CHAPTER 8

SITUATION ETHICS AND THE ARBITRATOR'S ROLE

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Situation Ethics and the Arbitrator's Conscience

The debate over the merits of situation ethics has been raging since 1966 when Joseph Fletcher published his provocative treatise entitled *Situation Ethics: The New Morality*.[1] The thrust of Fletcher's analysis is in his vigorous attack upon orthodox theological dogmatism and rigidity. His affirmative stress is upon individual responsibility in making "moral" decisions in a variety of "situations." Thus, *responsible relativism* is an accurate short-hand phrase for the basic situation ethics approach.

I shall devote little space to situation ethics per se. One thing I do not claim to be is a theologian, although my father came close.[2] The theme of this paper is that all "good" arbitrators are "religious" about the profession of arbitration, regardless of what their personal religious beliefs or nonbeliefs may be. The arbitrator's credo is founded on one rock, the contract. The professional arbitrator has a dogmatic conviction concerning his or her func-

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[1] Philadelphia: Westminster Press, 1966, *passim*. See also, by the same author, *Moral Responsibility: Situation Ethics at Work* (Philadelphia: Westminster Press, 1967), *passim*. For some sharp "back talk" against Fletcher's thesis, see Harvey Cox, ed., *The Situation Ethics Debate* (Philadelphia: Westminster Press, 1968), *passim*, including a rejoinder by Fletcher.

[2] William R. P. Davey (1877-1940) was ready for ordination after finishing divinity school, at which point he became an agnostic. His "conscience" required him to shift goals. He proceeded to acquire a doctorate in classics. My formal religious career as a Methodist was very short. I became an agnostic at a tender age. I was pushed in this direction unwittingly by Rev. Norman Vincent Peale. Dr. Peale, in his first pastorate, appeared to find in his sermons an amazingly high correlation between godliness and the possession, or earnest pursuit of, material wealth. In today's parlance, Dr. Peale turned me off at age 15. Perhaps I misunderstood him, but this was how I became converted from WASP to WAS. Ever since then I have been simply a white Anglo-Saxon. To balance the record, I must acknowledge the impact of a Roman Catholic wife and a scientific son (astrophysics) who is a believing Catholic in the modern fashion. Finally, my mother was a Connecticut Yankee who never agreed with my early evaluation of Dr. Peale. She remained a full-fledged WASP in good standing until her death in 1972 at age 93.

tion under the contract. This conviction derives from a keen awareness that the arbitrator's authority and jurisdiction stem from the contract. Grievance-arbitration awards must be based on "the essence of the agreement." [3]

Primary research based on interviews with experienced, competent, and acceptable arbitrators supports such generalizations.[4] The majority of arbitrators consider their functions to be judicial (interpretive only) rather than of a problem-solving nature.[5] The comparatively rare species of skilled mediator-arbitrators perform their function also in the name of the contract. They mediate grievances only with the consent (even urging) of the parties. The contract is the arbitrator's only bible.

This suggests orthodoxy approaching dogmatism as to the arbitrator's role in contract administration. This view of the arbitrator's role is incompatible with a relativistic, play-it-by-ear approach to hearing and deciding cases in grievance arbitration. Arbitrators can be (and many are) disciples of situation ethics in their private lives. However, all must subscribe to the sanctity of collective agreements in their professional lives.

This is not to say that any two experienced arbitrators would predictably decide a particular case in the same way. Integrity, ability, and fairness do not always add up to the same result in identical circumstances. Even the U.S. Supreme Court is deservedly famous over the years for split decisions, many of them of the five-four variety. Notwithstanding the excessive and unsought praise bestowed on arbitrators by Mr. Justice Douglas in the 1960 trilogy cases,[6] few arbitrators regard themselves as either omniscient or above the contract, let alone above applica-

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[3] *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

[4] For a report on this research, see Harold W. Davey, "How Arbitrators Decide Cases," 27 *Arb. J.* 274 (Dec. 1972).

[5] This is so well established that it no longer requires documentation, except perhaps for such doubting Thomases as Judge Paul R. Hays of the Second Circuit. Perhaps the best known in our profession who are skilled problem-solvers (who can also be judicial upon demand) are David Cole, Ted Kheel, and Bill Simkin. Messrs. Cole, Kheel, and Simkin would doubtless agree that they are part of a skilled minority within the profession. For a full discussion of this now well-worn intramural issue, see Harold W. Davey, "The Arbitrator Views the Agreement," 12 *Lab. L.J.* 1161 (1961). For a more recent rehash, see my *Contemporary Collective Bargaining*, 3d ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1972), 169-170.

[6] *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); and *Enterprise, supra* note 3.

ble statutory or judicial strictures.[7] Reasonable arbitrators may reasonably differ, for example, on what constitutes sufficient proof of "just cause," [8] or as to whether or not "implied" limitations findings are justified on subcontracting issues in the face of contractual silence.[9] They differ also in the evaluations of the substantive merits of other contractual interpretation issues. The indisputable, unshakable fact remains that professional arbitrators perform their task as servants of the contract. They are married to the contract, just as are Company X, Union Y, and all bargaining unit employees covered thereby.

We shall not consider here substantive problem areas in grievance arbitration. I plan to cover only the arbitrator's procedural role and to highlight some shortcomings, or even sins, of arbitrators in this category. I shall then make some suggestions for improved arbitrator performance, without getting overly masochistic about the whole business. I shall not encroach intentionally on the Academy's current effort, in cooperation with the AAA and FMCS, to revise and update the 1950 jointly promulgated ethical code for arbitrators.[10] At the same time, I express the hope that this paper will contain something of value for the

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[7] A tough question remains as to how an arbitrator should decide an issue under contract language that is manifestly illegal. My view is that the arbitrator must indicate clearly that the language is contrary to law or to judicially binding precedents. Some arbitrators, however, may not even be aware that the contract provision they are construing is fatally defective. The problem has been treated in depth in earlier meetings of this Academy.

