the other hand, can lead to different expressions of the principles of impartiality. This Chapter explores the application of the previously reviewed principles, as well as certain principles unique to the mediator's role, to the practice of mediation by a neutral government agency.

The labor mediation process has existed for a very long time, and mediation has been provided by government agencies since the 1880's. The Association of Labor Relations Agencies (ALRA) and its member agencies promulgated the "Code of Professional Conduct for Labor Mediators" in 1971and have updated it from time to time. The basic principles set down a generation ago in the Code remain valid, and this document is not intended to supersede the Code of Conduct. /1 The fact that mediation has, in the meantime, become a valued method for resolving other types of disputes does not detract from those basic principles. /2

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1 The full text of the ALRA Code is attached to this chapter as an appendix.

2 A general exploration of the ethics of the mediation process in other settings may be found in the Model Standards of Conduct for Mediators, formulated by the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution (a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR)). The Model Standards purport to establish standards "designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts." ALRA and its member governmental agencies were not involved in formulating the Model Standards, and have not adopted or endorsed the Model Standards. ALRA does not view the Model Standards as a guide for the mediation of labor-management disputes by neutral governmental agencies. By the same token, the principles and practices set forth in the Report of the Neutrality Project should not be viewed as applicable to mediation in any context other than the mediation of labor-management disputes by neutral governmental agencies.

Section 1: **THE MEDIATOR HAS AN AFFIRMATIVE OBLIGATION TO DISCLOSE ACTUAL OR POTENTIAL CONFLICTS OF INTEREST PRIOR TO COMMENCING THE MEDIATION PROCESS. A MEDIATOR MUST DECLINE THE ASSIGNMENT IF A CONFLICT WOULD PREVENT HIS OR HER EVEN-HANDED PURSUIT OF A SETTLEMENT ON TERMS ACCEPTABLE TO BOTH PARTIES.**

Commentary

As with any other employee or agent of a neutral agency, a mediator must be sensitive to the existence of conflicts of interests and to the possible perception of conflicts of interests. A mediator should fully disclose any such real or possible conflicts to the agency and to the parties. The disclosure should be made promptly upon the mediator's realization of the problem, and disclosure should never be delayed pending an inquiry by one of the parties. As noted in Chapter 3, §3, *supra*, "When matters which might lead a reasonable party to inquire further are not disclosed, a party which discovers the information later may infer nefariousness where none exists."

The lack of any power of compulsion by the mediator might, on its face, suggest a looser standard of disclosure of conflicts than in the case of an adjudicator. However, the retention of party free choice in deciding whether to enter into an agreement is offset by the lack of transparency in the mediation process, and the absence of any procedural checks or safeguards on the conduct of the mediator. The mediator's influence on the substantive agreement resulting from mediation is often invisible, even to the parties, but it is nonetheless real in many cases. The choices a mediator makes in the presentation of offers help to shape the final agreement. These choices include what to emphasize or de-emphasize, what to question or let go by, and what options and alternatives to aggressively explore. Thus, while a mediator cannot dictate the final outcome as an adjudicator might, a party cannot as easily identify the misconduct of a mediator as it can the misconduct of an adjudicator, and often lacks any effective remedy for an undisclosed conflict discovered after the mediation is concluded.

While the obligation to disclose conflicts is the same for a mediator as for any other agency staff member, the analysis of whether the mediator must recuse from the case is slightly different. The mediator does have opportunities to influence the outcome of the mediation, but if both parties have been advised of the potential conflict they have the opportunity to safeguard themselves through their ability to withhold agreement. Therefore, a mediator is not required to recuse from a case in which a reasonable question of a conflict might be raised, but in which the mediator does not objectively have a conflict. A mediator is only required to recuse from a case where the nature of the conflict is such that a reasonable person in the position of the mediator could not say with confidence that the mediator is able to even-handedly pursue a settlement on terms acceptable to both parties.

