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School of Law

I Shouldn't Be Talking to You About This, But....: Ex Parte Communications in  
Labor and Employment Law

Issues Raised by Ex Parte Communications with Labor and  
Employment Arbitrators

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## A. Ex Parte Communications

Ex parte communications are typically defined as communications between counsel and the court when opposing counsel is not present<sup>1</sup> and are ordinarily prohibited.<sup>2</sup> For example, ex parte communication is an issue when opposing counsel communicates with a represented party<sup>3</sup> or improperly communicates with a juror.<sup>4</sup> Although this rule is generally discussed in the context of litigation,<sup>5</sup> it arises in other contexts as well. For example, under the Administrative Procedures Act, “no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding.”<sup>6</sup> And there are a number of labor cases involving improper contact with administrative agencies.<sup>7</sup> The focus of this paper, however, is ex parte communications with a neutral, specifically a labor or employment arbitrator.

The rules of professional conduct very clearly prohibit ex parte communications with a judge. The prohibition is based on the rationale that communication with a neutral “before whom a matter is pending violates the right of the opposing party to a fair hearing and may constitute a violation of the due-process rights of the absent party. A communication made secretly may not withstand scrutiny. Ex parte communication also

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<sup>1</sup>Black’s Law Dictionary (8<sup>th</sup> ed. 2004).

<sup>2</sup> See e.g., *Hammond v. City of Junction City, Kansas*, 84 Fed. Appx. 57 (10<sup>th</sup> Cir. 2003) (ex parte communications of Title VII plaintiff’s counsel with City officials violated the Kansas Rules of Professional Conduct and that the violations warranted disqualification of Hammond’s attorneys from the case, and an award of attorney’s fees and costs); *Weeks v. Independent School Dist.*, 230 F.3d 1201 (10<sup>th</sup> Cir. 2000) (Court disqualified FLSA plaintiff’s attorney, based on her ex parte communications with school district employees, and, after jury returned verdict for driver on his FLSA and due process claims, reduced award of costs to driver and awarded attorney fees in amount less than that requested by driver).

<sup>3</sup> See e.g., *Habib Nasrullah & Carolyn J. Fairless, Interviews with Former Employees: Strategies and Pitfalls*, 16 PRAC. LIT. 47 (2005); *Ellen J. Messing & James S. Welilky, Contacting Employees of and Adverse Corporate Party: A Plaintiff’s Attorney’s View*, 19 LAB. LAW. 353 (2005).

<sup>4</sup> The Model Rules of Professional Conduct prohibit a lawyer from communicating ex parte with a judge, juror, prospective juror or other official unless authorized to do so by law or court order. MODEL RULES OF PROF’L CONDUCT R. 3.5

<sup>5</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 (2002);

<sup>6</sup> Administrative Procedure Act 5 U.S.C. § 557 (2000); 29 C.F.R. §18.38, Department of Labor Rules of Practice and Procedure, Ex Parte Communications, “(b) Any party or participant who makes a prohibited ex parte communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions, including, but not limited to, exclusion from the proceedings and adverse ruling on the issue which is subject of the prohibited communication.”; Pamela M. Giblin & Jason D. Nichols, *Ex Parte Contacts in Administrative Proceedings: What the Statute Really Means and What it Should Mean*, 57 BAYLOR L. REV. 23 (2005).

<sup>7</sup> See e.g., *Prof. Air Traffic Controllers Org., v. FLRA*, 685 F.2d 547 (D.C. Cir. 1982); *NLRB v. Sanford Home for Adults*, 669 F.2d 35 (2<sup>nd</sup> Cir. 1981); *NLRB v. Bata Shoe*, 377 F.2d 821 (4<sup>th</sup> Cir. 1967); *NLRB v. Botany Worsted Mills, Inc.*, 106 F.2d 263 (3<sup>rd</sup> Cir. 1939); *Bethlehem Steel Corp., v. Clayton*, 578 F.2d 113 (5<sup>th</sup> Cir. 1978); *Todd Shipyards Corp., v. Dir. Office of Workers’ Comp. Pgms.*, 545 F.2d 1176 (9<sup>th</sup> Cir. 1976); *Executive Airlines, Inc., v. Gore*, 38 F. Supp.2d 402 (1999); *Pioneer Hotel, Inc., v. NLRB*, 182 F.3d 939 (D.C. Cir. 1999); *Pennsylvania Steel Foundry v. Sec. Of Labor*, 831 F.2d 1211 (3<sup>rd</sup> Cir. 1987); *Smith Steel Casting Co., v. Brock*, 800 F.2d 1329 (5<sup>th</sup> Cir. 1986); *Davis Stamping, Inc., v. OSH Rev. Comm’n*, 800 F.2d 1351 (5<sup>th</sup> Cir. 1986); *U.S. Steel Corp., v. Fed. Mine Safety and Health Rev. Comm’n*, 756 F.2d 658 (8<sup>th</sup> Cir. 1985); *Bell Helicopter Int’l., v. Jacobs*, 746 F.2d 1342 (8<sup>th</sup> Cir. 1984).

threatens to embarrass the parties' relationship with the judicial officer, requiring the officer either improperly to acquiesce in the conduct or to make a censorious response."<sup>8</sup>

Obviously, this rationale applies to arbitrators as well, given their adjudicative position vis-à-vis the parties. It is therefore unsurprising that the codes of conduct applicable to arbitrators all contain prohibitions against ex parte communication.<sup>9</sup>

Several codes of conduct as well as the Federal Arbitration Act address ex parte communication in arbitrations and place limits on the conduct of the arbitrator and the parties. The next section of this paper presents the rules concerning ex parte communications in an arbitral setting, and the cases decided under each.

## B. The Federal Arbitration Act

Arbitrators are given wide latitude in managing cases.<sup>10</sup> However, under the Federal Arbitration Act (FAA), an arbitration award can be vacated where there is evident partiality or corruption in the arbitrator.<sup>11</sup> Challenges to arbitration awards based on ex parte communications are raised under the "evident partiality" standard of the FAA.<sup>12</sup> Courts impose a very high burden of proof on the party seeking vacatur on this ground.<sup>13</sup> The cases make it clear that evident partiality means more than "an appearance of bias."<sup>14</sup> In a case involving the Carpenters union benevolence fund, one court

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<sup>8</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §113 (2002).