[8] See Harold W. Davey, "The Arbitrator Speaks on Discipline and Discharge Cases," 17 *Arb. J.* 97 (1962).

[9] See, *inter alia*, Saul Wallen, "How Issues of Subcontracting and Plant Removal Are Handled by Arbitrators," 19 *Ind. & Lab. Rel. Rev.* 265 (1966); and a full-scale treatment by Margaret K. Chandler, *Management Rights and Union Interests* (New York: McGraw-Hill, 1964), *passim*.

[10] The 1950 version is entitled "Code of Ethics and Procedural Standards for Labor-Management Arbitration." Like Gaul, the document is divided into three parts: (1) Code of Ethics for Arbitrators; (2) Procedural Standards for Arbitrators; and (3) Conduct and Behavior of the Parties. A consensus exists among the current officers of the AAA-FMCS-NAA triumvirate that the 1950 edition needs fundamental revision. I share this view unreservedly. This paper is beamed solely at ethical and procedural faults of arbitrators. This should not be interpreted to mean that I regard either management or union practitioners as being in a state of grace. However, the sins of practitioners are treated only inferentially. One serious practitioner shortcoming is inordinate delay in processing grievances. Another is inadequate investigation of grievances. A third is poor preparation for arbitration. Practitioner deficiencies prior to and during arbitration are critiqued extensively in two earlier papers. See Harold W. Davey, "Restructuring Grievance Arbitration Procedures: Some Modest Proposals," 54 *Iowa L. Rev.* 560 (1969); also "Arbitration as a Substitute for Other Legal Remedies," 23 *Lab. L.J.* 595 (1972), to be published in the *Proceedings* of the 25th Annual New York University Conference on Labor, May 1972 (Albany, N.Y.: Matthew Bender, forthcoming).

Simkin committee's consideration.[11] I shall not try to anticipate Ben Fischer's paper on expedited arbitration.[12] It is significant that this year's program reflects a dual emphasis on expanding the frontiers of arbitration and upon considerable self-flagellation on the part of arbitrators and practitioners alike.[13]

This latter emphasis is always in order, but never more so than today when we have a critical supply problem in the face of an expanding demand for professional neutrals in both the private and the public sectors.[14] We shall review our procedural faults,

[11] Bill Simkin heads the Academy division of the troika to overhaul the 1950 Code. I hope that the Simkin committee will endorse the remarks of Sept. 11, 1972, by Richard Mittenthal, chairman of the Academy's standing Committee on Ethics and Grievance. I find myself in full accord with Mittenthal's critique of the 1950 Code. In particular, I favor his approach of formulating a separate document concerned solely with ". . . the ethical precepts governing the conduct of neutral arbitrators." This deserves top priority. As Mittenthal cogently observes, the 1950 Code is flawed by the dispersal of ethical considerations throughout its three major parts.

[12] The title of Fischer's paper (p. 00) is "Updating Arbitration." Under this broad rubic, Mr. Fischer can paint on a broader canvas. He is not limited to analysis of expedited arbitration in basic steel under the 1971-1974 agreement. This pioneering step appears to be working well. See Ben Fischer, "Arbitration: The Steel Industry Experiment," 95 *Monthly Lab. Rev.* 7 (1972).

[13] The thrust of this paper, as well as others in the 1973 NAA program, is one of detached, candid self-criticism. The same holds true for many papers by both arbitrators and practitioners at earlier Academy meetings and in the law journals. Those of us who write about grievance arbitration do not come to bury the process because we believe in it. At the same time, few of us are guilty of self-serving praise. This is best illustrated by the spate of law review articles by arbitrators expressing embarrassment in various ways at the unsolicited encomia of praise for our alleged omniscience by Mr. Justice Douglas in the *Steelworkers* trilogy *(supra* note 6). As one example of arbitral detachment, I wish to cite a four-man symposium review of two treatises on labor arbitration as a process. The books in question are R. W. Fleming, *The Labor Arbitration Process* (Urbana: University of Illinois Press, 1965), and Paul R. Hays, *Labor Arbitration: A Dissenting View* (New Haven, Conn.: Yale University Press, 1966). The reviewers are three well-known arbitrators, Tom Christensen, Peter Seitz, and Abe Stockman, all members of the NAA. The fourth reviewer is Stephen C. Vladeck, an attorney representing labor organizations. See 19 *Stanford L. Rev.* 671 (1967) I wish to cite also as further proof of arbitral detachment an article by Russell A. Smith and Dallas L. Jones, "Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law," 63 *Mich. L. Rev.* 751 (1965), and a dispassionate analysis of the process and its shortcomings by Benjamin Aaron, "Labor Arbitration and Its Critics," 10 *Lab. L.J.* 605-610, 645 (1959).

[14] Recognizing the growing supply crisis, the Academy established in 1968 a special Committee on Public Employment Disputes Settlement, chaired currently by Robert G. Howlett. More recently, the incorporation of SPIDR (Society of Professionals in Dispute Resolution) in late 1972 testifies to the need for further professionalism of mediators, fact-finders, future terms arbitrators, and grievance arbitrators in the public sector. The Academy also authorized in 1968 a special Committee on the Development of New Arbitrators, chaired from conception by Thomas J. McDermott. The AAA is experimenting with tailored programs for expedited arbitration. Both Berkeley and UCLA in 1972 conducted special training programs for selected promising neutrals in the public sector. These and other activities testify eloquently to the fact that currently active professional neutrals

preceded by a brief comparative analysis of decision-making by arbitrators and by "situationists."

