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THE IMPACT OF OPINION 11 ON THE PUBLICATION OF ARBITRATION AWARDS

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I. INTRODUCTION

The primary purpose of an arbitration award is, of course, to resolve the issues submitted to the arbitrator for determination. However, awards also serve a number of other purposes, namely, to facilitate the selection of arbitrators, to assist researchers in evaluating trends in arbitration, to educate prospective arbitrators, and to help the parties in the preparation of their cases and briefs.

Following the growth of labor arbitration after World War II, private organizations, primarily the Bureau of National Affairs and the Commerce Clearing House, have been publishing selected awards on a regular basis. In the past, the majority of arbitrators who intended to offer their awards for publication, requested the permission of the parties at the outset of the hearing, usually by means of a question on the appearance form. This practice came to an abrupt end in May of 1983 when the Committee on Professional Responsibility of the National Academy of Arbitrators (hereinafter Committee) issued its Opinion No. 11, which interpreted Rule 2.C.1.c. of the *Code of Professional Responsibility for Arbitrators* (hereinafter *Code*)

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adopted by the Academy, FMCS and AAA in November of 1974. Rule 2.C.1.c. provides that:

> It is a violation of professional responsibility for an arbitrator to make public an award without the consent of the parties. An arbitrator may request but not press the parties for consent to publish an opinion. Such request should normally not be made until after the award has been issued to the parties.[1]

According to Opinion 11 "because the code plainly states that an arbitrator's request to publish should normally not be made until after the award has been issued to the parties, such an inquiry cannot be properly initiated by the arbitrator at the hearing in the absence of unusual circumstances."

As a result of the above interpretation of the *Code*, the number of awards submitted by members of the Academy for publication radically declined. In some instances, the post-hearing request of the arbitrator was refused by the losing party; in other cases, the arbitrator simply refused to be bothered with the additional paperwork involved in obtaining the consent of the parties.

The noticeable decrease in the number of awards offered for publication by NAA members prompted John Schappi, editor of BNA's *Labor Arbitration Reports*, to express his concern over a potential decline in the quality of published awards because of the inability of Academy members to obtain the parties' consent for publication of their awards.[2] Similarly, the Section on Labor and Employment Law of the American Bar Association became concerned with the lack of access of labor attorneys to published awards of NAA members. It selected a Subcommittee on Publication of Labor Arbitration Awards, and charged it with the investigation of the matter. The above concerns notwithstanding, the Committee reaffirmed its ruling that arbitrators may not, during the hearing of a case, ask for the consent of the parties to publish the award.[3]

At the 1984 annual meeting of the Academy, the issue of the arbitrator-initiated publication inquiry at the hearing stage, became the subject of a heated discussion. However, the majority of members attending the sessions upheld the interpretation of the Committee. Nonetheless, in view of the opposition to Opinion No. 11 by a sizeable segment of the Academy and outside groups, the Committee elected for 1984-85 decided to look into a possible revision of the *Code* to allow a subsequent change in the policy of the Academy regarding the timing of requests by arbitrators for publication of their awards.

It should be noted here that the authority of the Academy regarding the

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1. CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES Rule 2.C.1.c.(1951) (amended 1974).

2. Letter addressed to NAA members, dated January 30, 1984.

3. *The Chronicle*, February, 1984, p. 4. (*The Chronicle* is a newspaper of the National Academy of Arbitrators.).

publication of awards issued by its members is actually limited to the private sector. According to recent statements made by authoritative sources, awards in the public sector constitute public domain. Therefore, the consent of the parties is not required for the publication of awards originating in that sector.

In its opinion, issued on December 17, 1984, the U.S. Office of Personnel Management found that arbitration awards in the federal sector constitute public information. Particular reference was made to Section 552(a)(2)(A) of 5 U.S.C., which requires each government agency to make available for public inspection and copying "final opinions, including concurring and dissenting opinions, as well as orders made in the adjudication of cases . . . ."[4] Under this provision, Federal sector awards are required to be disclosed by agencies.