<sup>9</sup> See e.g., Cal. R. CT. 1610, Judicial Arbitration Rules (2005):

Arbitrators will be barred from ex parte communication or from considering "other communications made to the arbitrator outside the presence of all of the parties concerning a pending or impending arbitration." However, arbitrators will be permitted to engage in ex parte communications with parties about administrative issues or as provided by law, but when "such a discussion occurs, the arbitrator must promptly inform the other parties of the communication and must give the other parties an opportunity to respond before making any final determination concerning the matter discussed."

<sup>10</sup> David E. Robbins, Calling All Arbitrators: Reclaim Control of the Arbitration Process—The Courts Let You, 60 Disp. Res. J. 9, 10 (2005). See e.g., First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) ("A party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute (say, as here, its obligation under a contract). But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances.") Storer Broadcasting Co. v. Am. Fed. Of Television & Radio Artists, 600 F.2d 45 (6<sup>th</sup> Cir. 1979):

Courts should refrain from reviewing the merits of arbitrator's award due to policy of favoring arbitration as a means of resolving labor disputes, but there are two important exceptions to this general rule: (1) arbitrator is without authority to disregard or modify plain and unambiguous provisions and courts are empowered to set aside award if arbitrator exceeds these confines and (2) although court is precluded from overturning award for errors in determination of factual issues, if examination of record before arbitrator reveals no support whatever for his determination, his award must be vacated.

<sup>11</sup> 9 USC §10 (a)(1)(2005).

<sup>12</sup> See e.g., Daiichi Hawaii Real Estate Corp. v. Lichter, 103 Hawai'i 325, 82 P.3d 411 (arbitrator's failure to disclose an ex parte communication with one of the parties' attorneys regarding the possibility of serving as a mediator in an unrelated action or his eventual appointment as a mediator in the action constituted "evident partiality").

<sup>13</sup> La Farge Conserve et Etudes, S.A. v. Kaiser Cement & Gypsum Corp., 791 F.2d 1334, 1339 (9<sup>th</sup> Cir. 1986).

<sup>14</sup> See e.g., Int'l Produce v. A/S Rosshavet, 638 F.2d 548 (2<sup>nd</sup> Cir. 1981) ("Standard of 'evident partiality' contained in 9 USCS § 10, such as would authorize vacating arbitration award due to bias or arbitrator, is

explained that the “standard of ‘appearance of bias’ is too low for invocation of 9 USCS § 10 and ‘proof of actual bias’ is too high, therefore evident partiality within the meaning of § 10 will be found where a reasonable person would conclude that the arbitrator was partial to one party to the arbitration.”<sup>15</sup>

One of the interesting side issues concerning ex parte communications is whether the FAA applies to arbitration agreements contained in collective bargaining agreements. The Supreme Court held that federal courts may look to the FAA for guidance in labor arbitration cases in the wake of the holding in *Lincoln Mills*.<sup>16</sup> So that apart from whether the FAA itself directly applies to collective bargaining agreements,<sup>17</sup> courts find guidance in the FAA’s provisions.<sup>18</sup> It is wise to keep this distinction in mind.<sup>19</sup> Consider the language of a recent Fifth Circuit opinion, “the FAA does not apply to cases reviewing arbitration awards pursuant to a collective bargaining agreement . . . “[w]hen an arbitration decision arises from the terms of the collective bargaining agreement, judicial review of the arbitration award is authorized not by the FAA but by the terms of Section 301 of the Labor Management Relations Act. Courts may, however, look to the FAA for guidance in reviewing an arbitration award under a collective bargaining agreement.”<sup>20</sup>

The FAA’s application to employment contracts is clearer. In *Circuit City*,<sup>21</sup> the Supreme Court held that the exclusionary language of §1 of the FAA<sup>22</sup> did not exclude all

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not made out by mere appearance of bias.”); *Health Svcs. Mgt. Corp. v. Hughes*, 975 F.2d 1253 (7<sup>th</sup> Cir 1992)(“Evident partiality’ means more than mere appearance of bias; arbitrators often have interests in relationships that overlap with the matter they are considering and mere appearance of bias that might disqualify a judge will not disqualify an arbitrator.”).

<sup>15</sup> *Morelite Constr. Corp. v. New York Dist. Council Carpenters Ben. Funds*, 748 F.2d 79 (2<sup>nd</sup> Cir 1984).

<sup>16</sup> *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 40 n. 9 (1987).

<sup>17</sup> The Fourth Circuit does not apply the FAA to labor disputes arising from collective bargaining agreements. That court interprets the exclusionary clause in § 1 of the FAA as excluding collective bargaining agreements from coverage of that statute. *Nieves v. Individualized Shirts*, 961 F.Supp. 782, (D. N.J. 1997)(citing *United Electrical, Radio & Machine Workers v. Miller Metal Prods.*, 215 F.2d 221, 224 (4<sup>th</sup> Cir.1954).

<sup>18</sup> *See, Kiewit/Atkinson/Kenny v. I.B.E.W., Local 103*, 43 F. Supp 2d. 132, 134 (D. Mass. 1999); *Am. Fed. Radio & Television Artists v. WJBK-TV*, 164 F.3d 1004 (6<sup>th</sup> Cir. 1999).

<sup>19</sup> *Springfield Terminal Railway Co., v. UTU*, 767 F. Supp 333 (D.Maine 1991). The District court declined to apply the FAA evident impartiality where there were ex parte communications between a congressman and mutual arbitrator and between member of the union and the arbitrator regarding scheduling of arbitration proceedings. “While acknowledging that the standard of review of arbitration awards under the RLA is sometimes informed by the articulation of standards of review of other types of arbitration awards, the Court declines ST’s invitation to apply the standard of ‘evident partiality’ that is statutorily prescribed in the United States Arbitration Act, 9 U.S.C. § 10.” *Id.* at 350, n.15. The court held the employer had to prove that the integrity of the process and the fairness of the result were irrevocably tainted by the communications in order to vacate an arbitral decision based on ex parte communications. *Id.* at 349. “Obviously the Court is not suggesting that improper contacts with an arbitrator by telephone should be insulated from review. It is suggesting, however that the evidentiary threshold is higher than it is here. Here, the arbitrator stated in his letter to the parties that the March 30 hearing date was set ‘[a]s a result of telephone conversations with each of you . . . concerning which I kept you both concurrently advised.’ In the general scheduling context, the mere existence of the phone calls does not raise the specter of bias.” *Id.* at 350.