What, If Anything, Do Arbitrators and Situationists Have in Common?

Situation ethics, as expounded by its high priest, Joseph Fletcher, has only one ruling principle—love. Arbitrators have in common one overriding constraint—the contract.

Situationists stress individual decision-making in ad hoc cases. Love and reason are held to be their only guides. Favorite words are pragmatism and relativism. Arbitrators decide arbitrable issues on a case-by-case basis. They do not handle decision-making by per se policies. Arbitrators consider themselves to be humanists rather than "straight" legalists or antinomians. Nevertheless, in any case of conflict between the written contract and equitable considerations, most arbitrators agree that the contract must prevail. They cannot decide cases on the basis of love (or even reason) if the contract reads the other way.

Situationists are pragmatists. So are most arbitrators, in the sense that they are normally aware of the realities of labor relations. Arbitrators as professionals do *not* enjoy the freedom of the situationist in making such personal decisions as whether to abort or not to abort, whether to sleep out or stay by the hearth, and so on. Arbitrators are constrained pragmatists. Their degrees of freedom cannot extend beyond the contract under which they operate. An arbitrator's decision cannot be based on love, however defined, and/or upon reason, however defined. The award must be based on the case record and drawn from the essence of the agreement.

The situationist is concerned with what is good rather than what is truth. The arbitrator must grapple with both of these slippery terms, but his contractual obligation requires a search for the whole truth in any case. The truth often turns out to be "not good" in the arbitrator's value judgment schemata. Yet the arbitrator can't cop out as did Pontius Pilate some 2,000 years ago. The arbitrator cannot sneer at truth. He must stay for an

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recognize an obligation to do what they can to augment the supply of qualified persons. Such efforts by the NAA and other groups provide a convincing answer to the undocumented diatribe of Judge Hays (*supra* note 13) that most arbitrators are preoccupied with their own acceptability and nest-feathering.

answer [15]—in fact, find the answer! The arbitrator stays for an answer because his contractual duty requires him to make a final and binding decision based on the contract and the complete record.

Helping persons is defined by Fletcher as good. Hurting persons is bad. Arbitrators are human. Many are humanists in their personal lives. Yet in their professional decision-making, arbitrators often must face a crunch, calling for a decision that, in humanistic terms, might be categorized as bad. The arbitrator must stay with the contract. He must often make a forced choice between the meaning of the contract as written and the equities. In a similar circumstance, the situationist could have a ball. He could always adopt the equitable solution in the name of love and/or reason. The arbitrator has no such happy option available. When the contract and equity are in conflict in a particular case (situation), the arbitrator is obligated to decide in terms of the contract. This is not always pleasant.

To summarize, arbitrators and situationists both make decisions in ad hoc situations. The arbitrator's discretion is defined, limited, and circumscribed by the contract. Under the "new morality," the situationist can let love, as interpreted individually, decide for him.

Why Arbitrators Must Be "Straight" or "Square" in Their Work

The arbitrator's code of conduct is determined for him by contracts and peers. Deviationism and revisionism are off limits for all arbitrators. The only exceptions would be rare instances where the parties jointly request that the arbitrator play God and allow him to say, "To hell with the contract!"

No matter what course of conduct arbitrators follow in their private lives, their professional lives are ruled by a web of restraints such as:

1. An obligation to resist any temptation to add to, subtract from, or otherwise twist or bend the contract as written.

[15] The reference is to the opening lines of Sir Francis Bacon's essay, "On Truth," which goes as follows: "What is Truth? said jesting Pilate; and would not stay for an answer." See John M. Robertson, *The Philosophical Works of Francis Bacon* (Freeport, N.Y.: Books for Libraries Press, 1905), at 736. We may recall that Pilate abdicated his decision-making obligation to "the mob," leaving the latter to choose whether to crucify Jesus or Barabas.

2. An obligation to observe informal but demanding standards of procedural due process and fair play in the conduct of hearings.[16]

3. An obligation to decide cases on the record in a detached, impartial manner, ignoring such irrelevancies as the relative strength of the parties, the impact of decisions on the arbitrator's future acceptability in a particular relationship,[17] and the personalities of the practitioners.

4. An obligation to decide cases in a calm atmosphere after studying the entire record rather than in an off-the-cuff manner on Flight No. 999 returning from the scene of the hearing.

5. An obligation to stick to the arbitrable issue[s] and to avoid both dicta and preaching in their opinions.

6. An obligation to develop a full record by restrained, skilled interrogation at the hearing when the presentation by one or both parties is incomplete or inept.

7. Finally, an obligation to observe the customary contractual rules of industrial jurisprudence which require adherence to a single standard in contract administration. The rare exceptions would be negotiated temporary double standards,[18] applicable to ethnic minority recruitment and/or hiring the so-called disadvantaged.

All this helps to explain why arbitrators have to be what modernists might call square or straight in the performance of their professional task. There is no viable alternative to being

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[16] Concern for procedural due process, rights of individuals in arbitration, fair representation, and a consensus against rigged awards (sometimes euphemistically referred to as "informed" awards) can be found in abundance by a perusal of NAA Proceedings volumes over the years. Complete citation is not necessary to back up this generalization. The record is clear for examination by doubters, skeptics, and cynics.

[17] Arbitrators who condition their decisions in terms of worry over their future acceptability are not likely to have any future—at least not in arbitration. I believe that Judge Hays is profoundly and tragically in error in holding the opposite view. Experienced arbitrators are concerned about how new faces can achieve general acceptability, but they are not concerned about their own future acceptability when deciding particular cases. It is a seriocomic fact of life that in any one case the arbitrator's decision appears Solomon-like to one party and stupid or biased to the other. This is especially true when the parties are not sufficiently knowledgeable to appreciate whether their contractual case is strong or weak.