This section is not intended to impair an agency's ability to exercise judgment in assigning mediators in ways that maximize their effectiveness. Thus, nothing compels an agency to assign a particular matter to a mediator where one or both parties object. Nor does this section

compel an agency to refuse to assign or to remove a mediator where there are objections to the mediator's service but there is no objective basis for the mediator's recusal. Agencies have the discretion to balance concerns with mediator effectiveness against a desire not to encourage parties to engage in "mediator shopping."

Section 2: **THE MEDIATOR'S ROLE NECESSARILY INCLUDES PRIVATE CONVERSATIONS WITH PARTIES AND PROTECTION OF INFORMATION PROVIDED BY PARTIES ON A CONFIDENTIAL BASIS. A MEDIATOR SHOULD NOT BREACH THE CONFIDENCES OF A PARTY UNLESS SPECIFICALLY REQUIRED TO DO SO BY STATUTE, A FINAL COURT ORDER, OR A FORMAL DIRECTIVE OF THE AGENCY EMPLOYING THE MEDIATOR.**

Commentary

The effectiveness of labor mediation results, in large measure, from its being a confidential process. There is a general expectation that there will be no revelation to parties external to the mediation process of the substance of the discussions had during the mediation and no characterization by the mediator of the status of the process or the conduct of the parties, except as may be agreed by the parties. For example, while the parties may agree on the wording of a public statement to be issued by the mediator at the end of a session, it would be improper for the mediator to disclose anything said or done in the confidential mediation session without the parties' consent. This does not preclude a mediator from providing a general description of how the process of mediation works, or from providing information that is public record. Mediator communication with the press should be confined to the boundaries shaped by the reasonable expectations of the parties.

The restrictions on discussions of mediations with third parties does not preclude the mediator from advising the agency that a mediation has been held, or that another session will or will not be held, or other information necessary for the administration of the agency and the management of the agency's personnel and caseload. It does not prevent a mediator from seeking professional advice on the conduct of the mediation from a colleague within the agency, including discussion of the specific issues, proposals and postures of the parties. The duty of confidentiality as to non-parties in binding on the agency itself and all employees of the agency, as they stand in the shoes of the mediator with respect to disclosure of information regarding the mediation.

In the event that an outside party seeks to compel disclosure of confidential information from a mediator, the mediator should immediately advise the parties and the agency. The interest of the agency in protecting the integrity of the mediation process is distinct from the interests of the parties in protecting the confidentiality of communications during a particular mediation, and the agreement of the parties to a forced disclosure of information does not control the mediator's course of action. Ultimately, the mediator is bound to abide by the directives of the agency, as the agency is entrusted by the enabling authority with responsibility for the mediation process, and the mediator acts as the agency's instrument in implementing the process. Unless some other protocol is established by a statute or rule which is directly on point, the agency should not direct the mediator to disclose such information unless given permission by the parties and unless the agency is satisfied that disclosure will not compromise the integrity and effectiveness of the mediation process as a whole. In the event that the agency and/or the mediator is ordered by a court to disclose confidential information, and the agency determines

that such disclosure would compromise the integrity or the effectiveness of the mediation process as a whole, the agency should seek every appropriate means of relief from the order, including an appeal, and/or stay pending appeal, and/or a request for modification in the order to make it consistent with the mediation process as envisioned by the enabling authority. The obligation to defend the integrity and effectiveness of the mediation process begins with the mediator, but rests finally with the agency, and this Chapter does not require the individual mediator to suffer court sanctions in order to comply with the obligation to maintain confidentiality.