<sup>20</sup> *I.A.M., South Texas v. Dynamic Science*, 322 F.Supp. 2d 817 (5<sup>th</sup> Cir. 2004)(citing *Brown v. Witco Corp.*, 340 F.3d 209, 217 (5<sup>th</sup> Cir.2003)).

<sup>21</sup> *Circuit City Stores, Inc., v. Adams*, 532 US 105, 115 (2001).

employment contracts, but rather exempted from FAA only contracts of employment of transportation workers.<sup>23</sup> There are several reported labor and employment law cases involving ex parte communications in which the courts cite and/or look to the FAA for guidance, however the majority are labor rather than employment cases.

### 1. Employment Cases<sup>24</sup>

*Hakala v. Deutsche Bank*<sup>25</sup> - A pro se bond trader, who alleged wrongful termination, sought to vacate an arbitration award rendered against him and in favor of his employer after 50 hearing sessions. He argued that the award should be vacated, among other reasons because the employer's counsel had obtained an ex parte hearing to explain why a scheduled witness could not be present. The counsel for the bank stated on the record that the reason for the confidential conversation was because the witness's absence related to a pending merger. The broker then protested the fact that the arbitrators denied him the opportunity to cross-examine the witness about his unavailability and felt that the chair of the arbitration panel had a "markedly more favorable attitude" towards defense counsel after the ex parte communication.

Interpreting the evident partiality standard, the court stated that an arbitration award could only be set aside if the broker could make a two-part showing. First he was required to prove that the ex parte conversation deprived him of a fair hearing and influenced the outcome of the arbitration. Second, he had to show that the subject matter of the conversation went to the heart of the dispute's merits. The court found that the broker offered only conclusory statements as to the arbitrator's partiality and that the discussion pertained to a merely peripheral matter.<sup>26</sup>

*Rosenberg v. Merrill Lynch*<sup>27</sup> - The District court refused to enforce an arbitration agreement between a stockbroker and her employer. The court found that the arbitration system as established by the employer was dominated by the industry, in part because of the permissibility of ex parte communications between industry staffers and the

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<sup>22</sup> Section 1 of the Federal Arbitration Act (FAA or Act) excludes from the Act's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 USC §1 (2005).

<sup>23</sup> *Circuit City*, 532 US at 115 (2001).

<sup>24</sup> *Prescott v. Northlake Christian School*, 369 F.3d 491(5<sup>th</sup> Cir. 2004) though not discussed above because the court never addressed the ex parte communications issue is nevertheless worth a read because of the choice of law issue. The case involved claims of sexual harassment, gender discrimination and retaliation. The court's synopsis of the case is also noteworthy, "Northlake Christian School (NCS) attempted to forestall strife with its newly-hired principal Pamela Prescott by entering into an employment contract for "biblically-based mediation" or arbitration under the auspices of the Institute for Christian Conciliation, these methods being prescribed as the 'sole remedy' for any controversy. When the school's relationship with Prescott deteriorated, however, Prescott filed suit. The district court ordered ADR. Mediation occurred, then arbitration; NCS appealed a highly adverse and somewhat dubious award back to the court; NCS appealed to this court; and we are forced to remand for further proceedings. So much for saving money and relationships through alternative dispute resolution. Perfect justice is not always found in this world."

<sup>25</sup> *Hakala v. Deutsche Bank*, No. 01 Civ. 3366, 2004 WL 1057788 (S.D.N.Y. May 11, 2004).

<sup>26</sup> *Id.* at \*4.

<sup>27</sup> *Rosenberg v. Merrill Lynch*, 995 F.Supp. 190 (D.Mass 1998).

arbitrator. Although this opinion cites the FAA and discusses its provisions and policy it does not specifically discuss the “evident partiality standard.”<sup>28</sup>

*Weinberg v. Silber*<sup>29</sup> - Though this is marginally an employment case it is included because of the interesting facts of the case. The parties were two sports agents who orally agreed to form a joint venture to recruit clients and split fees. As one might predict, things did not go well between the two agents and after filing several lawsuits against each other the two signed an arbitration agreement. The agreement did not contain any ground rules for the arbitration. While the arbitrator was preparing his decision he saw new reports that Weinberg had negotiated a successful contract for one of the disputed clients of the partnership.

The arbitrator then contacted Weinberg’s attorney to request information about the contract and told the attorney that without the information he “would accept as fact the outside information contained in the news reports . . . and calculate . . . an award using that evidence.”<sup>30</sup> Weinberg’s attorney gave a copy of the contract to the arbitrator, who then ordered that Weinberg pay Silber \$2,079,495 a figure which related exclusively to the fees earned from the contract. Weinberg challenged the award on the basis that the arbitrator had “impermissibly relied on ‘ex parte’ evidence,” that is the disputed client’s contract.

The court found that this did not meet the FAA §10 standard of “evident partiality” for two reasons. First it was unclear to the court “how these events created fundamental unfairness, given that [Weinberg] did in fact submit the actual contracts to the arbitrator,” and Weinberg did not object at the time.<sup>31</sup> Second, the court found “no evidence that the arbitrator considered outside evidence in making his award, and no evidence that he ignored the explanatory information requested from, and submitted by Weinberg.”<sup>32</sup> The court found that Weinberg had not offered any evidence of causation between the ex parte communication and the final award that would justify vacation of the award on that basis.

## 2. Labor Cases

*IAM v. Dynamic*<sup>33</sup> - At the end of the arbitration hearing between the Machinists and Dynamic, the company presented an oral summation and the union business representative indicated that was going to file a post-hearing brief rather than present an oral summation. The company did not request permission to submit a response to the

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<sup>28</sup> The court also cites the AAA National Rules for the Resolution of Employment Disputes, and the accompanying Guide. “Ex parte communications with one side to an arbitration can constitute a violation of the arbitrator’s Code of Ethics, and are prohibited by American Arbitration Association (“AAA”) rules, unless the parties agree in advance to permit them. AAA Rule 20; AAA, *Guide for Employment Arbitrators*, reprinted in SB31 ALI-ABA at 116 (‘An arbitrator should not communicate with the parties and their counsel except in the presence of both parties.’). See *infra* Part E.