[18] See Davey, *Contemporary Collective Bargaining*, *supra* note 5, at 225-228, for specific discussion of a negotiated double standard.

straight in the ethical framework of grievance arbitration. The contract demands a square stance from the arbitrator. Love is not an acceptable basis for decision-making by arbitrators.

Within this framework, we shall now proceed to review our sins and consider how we can redeem ourselves. Most of the sins derive from a failure on our part to honor the obligations set forth above.

The "Sins" of Arbitrators

Few experienced arbitrators in heavy demand are without sin when judged against a standard of optimal performance in contract administration. Some of our sins are mortal; others are perhaps venial. In most instances, it is the degree of guilt that determines whether the offense should be designated as mortal or venial.

The overriding problem is the tendency to overcommit. The irresistible compulsion to bite off more than we can chew within reasonable time constraints is the arch enemy of effective arbitration. From overcommitment flow many of the more specific faults that belie our claims to be mature and knowledgeable neutrals.

The listing of "sins" is presented here in terms of the chronological progression of Case X from the time the arbitrator is notified of his selection. The legend (M) for mortal and (V) for venial is attached to each shortcoming set forth below:

1. Failure to contact the parties promptly after notification of selection (V).

2. Inability to offer a selection of hearing dates earlier than two or three months from selection (M). Any arbitrator in this position has an obligation to notify the principal appointment agencies, FMCS and AAA, that he or she is "hors de combat" until further notice or a future date certain, depending upon the circumstances.

3. Failure to formulate, advise, and enforce a reasonable administrative charge for untimely hearing cancellations (V). Notification as to the arbitrator's policy should accompany the hearing date confirmation letter.

4. Failure to require the parties to furnish, at a minimum, the following data at least one week prior to the hearing (V): (a)

the contract; (b) written steps on the grievance[s] prior to arbitration; (c) brief written statements of what each party intends to show (a sneaky way of getting rough prehearing briefs without scaring the parties).[19]

5. Asking the parties for a court reporter (M).[20]

6. Undue permissiveness in the actual conduct of the hearing itself (M).

7. Excessive formalism in the conduct of the hearing, including overly strict rulings as to what is relevant and admissible testimony or evidence (M).

8. Failure (or inability) to distinguish between argument (rhetoric) and hard evidence and testimony (M).

9. Inability to admit that one does not understand something (M).

10. Failure to interrogate as may be necessary to secure what one deems essential to full comprehension of the case (M).

11. Excessive interference with the rights of the parties to present their cases in their preferred fashion, subject to the strictures against permitting argument as evidence, non sequiturs, and red herrings, as noted in Nos. 6 and 8, *supra* (M).

12. Failure to encourage verbal summations rather than posthearing briefs when the direct presentations have been completed (V). This point is marked V rather than M because, in many relationships, posthearing briefs are jointly desired by the parties. If, however, the arbitrator should seek to force briefs upon the parties, the tactic deserves an M rating.

13. Excessive or unreasonable delay in performing the decision-making function, defined as three months or more after the closing of the record (M). Decisions rendered between three to six months after the hearing (or receipt of briefs) constitute, at the very least, bad practice.[21] Any decision rendered after more

[19] Filing of formal prehearing statements should eliminate, in most cases, the need for posthearing briefs. Informal prehearing statements can be brief but sufficient to give the arbitrator and the other party a specific idea as to the nature of one's direct case.

[20] Court reporters are both expensive and in short supply in many areas. Use of a court reporter is a decision for the parties to make since they are footing the bill. I regard it as unethical for an arbitrator to insist upon a transcript.

[21] When and how to draw the line between bad practice and unethical behavior requires a subjective judgment, but the line must be drawn and stated clearly in our revised Code of Ethics.

than six months is, in my judgment, unethical conduct,[22] in the absence of genuine extenuating circumstances such as serious illness or a comparable "act of God" reason. Under any circumstances, the dilatory arbitrator has a duty to keep the parties informed as to his lack of progress. Long periods of silence on the arbitrator's part are damaging both to the parties and to the process.

14. Any unilateral communication, verbal or written, with either party on a pending case from the time of the arbitrator's selection to the time he or she becomes *functus officio* after the decision has been issued (M).[23]

15. Responding unilaterally to unilateral requests for "clarification" of decisions without the other party's knowledge (M).[24]

16. Overcommitment, as noted, is the principal sin that produces some of the more specific sins listed herein.

Wrestling With Overcommitment

The tendency to overcommit is often more of a problem for the experienced, full-time arbitrator than for academicians or attorneys whose arbitration work represents only a portion of their practice.

The full-time arbitrator is prone to take on too much. This is due in part to the "Ado Annie" syndrome[25] and in part to

[22] At least one Academy member shares my view that excessive delay in rendering decisions constitutes ". . . the most serious ethical problem in the arbitration profession." Letter to the writer from John C. Shearer, Mar. 5, 1973. Dr. Shearer goes on to observe that he considers unreasonable delays in scheduling cases and rendering awards as constituting ". . . the most serious threat to the continuation of an otherwise invaluable institution." As remedial action, he recommends as follows: "It seems to me that the parties should be encouraged to complain officially to the FMCS, AAA, and NAA whenever they do not receive prompt service from an arbitrator whose selection has been most important, and often difficult, for them. I would even go so far as to encourage the NAA to consider sanctions against habitually tardy arbitrators. I would not want to see a few, albeit expert, overworked arbitrators destroy, or even damage, the institution." I agree completely with John Shearer's sentiments.