Similarly, Arvid Anderson, Chairman, Office of Collective Bargaining, City of New York, expressed his view "that public sector arbitration awards are in the public domain. Collective Bargaining Agreements in the public sector are public documents, and it follows that arbitration awards interpreting those agreements are also public documents."[5]

However, the matter of revising Part 2.C.1.c. of the *Code* came to a head at the NAA's national meeting in Seattle in May of 1985. At that meeting the Committee on Professional Responsibility proposed a *Code* change (pursuant to NAA bylaws, Article IV, Section 2). Among its various considerations, the Committee read two research papers by the authors; one of which was an article previously published along with a summary of the findings contained in the instant paper.[6] After considerable deliberation, the NAA's Board of Governors approved the following amendment to Part 2.C.1.c. of the *Code*:

> c. It is a violation of professional responsibility for an arbitrator to make public an award without the consent of the parties.
>
> An arbitrator may ask the parties whether they consent to the publication of the award either at the hearing or at the time the award is issued.
>
> (1) If such question is asked at the hearing it should be asked in writing as follows:
>
> 'Do you agree to the submission of the award in this matter for publication:
>
> ( ) Yes ( ) No
>
> If you agree you have the right to notify the arbitrator within 30 days after the date of the award that you revoke your consent.

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4. 5 U.S.C. § 552(a)(2)(A) (1982).
5. *The Chronicle*, May, 1984, p. 5.
6. Memorandum to NAA members dated July 26, 1985, report of the Committee on Professional Responsibility and Grievances, pp. 4-6. *See also* Petersen & Julius Rezler, *Employee and Union Attitudes Toward Publication of Arbitration Awards*, 40 THE ARBITRATION JOURNAL 38-44 (1985).

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

(2) If the question of consent to the publication of the award is raised at the time the award is issued, the arbitrator may state in writing to each party that failure to answer the inquiry within 30 days will be considered an implied consent to publish.[7]

This *Code* change strikes a balance between the practicality of pre-award publication inquiry and the parties' requirement of confidentiality in some cases.

The purpose of this paper is to give a historical perspective of NAA member attitudes toward Opinion 11 prior to the recent *Code* change as well as to review their publication practices.

Methodology and Sample Characteristics

The findings of this study are based on a three-page questionnaire containing a total of 13 closed-end questions. The questionnaire was mailed to all active members of the National Academy of Arbitrators in June of 1984. Of the 620 Academy members, 238, or almost 40 percent, completed and returned the questionnaire. One-hundred thirty (130) arbitrators were engaged full-time in their practice, and 108 members in the sample arbitrated only on a part-time basis.

The experience of the sample members is indicated below by the number of cases decided yearly during the last five years, and by the length of their membership in the Academy.

TABLE 1

AVERAGE NUMBER OF CASES DECIDED EACH YEAR BY NAA MEMBERS

Categories	No. of Respondents	% of Respondents
0-25	50	21.0
26-50	72	30.3
51-75	33	13.8
76-100	44	18.5
Over 100	30	12.6
No answer	9	3.8
Totals	238	100.0%

Table 1 shows that approximately 51 percent of the respondents handled 50 or fewer cases per year in the past five years, while the case load of the remaining 49 percent was over 50 with 30 percent having over 100 cases per year.

7. CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES Rule 2.C.1.c. (1951) (amended 1985).

TABLE 2

LENGTH OF MEMBERSHIP IN NAA
OF SAMPLE RESONDENTS

Categories	No. of Respondents	% of Respondents
1-5 years	78	32.8
6-15 years	86	36.1
Over 15	73	30.7
No answer	1	.4
Totals	238	100.0%

If one accepts the length of NAA membership as an indicator of experience in arbitration, then, according to Table 2, approximately one-third of the sample have been members for five years or less, two-thirds of the respondents have belonged to the Academy for more than five years and about one-third have been members for over fifteen years. In view of the fact that current NAA members have worked in the field for at least five years before they were admitted to the Academy, it could be reasonably concluded that the respondents have had opportunity for a considerable length of time to submit their awards for publication.

II. Propensity of Academy Members to Publish

Apart from the awards that originate in the public sector and the ones processed through the American Arbitration Association, it is the arbitrator who submits awards for publication. Should the arbitrator decide, for whatever reason, that submission of his/her awards for publication is inappropriate or not worth the effort, the process will stop, regardless of the inclination of the parties. Therefore, it is only logical that a study, examining the status of award publication by NAA members, should begin with an inquiry into their propensity to publish.

It is a matter of some interest that, at the time the questionnaire was filled out, only half of the 238 respondents were willing to submit some or any of their awards for publication.

Inquiry was made of those arbitrators who publish as to their motives for submitting their awards to the publishers. On the basis of past experience the questionnaire listed three possible motives; to further education in the field of arbitration, to give an opportunity to the parties to learn about the arbitrator's position on various issues, and to make the arbitrator better known. The respondents were encouraged to name more than one motive if appropriate. However, in the latter case, they were asked to rank the various motives in the order of perceived importance. They were also given the opportunity to name motives other than the ones listed. The responses to the above questions are listed in Table 3.