<sup>29</sup> *Weinberg v. Silber*, 140 F. Supp.2d 712 (N.D. Texas 2001).

<sup>30</sup> *Id.* at 716.

<sup>31</sup> *Id.* at 722.

<sup>32</sup> *Id.*

<sup>33</sup> *IAM v. Dynamic Science, Inc.*, 322 F. Supp 2d. 817 (S.D. TX 2004).

union's brief. The union rep submitted the brief to the arbitrator but he failed to submit a copy to the company.<sup>34</sup> When the arbitrator issued an opinion he stated that the company had waived its opportunity to present a post hearing brief. The company refused to comply with the terms of the award claiming that the union's brief was ex parte communication that the arbitrator improperly considered, and that in doing so, the arbitrator was guilty of misconduct that prejudiced the employer.<sup>35</sup> The Arbitrator Review Board of the FMCS considered the post-hearing brief to be in violation of the FMCS Code<sup>36</sup> and placed a letter in the arbitrator's file. The court first made clear that "judicial review of the arbitration award is not authorized by the FAA but by the terms of Section 301 of the LMRA."<sup>37</sup>

Addressing the merits of the Dynamic's challenge to the arbitration award, the court first considered whether the FMCS letter of admonishment was relevant. In order to consider it the court held, the parties must have incorporated the FMCS rules into their arbitration agreement, however the only reference to FMCS contained in the agreement was the parties' reference to FCMS as the agency from which to draw arbitrators.<sup>38</sup> The court found that although the union admitted that it "failed to send a copy of the post-hearing brief to Dynamic, the company presented no evidence that the arbitrator actually considered the union's post-hearing brief in making his decision. Although the arbitrator cited IAM's post-hearing brief three times in his written opinion it was not clear as Dynamic argued that he was "clearly influenced" by it. His citations to the post-hearing brief were contained in the section titled "Positions of the Parties" and sub-titled "The Union," and all references to the post-hearing brief in the document were expressed solely as opinions of the union. The court could not conclude that vacatur of the award was necessary.

*Nasta v. Paramount Pictures*<sup>39</sup> - Employee members of the Home Office Employees Union were terminated based on an unauthorized run of a confidential computer program. After arbitration over their terminations, the arbitrator decided that an inspection of the premises would assist him in reaching his decision. The inspection was made with the employees and several members of management present. After they received the unfavorable decision from the arbitrator, the employees alleged that the arbitrator "must have" had ex parte communication with Paramount.<sup>40</sup> However, after "several years of discovery, including a deposition of Paramount's lawyer, there was no evidence in the record to support their allegations of ex parte communications."<sup>41</sup> "The

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<sup>34</sup> Because the union business representative was not an attorney, the court refused to consider his mistake purposeful or knowing.

<sup>35</sup> IAM v. Dynamic at 820.

<sup>36</sup> See *infra* Part C.

<sup>37</sup> *Id.* at 821. "Courts may, however look to the FAA for guidance in reviewing an arbitration award under a collective bargaining agreement. *Id.*

<sup>38</sup> *Id.* at 822.

<sup>39</sup> *Nasta v. Paramount Pictures Corp.*, 1991 WL 183353 (S.D.N.Y. 1991).

<sup>40</sup> *Id.* at \*4. The employees additionally asserted that the arbitrator refused to let them speak out fully during the inspection. They also argued that his comment that "Life is not fair and [I] don't know if it was one of you or all of you who did it" indicated bias.

<sup>41</sup> *Id.*

fact that the arbitrator at that time had not formulated an opinion which he then expressed does not give rise to a claim of bias.”<sup>42</sup>

*N.Y. Newspaper Printing Pressman’s Union v. The New York Times*<sup>43</sup> - In this case, the arbitrator and the parties agreed upon a fee of \$600 per day for each day of the hearing (which lasted 6 days), and the time spent considering the evidence and drafting the opinion and award. However shortly before issuing the opinion and award, the arbitrator then called the union attorney and in that ex parte conversation stated that he considered the dispute to be an interest arbitration and therefore worthy of a higher fee, \$25,000. The attorney was shocked and outraged that the arbitrator was demanding more than triple the agreed upon fee shortly before issuing the award. The arbitrator also called the management attorney’s office with the same news and urging prompt payment.<sup>44</sup>

The arbitrator shortly thereafter sent a copy of the award to the management lawyer, but not to the union attorney or to the AAA. The union lawyer called the AAA to complain that the arbitrator engaged in “ex parte communication demanding that his fee be tripled; bypassing the AAA and sending the award to the Times before the union and claiming the case was an interest arbitration even though the parties had not agreed to submit to interest arbitration.” The court found that even though there were grounds for questioning both the amount of the fee and the way in which it was solicited, the union could not prove that it had been prejudiced. Based on the facts, the court inferred that the arbitrator had finished his lengthy opinion and award before he phoned. He communicated with both counsel about his fee and the fact that one copy of the award arrived sooner than the other could be ascribed to the vagaries of the mail.<sup>45</sup>

*Teamsters v. E.D. Clapp Corp.*<sup>46</sup> - This case involved a particularly rancorous dispute.<sup>47</sup> The arbitrator was appointed by the New York State Mediation Board to hear a dispute concerning a strike. The arbitrator communicated frequently with the Union and Company from the date of his appointment. The parties disagreed on whether the issues in dispute were arbitrable. Because of the intense animosity between the parties they agreed that the arbitrator could conduct independent investigations of the disputes and engage in ex parte communications with the parties and their representatives.<sup>48</sup> Later the parties disagreed about the reason for the agreement. The union argued that it was to cover past ex parte communications and the company argued it applied to future contact with the arbitrator. The union responded that the company had modified the agreement

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<sup>42</sup> *Id.* at \*5.

<sup>43</sup> *New York Newspaper Printing Pressman’s Union v. The New York Times*, No. 91 Civ. 4677, 1992 WL 122788 (S.D.N.Y. May 22, 1992)

<sup>44</sup> *Id.* at \*3.

<sup>45</sup> *Id.* at \*6.

<sup>46</sup> *Teamsters, Chauffeurs, Warehousemen and Helpers v. E.D. Clapp Corp.*, 551 F. Supp. 570 (N.D.N.Y. 1982).