[23] Any communications between the arbitrator and the parties on a pending case, at any stage, should always be *joint* in nature if in writing or through the medium of a conference phone call, if verbal communication is essential for any reason.

[24] The 1950 Code requires that award clarification be issued only upon the request of both parties unless the contract requires otherwise. (Part II, Paragraph 5 (f), as cited in Mittenthal committee remarks, *supra* note 11, at 3.)

[25] For those who are not "afficionados" of the musical comedy genre, this syndrome can be phrased in medical terms as a congenital inability to say "No."

erroneous projections of the percentage of cancelled hearings that will be experienced. The academic has a built-in constraint against overcommitment because he or she has (or should have) a primary, full-time obligation to a particular college or university. Many academics overcommit nevertheless. When they do so, everybody suffers in varying degrees—their students, the research, their schools, and employers and unions who must wait too long for decisions. It is common knowledge that many academic arbitrators tackle too many cases each year. It is impossible for them to do justice to their multiple masters. I suspect that the students, research, and school in question are more victimized than the parties in arbitration. When the moonlighting tail wags the academic dog, problems are bound to arise. There is no need to spell them out. The shoe fits most of us at one time or another.

Most experienced arbitrators are at an age where the 80-hour week is no longer realistic in terms of fairness and performance efficiency. We cannot cut the mustard as we could in our salad days. Many of us remain unwilling to face this geriatric logic. The only answer for the overcommited moonlighters is a forced-choice cutback in either their academic chores or their arbitration caseload, or both.[26]

The full-time arbitrator has a more difficult problem—one that is not entirely of his own making. The full-timer is hit harder when he is "used" by the parties as a pawn in their games of brinkmanship or "chicken." He is hurt also through belated discovery that they don't have a good case just prior to the hearing (lack of thorough grievance investigation and/or faulty preparation for arbitration).[27]

Academicians are often grateful, to be candid, when we get a cancellation because we are already behind in our work. A cancellation gives us a breather that permits some catch-up activity if we are on the ragged edge of overcommitment. The full-time arbitrator, however, may be confronted with numerous unplanned, short-run, forced "vacations" if he is, in fact, not overcommitted. The fear of a forced vacation causes many full-time

[26] This is a matter that the Simkin committee, together with its AAA and FMCS counterparts, must meet head on, in my view.

[27] One can still find all too many situations where parties who have been around long enough to know better still are deficient in grievance administration and case preparation for arbitration.

arbitrators to accept whatever cases come their way while praying silently that a predictable percentage will be washed out. If their crystal cancellation balls become clouded, such arbitrators are in deep trouble—and so is the process to which we are all presumably dedicated.

It is a bit presumptuous for a moonlighter to prescribe for a full-timer. I shall plunge ahead, however, with some suggestions on how to avoid overcommitment. These include the following:

1. Develop a talent for turning down cases, instead of replying, "Yes, I'll be glad to hear your case four months from now." The latter response puts the parties under a pressure to which they should not be subjected, unless their time tables are out of joint.

2. Notify the designating agencies not to send out your name until further notice. Both the AAA and the FMCS have advised me that many arbitrators are apparently so busy that they do not display the elementary courtesy (and common sense) of letting the agencies know that their caseloads have reached a point where it is impossible for them to give prompt service in setting up hearings or in rendering decisions.

3. Develop and enforce a firm but reasonable and timely cancellation policy.

4. During actual hearings, at appropriate times, observe such "apple pie and flag" procedures as the following: (a) Encourage stipulation of the arbitrable issue[s] in a fashion that requires a yes-no type of award. (b) Encourage use of fact stipulations instead of witnesses wherever feasible. (c) Discourage the filing of posthearing briefs whenever possible. Never permit both verbal argument for the record *and* briefs. Practitioners do not need (and have no right to) two bites at the argument apple. (d) Encourage the parties to agree in advance to an opinion that is to be written short for their benefit. The goal would be an opinion setting forth only the issue and a full rationale supporting the award of "grievance denied" or "grievance sustained." (e) Encourage the parties to accept awards without opinions, whenever the case lends itself to such an approach. (f) Alternatively, particularly in discharge cases, encourage the parties to agree to a procedure of issuing the award only, after completing study of

the record. The understanding would be that the supporting opinion will be issued, if desired, at the earliest possible time thereafter. This approach has obvious advantages in any case involving potential financial liability.

5. Whenever decisions are delayed beyond the parties' expectations, both sides should be kept informed by joint letter of the reasons for the delay, and they should be given a probable decision date, even when extension of time is not required by the contract. Once again, this is elementary courtesy. The parties are often unwilling to bug dilatory arbitrators, but the practitioners and the grievant[s] are properly anxious over undue delay. They have a right to know.

6. When one is swamped, make an effort to induce the parties to try Arbitrator X, someone in whose ability and integrity you have confidence but who is not very busy because he or she is a new face striving to find the holy grail of acceptability.

7. If recommending Arbitrator X does not work, try what our distinguished past president, Lew Gill, would doubtless refer to as the "hearing officer ploy." This ploy involves making clear that you will perform the "grey eminence" role before the decision is issued by the fledgling arbitrator.

8. On pure contract interpretation issues, with no disagreement on facts, encourage the parties to make a written submission for decision without hearing.

Enough is enough. This home-spun wisdom is applicable to full-timers and overextended moonlighters alike. It is easy for the part-timers to slip into the morass of overcommitment whenever self-restraint is not practiced or whenever illness or unexpectedly heavy academic obligations force decision of cases to the back of the priority bus.