Mediators routinely, and properly, have separate conversations with the parties on substantive issues that they could never discuss ex parte with an adjudicator. The parties' confidence that the statements they make to the mediator will not be divulged without permission is what allows, and even encourages, them to speak honestly to the mediator. Full disclosure from the parties allows the mediator to gain the understanding and insight necessary to bring the case to a successful conclusion. A mediator must respect the participants' confidence that statements they make will not be divulged without permission. Mediators walk a fine line between maintaining confidences and facilitating agreement. Mediators have a variety of techniques to reconcile the tension between these two roles. No particular technique is mandated, but it is imperative that the mediator ensure that all participants, at the outset, understand the ground rules and that the mediator conform to the ground rules throughout the mediation.

Section 3: **THE MEDIATOR'S EFFORTS TO PERSUADE THE PARTIES TO REACH AGREEMENT MAY NOT EXTEND TO MAKING MATERIAL MISSTATEMENTS OF FACT OR LAW.**

Commentary

A wide variety of techniques and approaches are available for use in mediation, but mediators typically and generally attempt to persuade parties to accept compromises on their own proposals and to accept proposals that may further the interests of the other party. All parties understand that the process of negotiating and mediating involves persuasion, and that the parties must depend upon their own assessments of the merits and demerits of a proposal or an overall agreement.

At the same time that the parties to a mediation can be expected to overstate their cases in support of their demands and offers, the success of a mediation is predicated on the honesty of the mediator, and the parties' perception that the mediator is honest. While the settlement of a case may be premised on statements that might not meet the "truth, the whole truth, and nothing but the truth" standard imposed on sworn testimony, a reputation for dishonesty will be harmful to the mediator's effectiveness in future cases. Moreover, a reputation for dishonesty will harm the agency's effective pursuit of the goals established by the enabling authority. A mediator must not knowingly make a material misstatement of fact or law, including a knowingly false statement as to the likely interpretation or effect of proposed contract language, in order to persuade a party to reach agreement. A mediator may avoid answering a question in order to avoid the choice between giving an honest answer which would damage the prospects of voluntary settlement and giving a dishonest answer. Further, the mediator is not the guarantor of a party's understanding of the agreement, and the duty to refrain from false statements does not extend to fully informing a party of the implications of a given proposal, nor to correcting the party's own incorrect statements about the effect of agreeing to a proposal. A mediator should avoid, however, being the source or conveyor of disinformation, or ratifying or endorsing any party's patently incorrect statements about a proposal.

Section 4: **MEDIATORS SHOULD NOT ALLOW THEIR PERSONAL VALUES OR OPINIONS TO INTERFERE WITH REACHING AGREEMENT ON TERMS ACCEPTABLE TO THE PARTIES. MERE DISAGREEMENT WITH THE OBJECTIVES OF ONE OR BOTH PARTIES DOES NOT EXCUSE THE MEDIATOR FROM SEEKING TO FINALIZE AN AGREEMENT.**

MEDIATORS OPERATE UNDER ENABLING AUTHORITIES WHICH GENERALLY ENDORSE THE PURSUIT OF VOLUNTARY AGREEMENTS ON TERMS ACCEPTABLE TO BOTH PARTIES. MEDIATORS ARE GENERALLY FREE TO FACILITATE ANY PROPOSAL THE PARTIES MAY CHOOSE TO ADVANCE. MEDIATORS ARE NOT RESPONSIBLE FOR PROVIDING LEGAL ADVICE TO THE PARTIES OR FOR INTERPRETING THEIR ENABLING AUTHORITIES OR OTHER PROVISIONS OF LAW. AGENCIES SHOULD ESTABLISH POLICIES GUIDING MEDIATORS, WHERE A MEDIATOR KNOWS THAT THE TERMS DESIRED BY THE PARTIES ARE CLEARLY PROHIBITED BY THE ENABLING AUTHORITY.

Commentary

Labor mediators typically view their responsibility as being to the parties and to the settlement, and have no stake in the substance of the agreement, so long as it is acceptable to the parties. This course of action is generally inferred from the enabling authorities which, in most instances, speak to process issues in mediation while stating little or nothing about any proactive responsibility for content by the mediator. In some cases, the enabling authority mandates or prohibits inclusion of specific items in a collective bargaining agreement. For example: A contract provision conferring a right to strike would undoubtedly contravene the Taylor Law in New York; a contract provision concerning pensions would undoubtedly contravene the Personnel System Reform Act applicable to state employees in Washington.