<sup>47</sup> The court noted that in this case, “the search for the truth is hampered by the zealotry of the parties. . . . It appears that the parties have become so involved and convinced of the correctness of their positions that the court has been presented with diametrically opposed versions of the same incidents.” *Id.* at 572.

<sup>48</sup> *Id.* at 573.

to apply to future ex parte communications, and that it continually objected to any ex parte communications between the arbitrator and the company. The arbitrator eventually withdrew.

In what the court describes as a “strange twist,” soon after the arbitrator’s withdrawal, the union president and the Chair of the NY State Mediation Board ran into each other at a seminar. They met and discussed the pending arbitration between the union and the company.<sup>49</sup> No company representative was present. The next day the Chair sent a letter to the union and the company explaining that the Board was concerned about the situation and that he had appointed a panel of arbitrators for new hearings. The company was dismayed at the prospect of starting from the beginning. The President of the company then called the arbitrator to complaint and referred to their past phone conversation in which the arbitrator stated he had not withdrawn. Two months later the arbitrator issued an opinion deciding that the subjects of the dispute were not arbitrable.

The union challenged this decision under FAA §10 on the grounds that the arbitrator was guilty of misbehavior, prejudicial to the union, for failing to disclose his ex parte communications with the company. The courts response was simple. “This argument is without merit. Both parties were guilty of ex parte communications with the arbitrator as well as the Chairman of the New York State Mediation Board. The record is full of correspondences to the Chairman and the arbitrator indicating that the other party was not privy to the writing. Here, the acrimonious relationship between the parties led to a total breakdown of respect for the fairness of arbitration process.”<sup>50</sup>

*White v. Metallic Lathers Union*<sup>51</sup> - After an unsuccessful arbitration concerning employment discrimination claims, the union brought this challenge to vacate an unfavorable award based on the arbitrator’s ex parte communications with the company lawyer in an arbitration proceeding eleven months later. The union lawyer observed the arbitrator and the company lawyer briefly conversing ex parte in a hearing room, prior to the commencement of the later arbitration proceeding, and expressed his disapproval on the record. “I think in this case, given the difficulties that we seem to be having on resolution and the very highly contested nature of the proceeding, any kind of ex parte communications should be avoided in the future.”<sup>52</sup>

The management attorney responded, “[T]he arbitrator and I have had no ex parte conversations about this case . . . . The arbitrator and I merely exchanged greetings and he inquired whether I had a pleasant Passover. I did advise him that I had attended a Seder not too far from where he lives on Long Island and that was the extent of our conversation.”<sup>53</sup> The arbitrator also noted the conversation on the record. The court first found that the union had missed the FAA’s three month limitation period for filing notice of a motion to vacate an award. Nor did it find persuasive the fact that the AAA subsequently removed the arbitrator for bias, because there was no allegation of bias or inappropriate conduct during the first arbitration proceeding. “The alleged ex parte

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<sup>49</sup> *Id.* at 575.

<sup>50</sup> *Id.* at 576.

<sup>51</sup> *White v. Metallic Lathers Union and Reinforcing Iron Workers of NYC*, No. 01 Civ. 827, 2003 WL 470337 (S.D.N.Y. Feb, 24, 2003).

<sup>52</sup> *Id.* at \*2.

<sup>53</sup> *Id.*

communication between [the arbitrator] and [management council] was eleven months after the arbitrator's award and eight months after the time to serve under the statute had expired."<sup>54</sup>

### C. The Labor Arbitration Rules of the American Arbitration Association<sup>55</sup>

The preface to the rules describes the need for the parties to regulate the proceedings:

Arbitration is a tool of industrial relations. Like other tools, it has limitations as well as advantages. In the hands of an expert, it produces useful results. When abused or made to do things for which it was never intended, the outcome can be disappointing. For these reasons, all participants in the process—union officials, employers, personnel executives, attorneys, and the arbitrators themselves—have an equal stake in orderly, efficient, and constructive arbitration procedures. The AAA's Labor Arbitration Rules provide a time-tested method for efficient, fair, and economical resolution of labor-management disputes. By referring to them in a collective bargaining agreement, the parties can take advantage of these benefits.<sup>56</sup>

The specific Rule that governs ex parte communications with the arbitrator is Rule 45, Communication with Arbitrator. The Rule states that, "There shall be no communication between the parties and a neutral arbitrator other than at oral hearings, unless the parties and the arbitrator agree otherwise. Any other oral or written communication from the parties to the arbitrator shall be directed to the AAA for transmittal to the arbitrator." In other words, outside of the hearing, all communication between the parties and the arbitrator is to be conducted through the AAA. The cases below are those in which one of the parties sought to vacate an arbitration award because of a violation of Rule 45.

*Glass Workers Int'l Union v. Excelsior Foundry, Co.*<sup>57</sup> – An employee failed a drug test and failed to complete a rehabilitation program and was terminated. The union took the termination to arbitration. On May 6, 1993, the arbitrator ordered the employer to reinstate the employee if completed rehab 60 days from the "rendition of this award."<sup>58</sup> The award did not specify who was to pay for the rehab program which cost \$3000. On May 24th the union asked the arbitrator to clarify who had to pay for the program. On June 2<sup>nd</sup>, the arbitrator clarified that he did not intend for the company to pay. Shortly before the grievant completed the program, the union representative called the arbitrator to ask when the 60 days had begun to run. On July 30<sup>th</sup>, the arbitrator wrote to the parties

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<sup>54</sup> Id. at \*5.

<sup>55</sup> Labor Arbitration Rules of the American Arbitration Association, Amended and Effective May 1, 2004. The rules are available at the American Arbitration Association, <http://www.adr.org/sp.asp?id=22107> (last visited June 18, 2005)..

<sup>56</sup> Id.

<sup>57</sup> *Glass, Molders, Pottery, Plastics & Allied Workers v. Excelsior Foundry Co.*, 56 F. 3d 844 (7<sup>th</sup> Cir. 1995).

<sup>58</sup> This would mean that the grievant had to complete the rehabilitation program by the 5<sup>th</sup> of July. Id. at 846.

that the 60 day had begun to run on June 2<sup>nd</sup> the dated of his letter clarifying the award, rather than May 6<sup>th</sup> the date of the award.