TABLE 3

PRIMARY MOTIVES FOR PUBLISHING AWARDS

Motives	First Rank	Second Rank	Third Rank	No Rank	Totals
Educational Purpose	64	16	4	5	89
Letting the parties learn about the respondent's position on issues	20	23	5	5	53
Strategy to become better known	7	11	15	4	37
Other	10	1	—	5	16
No answer	5	—	—	—	5

It is obvious that the large majority of the respondents recognized the contribution of published awards to the education of starting arbitrators as well as to the triers of arbitration cases. Sixty-five respondents either ranked education first, or it was their only motivating factor. Sixteen additional respondents considered education as their second choice. If the four arbitrators who ranked education third and the five who listed this motive, regardless of ranking, are taken into account, 89 out of the 119 respondents were motivated by the education factor to varying degrees when submitting awards for publication.

The desire to facilitate the selection process of arbitrators by giving the parties an opportunity to learn about their position regarding various issues was the first choice of 20 respondents and the second choice of 23 respondents. Seven respondents candidly admitted that they were motivated primarily by their wish to be better known by the parties when submitting awards for possible publication. Thirty-two additional arbitrators in the sample took this factor into consideration and ranked it either as their second or third choice.

Eight respondents named more than one motivating factor. However, they refused to rank them according to their perceived importance. Of the ten respondents who did not mark any of the three motives listed in the questionnaire but named others, four part-time arbitrators who are affiliated with institutions of higher education stated the need to publish and obtain credit for it as their primary motive for publishing their awards. Three respondents hoped that through the publication of awards a "common law" in arbitration could be developed. Finally, one respondent frankly admitted that he is motivated by "vanity" when seeking publication of his awards.

This study also examined the quantitative aspects of the topic. It was specifically asked whether or not the respondents, who submit awards for publication, submit all awards which are permitted by law or the parties, or whether or not the submission is made on a selective basis. Thirty-seven (37) of the 119 respondents stated that they offered all of their awards to the

publishers for consideration. The remaining 82 respondents did not send in all their awards but only those which, in their opinion, satisfied certain criteria.

The questionnaire listed three possible criteria of selection for the consideration of the respondents: novel issue, novel reasoning, or novel factual situation involved in a case. The respondents were again allowed to name more than one criteria with the request to rank them in order of their perceived importance. The category of "other" was also listed to enable respondents to name criteria in addition to the ones listed in the questionnaire. The responses of the 82 arbitrators are tabulated in Table 4.

TABLE 4

CRITERIA FOR THE SELECTION OF AWARDS FOR PUBLICATION

Criteria	First Rank	Second Rank	Third Rank	No Rank*	Totals
Novel Issue	40	7	—	20	67
Novel Reasoning	3	18	10	16	47
Interesting Factual Situation	13	12	13	17	55
Other	3	—	—	5	8
No answer	2	—	—	—	2

*Note: Twenty-one respondents named more than one criteria without ranking them.

Of the 82 respondents who offered their awards for publication on a selective basis, 56 named one or more criteria and ranked their choice in order of importance. Twenty-one respondents also named two or more criteria without ranking them. Three respondents referred to criteria other than those items listed in the questionnaire, and two respondents did not name any criterion.

Table 4 reveals the preferences of the 56 respondents who selected either one criterion or more than one and ranked them. Forty respondents considered the novelty of the issue involved in a case as the single most important criterion of selection. Seven other respondents ranked the novelty of issue as their second choice. Altogether 67 arbitrators took the novelty criterion into consideration when deciding the publicity- worthiness of an award.

The novelty of the factual situation was ranked as the primary basis for selection by 13 respondents. In addition, this criterion was the second choice of 12 respondents, and the third choice of 13 respondents. The novelty of reasoning was the consideration of first order for three respondents. Eighteen took into account this criterion in the second place, and 10 in the third place. The three respondents who selected awards for publication on the basis of criteria other than the ones listed in the questionnaire, named such aspects

as "well-researched and supported by cases," "clarification of existing principles" and "specific aspects of a common issue."

A. *Arbitrator Publication Practices Prior to the Code Change*

Because the research in this study was completed prior to the change in the *Code* in June of 1985, we were interested in whether Part 2.C.1.c. and its interpretation by Opinion 11 had a negative impact on the number of published awards submitted by arbitrators who otherwise may have been inclined to publish. Sample data indicated that it has had some depressing effect on publication. When the number of respondents who stopped submitting awards for publication as a result of Opinion 11 is added to the number ceasing publication due to the original adaptation of the *Code* itself (in 1974), 31.4 percent of NAA arbitrators who stopped publishing their awards are included (see Table 5).