In most circumstances, the mediator has an affirmative obligation not to interfere with the content of a proposal, merely because the mediator finds the proposal ill-advised, or personally offensive, or inconsistent with the spirit as opposed to the letter of some relevant legal or social principle. The substance of the agreement remains the province of the parties. A party is free to make an agreement that is unfair or even foolish, and the mediator's disagreement with or reservations about the substance of a given proposal or an overall agreement does not relieve the mediator of the obligation to truthfully communicate offers and use his or her best efforts to aid the parties in reaching agreement.

The mediator is not to act as or hold him or herself out as legal counsel to the parties. However, the demands of neutrality include fidelity to the statute or other enabling authority, and a mediator does have a professional responsibility to be familiar with the terms of the enabling authority under which he or she acts, and with the policies of the agency concerning illegal and prohibited bargaining proposals. An agency has a responsibility to provide guidance

to its mediators as to how the agency intends them to respond in a situation where the mediator is confronted with a proposal that is in dispute in the course of the mediation, which the mediator knows to a certainty is directly prohibited by the enabling authority.[3] Such guidance may take the form of a standing policy or it may be directions as to who in the agency should be contacted for ad hoc direction in any given case. The mediator has a responsibility to conduct him or herself in accordance with such policies or directions. If consistent with such policies or directions, the mediator may, for example, direct the parties to confer with their legal counsel regarding the proposal, assist the parties in finding alternatives which do not pose the same legal difficulties, or, if the parties refuse to modify the clearly illegal proposal, may decline to facilitate agreement on that portion of the dispute. Whatever course of action or inaction is directed by the agency, the mediator should take care to avoid the appearance that the agency is in any fashion endorsing the illegal proposal.

3 Nothing in this section in any way restricts an agency from providing guidance to its mediators about proposals which violate other provisions of law, nor does this section mandate the provision of such guidance.

Section 5: **AS MEMBERS OF THE BROADER LABOR RELATIONS COMMUNITY, MEDIATORS MAY PARTICIPATE IN THE PROFESSIONAL ACTIVITIES OF THAT COMMUNITY TO BETTER EXPRESS THEIR UNDERSTANDING OF LABOR RELATIONS AND TO MAINTAIN ONGOING RELATIONSHIPS WITH PARTIES THAT FURTHER THE OVERALL GOAL OF POSITIVE LABOR RELATIONS. HOWEVER, MEDIATORS, LIKE ALL OTHER AGENCY PERSONNEL, SHOULD AVOID SOCIAL OR PERSONAL INTERACTIONS THAT WOULD CAUSE OTHERS TO QUESTION THEIR IMPARTIALITY.**

Commentary

The process of mediation is facilitated not only by the mediator's active role in particular cases but also by the mediator's active role in the labor relations professional community as a whole. Mediator involvement in the community that conveys the mediator's understanding of labor relations works to the advantage of the agency and the process. However, mediators must walk a fine line between positive professional relationships that are developed in an impartial manner and social or personal activities that can impair the mediator's acceptability as an impartial agent of the agency. This is particularly so in agencies where the same personnel mediate and serve as adjudicators. Mediators must be mindful of Section 3 of the Code of Professional Conduct for Labor Mediators:

> Mediators should not use their position for private gain or advantage, nor should they engage in any employment activity, or enterprise which will conflict with their work as mediators, nor should they accept any money or thing of value for the performance of their duties - other than their regular salary [or compensation] - or incur obligations to any party which might interfere with the impartial performance of their duties.