The employer refused to reinstate the grievant on the basis of the union's ex parte communications with the arbitrator, arguing that the union had violated the rules of the AAA which the parties adopted to govern the arbitration. Judge Posner writing for the panel found however, that the contacts were "harmless and possibly condoned or invited," because the employer had refused to cooperate in getting the issues back before the arbitrator.<sup>59</sup> In fact one of the company representatives told the union rep to "do what you have to do when" the rep said he wanted to ask the arbitrator for clarification. The court noted that "this could have been construed by as an authorization to approach the arbitrator ex parte . . . provided that the union did not use the occasion to argue its case," which it did not.<sup>60</sup> "[E]ven if an improper, uncondoned ex parte contact occurred, this would not in itself warrant the vacating of the arbitrator's award. An ex parte contact is not an automatic ground for invalidating such an award. The contact would have to trigger one of the recognized grounds for vacation, such as partiality on the part of the arbitrator . . . and this is not argued."<sup>61</sup>

*UFCW v. Sipco, Inc.*<sup>62</sup> – This case originally involved a grievance brought by the union over subcontracted work. The arbitrator in this case had a number of personal connections to the lawyer for the subcontractor.<sup>63</sup> In addition, he engaged in private conversations, between arbitration sessions, with union officials who represented the subcontractor's employees. These conversations resulted in the arbitrator considering evidence not introduced by either of the parties to the arbitration. He then relied upon this evidence to "take everyone's interests into account" including the subcontractor in crafting his opinion.<sup>64</sup>

The court held that: "Based on the finding of facts set forth above and the following conclusions of law (which include some ultimate fact findings), the court concludes that Arbitrator Slade's decision and award of February 27, 1990, must be vacated. Numerous actions of the arbitrator constituted misconduct, whether considered as separate events or in their cumulative effect and the Unions have clearly demonstrated that the misconduct in its entirety prejudiced their rights, deprived them of a fair hearing, and influenced the outcome of the arbitration."<sup>65</sup> Specifically addressing the ex parte communications, the court held that this was improper behavior by the arbitrator and constituted misconduct. Based on the evidence the court concluded that the

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<sup>59</sup> *Id.* at 846.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *UFCW v. Sipco Inc.*, 142 L.R.R.M 2256 (S.D. Iowa 1992).

<sup>63</sup> The arbitrator failed to disclose that he had met the attorney for labor organization that represented subcontractor's employees at law school. He also failed to disclose that he had dealings with him for several years when he was the chief management negotiator for his then employer, and the attorney was his union counterpart Nor did he disclose that he had hired the attorney's former longtime personal secretary as his own, or that he and attorney were involved in civic activities together. He also did not reveal that he had provided recommendations to enable attorney to be listed on labor arbitration panels. *Id.* at 2259.

<sup>64</sup> *Id.* at 2257.

<sup>65</sup> *Id.* at 2258.

conversations improperly influenced the arbitrator on the merits, was prejudicial, and denied the unions a fair hearing.

In addition to the AAA Labor Arbitration Rules, AAA, NAA and FMCS arbitrators are bound by a Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.<sup>66</sup> The Code describes itself as a “privately developed set of standards of professional behavior for arbitrators who are subject to its provisions.” There are several provisions of the Code which arguably apply to situations involving ex parte communications with the arbitrator. They apply to all stages of the arbitration process.

Under the “General Qualifications” Section of the Code the essential qualifications of an arbitrator are described as including, “honesty, integrity, *impartiality* and general competence.”<sup>67</sup> Also included in this section is a prohibition against conduct that would “appear to compromise the arbitrator’s impartiality.”<sup>68</sup>

The Code also addresses communications between the parties.<sup>69</sup> “An arbitrator must make every reasonable effort to conform to arrangements required by an administrative agency or mutually desired by the parties regarding communications and personal relationships with the parties.”<sup>70</sup> The comments to this rule explain that:

a. Only an “arm’s-length” relationship may be acceptable to the parties in some arbitration arrangements or may be required by the rules of an administrative agency. The arbitrator should then have no contact of consequence with representatives of either party while handling a case without the other party’s presence or consent.

b. In other situations, both parties may want communications and personal relationships to be less formal. It is then appropriate for the arbitrator to respond accordingly.<sup>71</sup>

At the hearing stage, the code authorizes an arbitrator to conduct an ex parte hearing after considering “the relevant legal, contractual and other pertinent circumstances.”<sup>72</sup> This might be appropriate for example where one of the parties refuses to participate in the hearing, after sufficient notice and opportunity to appear. Post hearing, the arbitrator is prohibited from “considering a post hearing brief or submission that has not been provided to the other party.”<sup>73</sup> In addition, the arbitrator must disclose the terms of the award simultaneously to both parties.<sup>74</sup>

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<sup>66</sup> Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, <http://www.fmcs.gov/assets/files/Arbitration/mar04CodeProfessionalResponsibility.doc>, last visited June 18, 2005. The NAA expects its members to be governed in their professional conduct by the Code. The AAA and the FMCS apply the Code to arbitrators on their rosters in cases handled under their respective appointment or referral procedures. (Other arbitrators and administrative agencies are free to voluntarily adopt it).

<sup>67</sup> 1 Arbitrators Qualifications and Responsibilities to the Profession, A. General Qualifications, § 1.

<sup>68</sup> 1 Arbitrators Qualifications., C. Responsibilities to the Profession, §3.

<sup>69</sup> 2 Responsibilities to the Parties, D. Personal Relationships with the Parties §1.

<sup>70</sup> Id.

<sup>71</sup> Id., Comments a. & b.

<sup>72</sup> 5 Hearing Conduct, C. Ex Parte Hearings §§ 1-2.

<sup>73</sup> 6 Post Hearing Conduct, A. Post Hearing Briefs and Submissions §2.

<sup>74</sup> 6. Post Hearing Conduct, B. Disclosure of Terms of Award §; *IAM v. Dynamic Science, Inc.*, 322 F. Supp. 2d. (S.D. Texas 2004)(Arbitrator Review Board of the FMCS determined Arbitrator Bankston’s

*Cleveland Elec. Illuminating Co. v. Utility Workers*<sup>75</sup> - This arbitration relies upon the Code to determine whether an arbitrator's acceptance of a late post hearing brief filed by the employer was reason to vacate the award. The issue was whether the date referred to the postmark date or date of receipt. In addition, the company sent two copies of the brief directly to the arbitrator, not to the AAA as the union had properly done. The union did not protest the lateness of the brief or request that the arbitrator not consider it. After the decision was issued, the union complained that the arbitrator acted improperly in accepting the brief. The union argued that the company's mistake amounted to an ex parte communication as prohibited by 6-A-2 of the code.<sup>76</sup>

The arbitrator resolved the issue by find that "the mailing of the copies of the company's brief to directly to the arbitrator may technically have been an ex parte communication in that it was direct and without the participation of the Union and/or the Administrator. But, the ex parte aspect is of small moment because exactly the same brief would have been forwarded to the arbitrator a few days later by the AAA Administrator in the ordinary course of business." The union was directed to take its request for sanctions to the AAA Administrator or the appropriate bar association.