It is possible to avoid overcommitment. The price of doing so is eternal vigilance over oneself and one's schedule. Few arbitrators are alcoholics, but many are "workaholics" in an addictive sense. The habit may be hard for many of us to kick, but kick it we must. We have a professional obligation to do so.

Conclusion

The recurrent theme of this paper has been that grievance arbitrators cannot meet their professional obligations to the par-

ties and to the contract by adopting the "new morality" of situation ethics. The principal target has been procedural rather than substantive. The latter could well be the subject of a future paper. Attention here has been limited to the procedural obligations of arbitrators from the time of selection to the issuance of awards.

Situation ethics has no proper place in the arbitrator's professional scheme of things. The contract has to be "La Cosa Nostra" which, as all informed arbitrators know, translates in English as "our thing." Our task is easy to define but often hard to perform. We do not need to follow the Mafia maxim of "honor thy father." [28] We must follow the collective bargaining maxim of "honor the contract." We have no choice.

This paper was prepared without the benefit of the constructive and innovative ideas certain to emanate from a full day on "Arbitration Practice" by some distinguished members of this Academy. I predict with cheerful confidence that much of what is written here for Wednesday delivery will have been anticipated by sage remarks of Arbitrators X, Y, and Z on Tuesday. As a teacher, I am not alarmed at this real possibility of duplicatory statements on successive days. Any teacher worth his salt knows that judicious repetition of key points remains a respectable, useful pedagogical tool.

When one needs a phrase, the French can always be relied on to come to the rescue. I have in mind one in particular that fits what I have been saying—"Plus ça change, plus c'est la même chose." The arbitrator's role does not change in essence over time, even though the issues before him involve novel language and unprecedented factual situations.

Last year's edifying "seminar" on hair, beards, bomb, and drug cases substantiates the foregoing generalization.[29] Just cause remains just cause and must still be proved. Contract language changes can alter the arbitrator's parameters of discretion. The arbitrator's ethical approach to conduct of hearings, decision-making, and other weighty matters discussed herein has not

[28] The phrase is appropriated from the title of a recent nonfiction account of "La Famiglia Bonnano" by Pulitzer-prize author, Gay Talese, available in paperback as of 1972.

[29] See Barbara D. Dennis and Gerald G. Somers, eds., *Labor Arbitration at the Quarter-Century Mark*, Proceedings of the 25th Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1973), at 235.

changed in its true essence. Like it or not, we must play our role in a straight and square fashion. Relativism is a luxury that is not ours to enjoy.

Anyone who cannot live with such constraints is in the wrong business and should take up another vocation. The only instrument that can free us from the customary strictures on our discretion is the contract. Collective bargaining is a dynamic process, involving a constant balancing of the pressures for both change and stability.[30] Viewed in this light, it is worth stressing that recent efforts by the parties and arbitrators to improve contract administration have not changed materially the essentially judicial role of the grievance arbitrator. This is one of the rare constants in the kaleidoscope of change that is an integral part of collective bargaining. Such constancy is highly significant.

Comment—

JOHN PHILLIP LINN *

I am very pleased to have the opportunity to appear here this afternoon, together with such distinguished arbitrators as Harold Davey, Paul Prasow, and Chairperson Abe Stockman. Professor Davey, in his inimitable style, has challenged all of us with a thought-provoking paper, and I know a lively discussion will follow among you.

If I have analyzed his paper accurately, Professor Davey structured his thoughts in this way:

First, situation ethics imposes a new methodology on those who make moral decisions, attacking the efficacy of orthodox theological dogmatism and rigidity.

Second, all "good" arbitrators are "religious" about the profession of arbitration; but because their function is "judicial" (defined as interpretive only), rather than of a "problem-solving" nature, arbitrators must subscribe to the sanctity of col-

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[30] See Davey, *Contemporary Collective Bargaining, supra* note 5, *passim*. See also Paul Prasow and Edward Peters, *Arbitration and Collective Bargaining: Conflict Resolution in Labor Relations* (New York: McGraw-Hill, 1970), *passim;* and Russell A. Smith, Leroy S. Merrifield, and Donald P. Rothschild, *Collective Bargaining and Labor Arbitration* (Indianapolis: Bobbs-Merrill, 1970), *passim*.
(Linn note)

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lective agreements in their professional lives and recognize the labor contract as the arbitrator's only bible. They must accept the praise bestowed on them by Mr. Justice Douglas in the trilogy as excessive, and keep their place *under* the contract; be servants of the contract—married to the contract.

Third, arbitrators are characterized as pragmatists constrained by the contractual obligation to search for the whole truth in any case and to render a decision through the exercise of such discretion as is defined, limited, and circumscribed by the contract. When faced with the choice of deciding a case on the meaning of the contract as *written,* or on the equities, the arbitrator must stay with the contract. "Love" isn't an acceptable basis for decision-making by arbitrators. "Good" is not the goal of the arbitrator.

Finally, the contract as holy writ imposes procedural obligations on the arbitrator which, when breached, constitute "sinful conduct." The question is not whether we are with or without sin; the issue is, "How sinful are we?" To assist us in making a personal judgment in the matter, Professor Davey has attached orthodox standards for measuring sin to selected, but not uncommon, conduct. He has covered a sufficient number of acts to be assured that each one of us may share the agony of sinners. We can now assess our degree of sin and be prepared to repent, be anxious to seek redemption, and be grateful for the opportunity to engage in self-flagellation.

Basically, there are two parts to Professor Davey's paper. The first part is concerned with our fidelity to and obligations under the contract. The second deals with those procedures which constitute unprofessional conduct, in varying degrees.