APPENDIX 1 TO CHAPTER FOUR

Code of Professional Conduct for LABOR MEDIATORS

Adopted jointly by the Federal Mediation and Conciliation Service of the United States and the Association of Labor Relations Agencies.

Federal Mediation and Conciliation Service (FMCS)

Created by the Labor Management Relations Act of 1947, the Federal Mediation and Conciliation Service (FMCS) is an independent agency of the U.S. Government. The Service is mandated to use mediation and other forms of dispute resolution to promote labor-management peace in the United States. Specifically, FMCS is responsible to prevent or minimize labor-management conflict in the private and public sectors of the American economy, exclusive of the railroad and airline industries. The agency's national headquarters is in Washington, DC with regional offices located in New York, Atlanta, Chicago, Los Angeles, and Minneapolis. In addition, there are field offices located throughout the nation.

Association of Labor Relations Agencies (ALRA)

The Association of Labor Relations Agencies (ALRA), founded in 1952, is comprised of nearly 100 impartial governmental and private nonprofit agencies in the United States and Canada. These agencies are responsible for the administration of labor-management relations laws or services including, but not limited to, mediation, conciliation, fact-finding, arbitration, and adjudication. The member agencies of ALRA include all of the major federal, state, provincial, and municipal/local agencies in the United States and Canada.

Preamble

The practice of mediation is a profession with ethical responsibilities and duties. Those who engage in the practice of mediation must be dedicated to the principles of free and responsible collective bargaining. They must be aware that their duties and obligations relate to the parties who engage in collective bargaining, to every other mediator, to the agencies which administer the practice of mediation, and to the general public.

Recognition is given to the varying statutory duties and responsibilities of the city, state, and federal agencies. This Code, however, is not intended in any way to define or adjust any of these duties and responsibilities nor is it intended to define when and in what situations mediators from more than one agency should participate. It is, rather, a personal code relating to the conduct of the individual mediator.

This Code is intended to establish principles applicable to all professional mediators employed by city, state or federal agencies and to mediators privately retained by parties.

Foreword

The mediation process helps to promote economic freedom in assisting labor and management resolve collective bargaining controversies. The practitioners of labor mediation, therefore, have a high professional responsibility to the parties, to the public, and to mediator colleagues.

Representatives of the Federal Mediation and Conciliation Service and the Association of Labor Relations Agencies, in consideration of these requirements, decided at a meeting held in November 1963 in Hollywood, Florida to attempt to write a set of canons embodying the moral and professional duties and responsibilities of mediators.

Liaison Committees representing the FMCS and the ALRA were established and, after a series of meetings, this Code was drafted and thereafter adopted by the two organizations in Minneapolis, Minnesota in September 1964.

The text of this Code remains basically unchanged from its adoption in 1964 except for the addition of graphics to reflect today's more diverse workforce and the use of gender neutral language. It is being printed by FMCS with the thanks and permission of ALRA.

Code of Professional Conduct for LABOR MEDIATORS

1. The Responsibility of Mediators Toward the Parties

The primary responsibility for the resolution of a labor dispute rests upon the parties themselves. Mediators at all times should recognize that the agreements reached in collective bargaining are voluntarily made by the parties. It is the mediator's responsibility to assist the parties in reaching a settlement.

It is desirable that agreement be reached by collective bargaining without mediation assistance. However, public policy and applicable statutes recognize that mediation is the appropriate form of governmental participation in cases where it is required. Whether and when mediators should intercede will normally be influenced by the desires of the parties. Intercession by mediators on their own motion should be limited to exceptional cases.

The mediators must not consider themselves limited to keeping peace at the bargaining table. Their role should be one of being a resource upon which the parties may draw and, when appropriate, they should be prepared to provide both procedural and substantive suggestions and alternatives which will assist the parties in successful negotiations.