#### D. 5 U.S.C. § 7122 Exceptions to Arbitral Awards

Section 7122 has limited application. It applies to disputes governed by the Federal Labor Relations Authority.<sup>77</sup> Under this provision the FLRA has authority to review directly arbitral awards that are assertedly contrary to any law, rule, or regulation and can "take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations."<sup>78</sup> While there is not much case law on this specific issue, in the case below an arbitrator applies § 7122 to a request for vacatur based on ex parte communication.

*Soc. Sec. Admin. v. AFSCME*<sup>79</sup> - In this case, the union telephoned the arbitrator to request clarification of the award and engaged in a heated discussion about the need for clarification at another hearing unrelated to the first decision. The Agency

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consideration of the post-hearing brief violated FMCS Code requirements and admonished Arbitrator Bankston by placing a letter in his file).

<sup>75</sup> *Cleveland Electrical Illuminating Co. v. Utility Workers Union*, AAA# 53 300 00472 97, 2001 WL 100183 (2001)(White, Arb.).

<sup>76</sup> An arbitrator must not consider a post hearing brief or submission that has not been provided to the other party.

<sup>77</sup> 5. U.S.C § 7122, Exceptions to Arbitral Awards:

(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in [section 7121\(f\)](#) of this title). If upon review the Authority finds that the award is deficient-- (1) because it is contrary to any law, rule, or regulation; or (2) on other grounds similar to those applied by Federal courts in private sector labor-management relations."

<sup>78</sup> *Id.*; *American Federation of Government Employees, AFL-CIO v. Federal Labor Relations Authority*, 850 F.2d 782, (D.C. Cir. 1988).

<sup>79</sup> *Social Security Administration v. AFSCME*, 90 LA 247(1987).

objected to the union's ex parte communication with the arbitrator and to the fact that the union did not make a written request for clarification, as opposed to the repeated verbal exchanges with the arbitrator. The agreement between the parties stated that "if the arbitration award is unclear to either party, the award shall be returned to the arbitrator for clarification." The arbitrator hearing the challenge to the original award interpreted this language to mean either party could request clarification without the consent of the other. "Given the fact that the Contract provides specifically for a right to seek clarification without consent, and in light of the specific circumstances involved, I cannot conclude that the Union has violated any provision of the Contract or governing law by either its ex parte contact with the Arbitrator to seek clarification, its failure to seek clarification in writing, and its raising the issue at its next scheduled hearing by the same Arbitrator."<sup>80</sup>

#### E. American Arbitration Association National Rules for the Resolution of Employment Disputes

These rules, as the title implies, apply to employment arbitration as opposed to labor arbitration. The introduction to the rules explains the need for the rules:

The revised rules were developed for employers and employees who wish to use a private alternative to resolve their disputes. The rules enabled parties to have complaints heard by an impartial person of their joint selection, with expertise in the employment field. Both employers and individual employees benefit by having experts resolve their disputes without the costs and delay of litigation. The rules included procedures which ensure due process in both the mediation and arbitration of employment disputes.<sup>81</sup>

In addition to the rules the AAA also developed a Guide for Employment Arbitrators which "discusses the role of the arbitrator the rules and procedures, and the authority of the arbitrator in resolving employment disputes under the Rules."<sup>82</sup> The Guide explains and clarifies the rules while providing concrete examples to guide the arbitrator in applying the rules.

The sections of the Rules that which might be raised in by a party alleging ex parte communication includes Section 5 which directs the arbitrator to only consider new claims if the party requesting it does so, "in writing to the AAA and the parties and/or their counsel."<sup>83</sup> Similarly where the arbitrator decides that an inspection or investigation is necessary she is to inform the AAA which will so advise the parties. And "in the event that one or all of the parties is not present during the inspection or investigation, the arbitrator shall make an oral or written report to the parties and afford them an opportunity to comment."<sup>84</sup> The Guide explains that, "An on-the-scene investigation is

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<sup>80</sup> Id at 252.

<sup>81</sup> National Rules for the Resolution of Employment Disputes (Including Mediation and Arbitration Rules), Amended and effective January 1, 2004, available at American Arbitration Association, <http://www.adr.org/sp.asp?id=22075>.

<sup>82</sup> AAA Guide for Employment Arbitrators

<sup>83</sup> National Rules § 5.

<sup>84</sup> National Rules § 26.

an extension of a hearing. An arbitrator should not accept testimony from one side that the other had had not opportunity to hear and comment on. Nor may an arbitrator receive evidence of any kind outside of the hearing room without protecting the rights of both parties.”<sup>85</sup> Also Rules explicitly state that, “There shall be no ex parte communication with the arbitrator, unless the parties and the arbitrator agree to the contrary in advance of the communication.”<sup>86</sup>

The Guide makes clear that the parties are to deliver any post hearing briefs to the AAA which will then send them to the arbitrator. It cautions the arbitrator to make clear to the parties in advance the fact that unsolicited responses to briefs will not be permitted.<sup>87</sup> Requests for clarification of awards are to be made to the AAA, upon notice to the other parties, who have 10 days to respond to the request. The arbitrator has 20 days to respond after receiving the request and responses from the AAA.<sup>88</sup> Finally, the guide describes the pitfalls of post award at ex parte communication:

On occasion, a party or its representative will call an arbitrator after the award is issued, seeking an explanation of the decision. Do not talk at all. Instead, refer the party or attorney to the Association. One reason why an arbitrator should not answer these questions is that the award could still be subject to enforcement proceedings in court. A party might try to impeach the award by getting the arbitrator to divulge his or her reasoning or thought processes. Another reason is that, in rare instances, all or part of a case is remanded to the arbitrator for further consideration. You could be tainted by having had direct ex-parte communications with one party. . . [Y]ou are required to wait a reasonable period following the conclusion of the case before entering into any relationship with individuals involved in the arbitration.<sup>89</sup>