TABLE 5

REASONS GIVEN BY NAA ARBITRATORS
FOR NOT SUBMITTING AWARDS FOR PUBLICATION

Reasons	Number of Times Cited	Percent of Total
Never or seldom submitted an award of publication	64	41.8
NAA interpretation of Rule 2.C.1.c of the *Code* in Opinion 11	35	22.9
Cessation of the FMCS' procedure of submitting arbitration awards to publication agencies	25	16.3
The adaptation of the *Code* in 1974	13	8.5
Other reason	16	10.5
Totals	153*	100.0%

*Does not add to 119, the number of arbitrators who do not publish, because more than one reason was given.

Prior to the change in the *Code* and its interpretation, as previously noted, no publication inquiry could be made of the parties until *after* the award was submitted. Some arbitrators believed that it was an exercise in futility to request publication permission *following* the rendering of a decision because either the losing party would not permit it, or the parties might simply ignore the request.

However, the pre-change *Code* and Opinion 11 were not the only negative influences regarding publication. Another major factor was the FMCS' decision to cease forwarding awards to the various publication agencies (such

as BNA, CCH, etc.) because of a lack of funds. Prior to 1980, the FMCS would assume publication permission was granted by the parties unless informed otherwise. Accordingly, it would automatically send out those awards when the parties had given permission to publish. Obviously, with the cessation of this practice, arbitrators who wished their decisions to be published, were required to obtain the parties' permission themselves, and then submit the award to one or more publication agency, a task that some NAA arbitrators apparently did not feel was worth the effort. Of course, some arbitrators seldom or never submitted any awards for publication at any time, and so they were not influenced by the *Code* or Opinion 11.

B. *Effects of the Code Change On Publication Practices*

The data, as previously noted, indicated that approximately one-third of NAA arbitrators ceased submitting awards for publication as a result of the former *Code* or its interpretation by Opinion 11. Forty-three (36 percent) of the 120 NAA arbitrators responding to the survey indicated a change in the *Code* would induce them to publish, while for 72, or 60 percent, of the respondents, there would be no impact. Four respondents did not answer the question or said a change in the *Code* "may" have some inducement for them to publish. It will remain to be seen whether more NAA arbitrators will resume publication of awards following the amendment to the *Code* in June of 1985.

III. Reasons For and Against Changing The Code

Not all NAA arbitrators were in favor of the *Code* change. Sample data indicated that 101 NAA respondents supported (old) Rule 2.C.1.c. as interpreted by Opinion 11, and 119 of them opposed it.[8]

Apparently, the assumption upon which Rule 2.C.1.c. of the *Code* and its interpretation by Opinion 11 rested was that pre-award publication inquiry by the arbitrator placed undue or unethical pressure on the parties to comply with the request.[9] This was the most frequently cited reason given by NAA arbitrator respondents who support Opinion 11, as shown in Table 6. Some arbitrators also believed that *post*-award inquiry is better practice. A few arbitrators did not consider writing to the parties in order to seek their consent to publish to be especially inconvenient.

Support for Part 2.C.1.c., as interpreted by Opinion 11, appears to be

8. Fourteen (14) respondents did not answer the question and four arbitrators were "neutral" regarding the question.

9. The Chairman of the Committee on Professional Responsibility at the time of the adoption of Opinion 11, stated in part that: "The parties have expressed displeasure about inquiries pre-publication made at hearings and with good reason." *The Chronicle*, February, 1984, p. 4.

TABLE 6

REASONS GIVEN FOR SUPPORTING RULE 2.C.1c OF THE *CODE* AND ITS INTERPRETATION BY OPINION 11

Reasons	No. of 1st rankings	No. of 2nd rankings	No. of 3rd rankings	No. of 4th rankings	No. of 5th rankings
Undue or unethical pressure on parties to comply with a publication request at the hearing	63*	9	4	1	1
Good arbitration practice	13	33	9	0	2
Post award inquiry not more inconvenient	7	7	17	1	0
Other	14	3	2	1	2

*Note: Totals do not add to 101 as more than one ranking could be assigned.

directly related to the length of membership in the NAA. Table 7 below confirms this relationship.

TABLE 7

NUMBER OF NAA MEMBERS SUPPORTING 2.C.1.c. AS INTERPRETED BY OPINION 11

Years in NAA	No. in Category Agreeing	Total No. in Category	Percentage Agreeing
1-5	24	78	30.8
6-15	39	86	45.3
15 years or over	38	73	52.1
Totals	101	237*	

*One respondent did not designate his years in the NAA.