Since mediation is essentially a voluntary process, the acceptability of the mediator by the parties as a person of integrity, objectivity, and fairness is absolutely essential to the effective performance of the duties of the mediator. The manner in which mediators carry out their professional duties and responsibilities will measure their usefulness as a mediator. The quality of their character as well as their intellectual, emotional, social, and technical attributes will be revealed by the conduct of the mediators and their oral and written communications with the parties, other mediators, and the public.

2. The Responsibility of Mediators Toward Other Mediators

Mediators should not enter any dispute which is being mediated by another mediator or mediators without first conferring with the person or persons conducting such mediation. The mediator should not intercede in a dispute merely because another mediator may also be participating. Conversely, it should not be assumed that the lack of mediation participation by one mediator indicates a need for participation by another mediator.

In those situations where more than one mediator is participating in a particular case, each mediator has a responsibility to keep the others informed of developments essential to a cooperative effort and should extend every possible courtesy to fellow mediators.

The mediators should carefully avoid any appearance of disagreement with or criticism of their mediator colleagues. Discussions as to what positions and actions mediators should take in particular cases should be carried on solely between or among the mediators.

3. The Responsibility of Mediators Toward Their Agency and Their Profession

Agencies responsible for providing mediation assistance to parties engaged in collective bargaining are a part of government. Mediators must recognize that, as such, they are part of government. Mediators should constantly bear in mind that they and their work are not judged solely on an individual basis but they are also judged as representatives of their agency. Any improper conduct or professional shortcoming, therefore, reflects not only on the individual mediator but also upon the employer and, as such, jeopardizes the effectiveness of the agency, other government agencies, and the acceptability of the mediation process.

Mediators should not use their position for private gain or advantage, nor should they engage in any employment activity, or enterprise which will conflict with their work as mediators, nor should they accept any money or thing of value for the performance of their duties - other than their regular salary - or incur obligations to any party which might interfere with the impartial performance of their duties.

4. The Responsibility of Mediators Toward the Public

Collective bargaining is in essence a private, voluntary process. The primary purpose of mediation is to assist the parties to achieve a settlement. Such assistance does not abrogate the rights of the parties to resort to economic and legal sanctions. However, the mediation process may include a responsibility to assert the interest of the public that a particular dispute be settled; that a work stoppage be ended; and that normal operations be resumed. It should be understood, however, that the mediators do not regulate or control any of the content of a collective bargaining agreement.

It is conceivable that mediators might find it necessary to withdraw from a negotiation, if it is patently clear that the parties intend to use their presence as implied governmental sanction for an agreement obviously contrary to public policy.

It is recognized that labor disputes are settled at the bargaining table; however, mediators may release appropriate information with due regard (1) to the desires of the parties, (2) to whether that information will assist or impede the settlement of the dispute, and (3) to the needs of an informed public.

Publicity shall not be used by mediators to enhance their own position or that of their agency. Where two or more mediators are mediating a dispute, public information should be handled through a mutually agreeable procedure.

5. The Responsibility of Mediators Toward the Mediation Process

Collective bargaining is an established institution in our economic way of life. The practice of mediation requires the development of alternatives which the parties will voluntarily accept as a basis for settling their problems. Improper pressures which jeopardize voluntary action by the parties should not be a part of mediation.

Since the status, experience, and ability of mediators lend weight to their suggestions and recommendations, they should evaluate carefully the effect of their suggestions and recommendations and accept full responsibility for their honesty and merit.

Mediators have a continuing responsibility to study industrial relations and conflict resolution techniques to improve their skills and upgrade their abilities.

Suggestions by individual mediators or agencies to parties, which give the implication that transfer of a case from one mediation "forum" to another will produce better results, are unprofessional and are to be condemned.

Confidential information acquired by mediators should not be disclosed to others for any purpose or in a legal proceeding or be used directly or indirectly for the personal benefit or profit of the mediator.

Bargaining positions, proposals, or suggestions given to mediators in confidence during the course of bargaining for their sole information should not be disclosed to the other party without first securing permission from the party or person who gave it to them.