My first reaction to the paper caused me to reflect not on religion or arbitration, but on English literature—specifically, on Shakespeare's play, *The Merchant of Venice,* which at the end of the 16th century constituted social commentary on the dramatic conflict of the day between law and equity in English jurisprudence. Equity has grown, in part, as a reaction to the rigidity and restrictions of English common law, and the two separate and distinct systems of jurisprudence developed in different courts. In the trial scene of his play, you will recall that Shakespeare developed the basis for a judgment at law in favor of Shylock to his pound of flesh, but then he used the devices of equity to have

mercy season justice, and Shylock was enjoined from enforcing his common-law judgment. The triumph of equity over orthodox legal notions in Shakespeare's Elizabethan poetry accurately predicted the victory for equity that was subsequently realized between the English court systems. In retrospect, I believe we would agree that concepts of equity were destined to play the more significant role in the pursuit of dispute settlement because of their adaptability to the interests of a changing society. In like fashion, situation ethics today functions in opposition to the orthodox theological dogmatism and rigidity, and I am not prepared to say that in the long run it will not prove to be more valuable in the process of making moral decisions.

Divergencies in method of decision-making, whether on moral or legal issues, reflect differences prevailing in the temper of the times. Toward the end of the 19th century, a doctrinal or dogmatic spirit dominated legal thinking, regarding judges as having a purely deductive function. Under this method of decision-making, each case was analyzed in terms of basic elements or premises well established in law, and the decision of the controversy was somewhat mechanically deduced, irrespective of the practical consequences. The reaction against this doctrinal method, at the turn of the century, was identified with the "sociological jurisprudence" of Roscoe Pound and with the "functionalism" and "legal realism" of Karl Llewellyn and others in this country. The resulting method of decision-making, frequently referred to as utilitarian in nature, forces one to inquire closely into the objectives and motives of the particular parties and, consequently, to weigh the results of any decision reached against considerations arising out of such inquiries.

Among the great judges of this century, Benjamin N. Cardozo is one who stands out in my mind at this point. (Incidentally, I believe that his book, *The Nature of the Judicial Process,* written in 1921, is worthy of the attention of all arbitrators even today.) Justice Cardozo authored the opinion in *Wood* v. *Lucy, Lady Duff-Gordon,* a case known by every student of the law, wherein the defense to an action brought on an agreement of employment was that the plaintiff had made no express promise of undertaking in the agreement, and in the absence of such promise, an essential element of contract was lacking, leaving no contract to enforce. Had the case been before a 19th century judge, steeped in the orthodox legal principles espoused in his day and trained

to determine the rights and duties of contracting parties as they clearly existed within the four corners of the contract, that judge, in all likelihood, would have rendered a much different opinion and award than did Cardozo. The latter stated: "A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed. . . . Without an implied promise, the transaction cannot have such business 'efficacy, as both parties must have intended that at all events it should have.' " Although not an express part of the agreement, the implied promise existed with the same force and effect as if it were chiseled in stone. The methodology of this legal precedent of more than 50 years should not be without significance to the arbitration profession today.

Contract interpretation by the courts has frequently resulted in determinations that the express language of an agreement required a construction quite different from the ordinary meaning attached to the words used. "Covenants," so designed by the parties, have been construed as "conditions," and vice versa, with substantially diverse legal implications. That which the parties have called "liquidated damages" has been held to constitute unenforceable "penalty," and that expressly termed a "penalty" has been found to have been intended as liquidated damages and, consequently, enforceable.

What I have tried to suggest, in addressing these remarks to the first part of Professor Davey's paper, is that within the process of contract interpretation and application, the arbitration process, no less than the judicial process, permits a choice of methodology. Fidelity to the parties' agreement and faithfulness to the contract is a problen of determining the intention of the parties regarding rights and duties, which may be implied as well as express. Contract language provides a significant indication of what the parties intended, but it is not always determinative of that intention. The written contract is seldom a whole agreement, completely, definitely, and unambiguously expressed. I am confident that each one of you is familiar with Professor Archibald Cox's article, "The Legal Nature of the Collective Bargaining Agreement," which was published in the *Michigan Law Review* in 1958 and which found the favor of the Supreme Court in the 1960 trilogy, so I will not dwell longer on those notions which frequently compel us, as decision-makers in an essentially equitable institution, to look behind and beyond the written word.

Before moving to the second part of Professor Davey's paper dealing with arbitral procedural matters, I would like to comment briefly concerning what I believe to be my obligations as an arbitrator which are in addition to those running to the parties. First, I believe I have an obligation to the appointing agency, where one is involved. Second, I have an obligation to myself in that I must be satisfied that I have fairly heard and justly decided the matter in controversy, according to the best of my ability. It is no less important that I be able to live with my decision than that the parties be able to live with it. Indeed, I must be satisfied with that decision, in many instances, much longer than must the parties, who have the power to erase its significance in practice or negotiations. Third, I believe I have an obligation to the arbitration process or, to state it broadly, to the entire collective bargaining process of which arbitration has been characterized by the Supreme Court as a central institution. Finally, I believe I have an obligation to this National Academy of Arbitrators as the recognized professional organization of those persons best able to analyze, formulate, communicate, and effectuate principles and procedures to successfully resolve grievance disputes. Each of these obligations can play a part, directly or indirectly, in the decision-making process, including the procedural aspects of arbitration.

The transition in Professor Davey's paper from notions of "fidelity to the labor agreement" to the conclusion that certain specific procedures must necessarily be followed is difficult for me to make. That is not to say that I disagree with Davey's designation of certain procedures as good or bad. I simply do not find that the merit or demerit of given procedures arises out of the contract. In most labor agreements, the parties have wisely given little or no attention to procedure in arbitration beyond that required to process a grievance to the arbitration step and to select the arbitrator. The procedure that is ultimately adopted by the arbitrator is usually the product of many considerations, as I have earlier indicated, which neither originate in nor are formed by the labor agreement.