It has been said that arbitrators who have long tenure in the Academy have already established reputations in the field as well as clientele, and thus are not as concerned with publication as newer NAA members. For this reason alone they would have little reason to oppose Part 2.C.1.c. or Opinion 11. Sample data indicated that a higher percentage of members belonging to the NAA for 15 years or longer (46 of 73 or 63 percent) do not publish their arbitration awards as compared to more short term members.

A. *Member Opposition to Part 2.C.1.c.*

The NAA members objecting to the old Part 2.C.1.c. of the *Code* and its interpretation by Opinion 11 gave diametrically opposite reasons from those offered by their colleagues who supported the *Code*. The former group's reasons are presented in Table 8.

TABLE 8

REASONS FOR OPPOSING PART 2.C.1.c.
AS INTERPRETED BY OPINION 11

Reason	No. of 1st Rankings	No. of 2nd Rankings	No. of 3rd Rankings	No. Ranking Rankings
Pre-award inquiry would not intimidate the parties	64*	23	0	14
Losing party may be inclined to respond negatively to a publication request	26	35	7	7
Other	16	10	13	11

*Note: Does not add to 119 because more than one reason could be given.

Many arbitrators disputed the assertion that publication inquiries, made during the hearing, intimidated or forced the parties to consent to their requests. This position has considerable support from another study which investigated union and employer views regarding the same issue.[10] Data from that study indicated that almost 75 percent of the parties were not opposed to publication inquiries made at arbitration hearings. They did not feel intimidated, harassed or forced to comply with such a request.

A substantial number of arbitrators, opposed to Part 2.C.1.c. of the *Code*, explained their opposition on the grounds that the losing party would be prompted to withhold permission for publication of the award. It is well known that the losing party may be moved to deny publication permission either to get even with the arbitrator and/or to avoid embarrassment from or connection with a losing cause.[11]

B. *Reasons for Changing or Preserving Part 2.C.1.c.*

While arbitrators may have had honest disagreement as to whether or not Part 2.C.1.c. or Opinion 11 should be changed, the real issue, of course,

10. *See* Petersen and Rezler, *supra* note 4.
11. A study by the authors showed that 35 percent of union and management respondents stated that a loss would prompt them to deny permission to publish. *Id.* at 43.

is the preservation of the quality of published arbitration awards. As noted earlier in this paper, there was serious concern by at least one publication agency (The Bureau of National Affairs) that unless more NAA members submitted arbitration awards for publication, the published awards would reflect the thinking of less experienced arbitrators. Only half of the sample NAA members presently publish at all, but perhaps more will be prompted to do so now that the *Code* has been revised.[12]

NAA sample respondents indicated that published awards are of benefit to them. One hundred fifty (150), or 63 percent, claimed that such awards are of equal benefit to all arbitrators while 34 (14.3 percent) believed that awards are only of value to new arbitrators. Only 22 (9.2 percent) felt that published awards are of no worth.

In studying and preparing decisions, arbitrators may also make use of published awards. The frequency of this practice is shown in Table 9.

TABLE 9

FREQUENCY WITH WHICH RESPONDENTS CONSIDERED PUBLISHED AWARDS IN PREPARING DECISIONS

Frequency	No. of Respondents	Percent of Total
Not at all	38	16.0
Seldom	97	40.8
Frequently	84	35.2
All of the time	10	4.2
No answer	6	2.5
Other	3	1.3
Totals	238	100.0%

The data indicate that NAA arbitrators make some use of the published cases and about four percent of them use them all of the time. Sixteen percent do not consult published awards at all.

Of course, it is well known that the parties study published cases for a variety of reasons. Ninety-three (93) percent of union and employer representatives use them to select arbitrators and over 95 percent incorporate awards into the preparation of their briefs.[13]

IV. Conclusions

The amendment to Part 2.C.1.c. of the *Code* in June of 1985 is a welcome one. Published arbitration awards have contributed significantly to

12. As indicated by sample data almost 36 percent of NAA members who presently do not publish indicated they would resume submitting awards for publication if the *Code* were changed.

13. Petersen & Rezler, *supra* note 4.

the field of industrial relations, both for practitioners and arbitrators alike. Indeed, they have been creating a kind of "common law" over the years. It is critical that NAA members, who are among the most experienced arbitrators in the country, have a reasonable opportunity to gain approval to publish at the time of the hearing. At the same time, the parties also have the chance, under the new *Code* amendment, to withdraw permission to publish after the award is handed down. Hopefully, this study's data will be borne out in the future, namely that NAA arbitrators, following the *Code* change, will be prompted to submit more of their awards for publication.