*Polin v. Kellwood*<sup>90</sup> - The parties in this case agreed in the text of their arbitration agreement to be bound by the National Rules for the Resolution of Employment Disputes as well as the FAA. The alleged ex parte communications in the case were based on two different sets of contacts. The first were between the neutral arbitrator and the company party arbitrator. The court held that as both were arbitrators there was no misconduct.<sup>91</sup> The other alleged improper contacts involved communications between the company’s attorney and its arbitrator. Concerning these contacts, the court held,

I do not find that the remaining conversations were improper just because they took place. [Plaintiff] has presented no evidence that substantive issues were discussed. The way the agreement was structured there had to be conversations between and among the participants in this arbitration, and everyone had to know this. The agreement required Kellwood [former employer] to pay for all the arbitration expenses and all

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<sup>85</sup> AAA Guide for Arbitrators at \*11.

<sup>86</sup> National Rules § 22.

<sup>87</sup> Id.

<sup>88</sup> National Rules § 35.

<sup>89</sup> AAA Guide for Arbitrators \*14.

<sup>90</sup> *Polin v. Kellwood Co.*, 103 F.Supp.2d 238 (S.D.N.Y. 2003)

<sup>91</sup> Id. at 263.

such presumably had to be arranged through them. Kellwood was also paying the expense of its own arbitrator, Kleinman, and the fee of the neutral arbitrator, Liebowitz. The other alleged ex parte conversation cited in ¶ 154 has to do with procedures, scheduling, arranging for transcripts. Nothing is shown to be improper.

*Shore v. Groom Law Group*<sup>92</sup> - Shore was a partner in the Groom Group law firm until she was asked to resign. She accused the firm of sex discrimination, retaliation and breach of contract. Her employment contract required her to arbitrate her contract claim, but she agreed to submit all her claims to arbitration. The two parties agreed to follow some, but not all of the National Rules, and to engage a three member panel to arbitrate the dispute. The panel found that firm did discriminate against her, but only in the manner of her release from the firm.<sup>93</sup>

She moved to have the decision vacated because of alleged ex parte communications between the law firm and the panel. The subject of the ex parte contacts was the amount of back pay entitled to her. She alleged that the firm submitted ex parte communications to the arbitrators concerning the amount of back pay without giving her an opportunity to respond. However the court found that the firm sent the letter to her at the same time it submitted the evidence to the panel. More damning to her argument however, was the fact that the parties waived Rule 22 concerning ex parte communications. “In the first place, the letters about which she complains plainly do not qualify as *ex parte* communications because copies were provided to appellant at the time they were sent. Moreover, even if any *ex parte* communications were made, individual communications with the arbitration panel were not prohibited in this case because the parties specifically agreed to disregard Rule 22 of the AAA Rules, which prohibits *ex parte* contacts.”<sup>94</sup>

#### F. Model Rule for the Lawyer as Third-Party Neutral<sup>95</sup>

Under the Model Rules, Rule 4.5.2 states that the “third-party neutral shall discuss confidentiality requirements with the parties at the beginning of any proceeding and obtain party consent with respect to any ex parte communication.”<sup>96</sup> The comments to the rule further explain. “In addition to advising the parties about the scope of confidentiality protections under law and applicable agreement, section (a)(1) also requires the neutral to discuss and obtain party consent regarding the nature of ex parte communications, if any, contemplated by the process. . . . In arbitration processes, ex parte communications with partisan arbitrators may be permitted under certain rules and prohibited under others.”<sup>97</sup>

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<sup>92</sup> *Shore v. Groom Law Group*, No. 00-CV-1657, 01-CV-82,01-CV1401, 2005 WL 195562 (D.C. Cir. Jan 27, 2005)(subject to revision).

<sup>93</sup> *Id.* at \*1.

<sup>94</sup> *Id.* at \*7.

<sup>95</sup> CPR-Georgetown Commission on Ethics and Standards in ADR, Model Rule for The Lawyer As Third Party Neutral, available at <http://www.cpradr.org/pdfs/CPRGeorgetown-ModelRule.pdf>.

<sup>96</sup> Model Rule 4.5.2 §(1).

<sup>97</sup> Model Rule 4.5.2 §(1), Comment 7. The footnote to the comment compares rules of arbitration under which ex parte communication between arbitrators is and is not appropriate. It is reproduced here in full.

This paper provides an overview of the rules of conduct, and cases decided under them pertaining to ex parte contact with arbitrators, focusing on non-partisan arbitrators. It does not get into the problems that arise with tri-partite boards. However there are a number of excellent articles on this topic.<sup>98</sup>

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*Compare Delta Mine Holding Company v. AFC Coal Properties Inc.*, 280 F.3d 815 (8<sup>th</sup> Cir. 2001) (AAA Commercial arbitration Rules provide that, absent agreement to the contrary, party-appointed arbitrators presumed to be non-neutral; ex parte communications of ongoing panel deliberations not grounds for vacatur) with CPR Institute for Dispute Resolution Rules for Non Administered Arbitration (Rev.2000), Rule 7.1 (“Each arbitrator shall be independent and impartial”) and 7.4 (“no party or anyone acting on its behalf shall have any ex parte communications concerning any matter of substance relating to the proceeding with any arbitrator or arbitrator candidate, except that a party may advise a candidate for appointment as its party-appointed arbitrator of the general nature of the case and discuss the candidates qualifications . . .and a party may confer with its appointed arbitrator regarding the selection of the chair of the Tribunal.”)

<sup>98</sup> See e.g., Carrie Menkel-Meadow, *Ethics in Arbitration and Related Dispute Resolution Processes: What’s Happening and What’s Not*, 56 U. MIAMI L. REV. 949 (2003); John D. Feerick, *The Code of Ethics for Arbitrators: An Outside Perspective*, 8 Ga. St. L. Rev. 907 (2002); Christopher M. Fairmman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads*, 18 OHIO ST. J. ON DISP. RES. 505 (2003); Seth H.Lieberman, *Something’s Rotten in the State of Party Appointed Arbitration: Healing ADR’s Black EYE that is “Nonneutral Neutrals”*, 5 CARDOZO J. CONFLICT RESOL. 215 (2004).