Now, I would like to consider briefly a few of the procedural sins categorized by Professor Davey.

Let me begin with the second of the listed mortal sins, that is, the inability of an arbitrator to offer a selection of hearing dates

earlier than two to three months from the time of his selection. I agree that hearings should not be delayed two or three months, but I submit that a part of the problem involved arises out of the arbitrator's willingness to offer the parties a "selection" of hearing dates in the first place. It is common for the parties to request three hearing dates, even though they know that no more than a single day will be required for the hearing. Why? And customarily arbitrators will comply with a request for a selection of dates. Why? One mutually satisfactory date is all that is needed, and it is senseless to clog busy calendars with hearing dates that are obviously unnecessary. As a part-time arbitrator, I must schedule hearings around my commitments as a teacher in the law school. The number of days I have for hearing arbitrations is limited. A half-dozen requests for a selection of three hearing dates each pose serious problems for me in maintaining a reasonable calendar and for the parties in getting reasonably early dates. The only way to avoid giving a selection of dates in the distant future is to operate on a first-to-select is the first-served basis, and this can cause confusion. Therefore, it is my practice to give the parties a single date for the hearing, suggesting that if it is not mutually satisfactory they should contact me by telephone so that the hearing date can be expeditiously determined. Personally, I consider the use of the mails to set hearing dates as outdated as the buggy whip.

Mortal sin number 10 is failure to interrogate as may be necessary to secure what one deems essential to full comprehension of the case. I quite agree with this. What I find most surprising is that there are those who totally disagree with this premise, claiming that arbitrators should take no part in the adducement of evidence except for purposes of clarification concerning evidence offered by the parties. Let me reemphasize Professor Davey's point that our job as arbitrators is to get the truth, the whole truth, of the case and not just accept what an inept or a particularly skillful representative of the parties may want to enter in evidence. Among the obligations I have to myself is the duty to secure essential evidence to full comprehension of the case. Consequently, when the parties have concluded their interrogation of a witness, I feel completely free to ask questions of that witness which I deem necessary to get information relevant to the issues before me. Nothing is more dissatisfying to me than to return to my office with incomplete evidence on significant

points in a case. The well-worn expression, "Bad cases make bad law," is based in part on cases inadequately or incompletely presented.

Mortal sin number 13 relates to excessive or unreasonable delay in rendering the arbitration decision. I must confess that in this area I have sinned. While such confession may be good for the soul, I would not want to subject it on others, but I would like to have a show of hands of those of you who have *never* rendered an opinion later than six months. If you have never rendered an opinion later than six months, please raise your hand. Thank you. It would appear that 75 percent, perhaps more, have never rendered an opinion later than six months. Now, how many of you have never rendered an opinion later than three months? From the show of hands I estimate that 60 percent of you have never rendered an opinion later than three months. That's great! I am delighted to know that. I would not have guessed that the number of sinners in this area was that low. Incidentally, I know that there are situations in which the arbitrator must exercise discretion even as to the appropriate time for rendering an award. A late award would not necessarily be sinful in all cases, in my judgment. Nevertheless, I quite generally agree that cases should be expeditiously rendered if we are to best serve the parties and the arbitration process.

Among the suggestions made by Professor Davey to avoid overcommitment is encouragement of the parties to agree in advance to an opinion that is to be written short for their benefit, or, alternatively, encouragement of the parties to accept awards without opinions, whenever the case lends itself to such an approach. Neither of these suggestions finds favor with me. As to the first of these suggestions, there is no time to ask the parties to agree in advance concerning the length of the opinion because until I have had opportunity to reflect adequately on the case, sometime after the hearing is closed, I'm not satisfied as to what length I believe the opinion should be. As to the notion that awards be rendered without opinions, I am prepared to state, quite emphatically, that I am opposed to any such suggestion. I deeply believe the arbitration process has in large measure succeeded in serving the needs of labor and management because of the rationale developed in well-reasoned opinions in support of the arbitrator's award. Delete the opinion, and the unsupported decision will soon bring our function into doubt in the minds of the parties. Believing, as

I do, that the rationale is as important as the award, it is my personal intention to write opinions which I believe are essential to explain the case satisfactorily and permit it to stand the test of close scrutiny. I believe we shall continue to have the confidence of the parties and we shall provide the best possible system of grievance resolution if each case is able to stand on its own feet. It cannot do this if it is left to stand in its bare feet, with only its award hanging out.

Before closing, I would like to speak to the current cooperative effort of the NAA, the AAA, and the FMCS to revise the ethical or professional code for arbitrators. Professor Davey has presented many statements in his paper which will be the concern of that committee charged with drafting the new code. It is my hope that the committee's product will take the form of guides rather than rules. The flexibility of guidelines permits discretion in the arbitrator which allows a constructive type of personal and professional growth without undue concern about particular rule violations. I don't want to see us locked in by rules that prevent inventiveness in arbitration. Inventiveness with respect to arbitral procedures and remedies is as important to us today as it is for the courts who were charged by the Supreme Court in the 1957 *Lincoln Mills* decision to be inventive in fashioning a new body of federal labor law.

In our session yesterday, we discussed that section of the 1950 Code that forbids the retention of jurisdiction over the case by the arbitrator at the time he renders his opinion and award. Abe Stockman noted that when that section was made a part of the 1950 Code, it reflected the attitude of a majority of the arbitrators at that point in time. As a result of a show of hands indicating those among us who have retained jurisdiction over cases, it is clear that that section of the Code has been violated by most of the members of the Academy, presumably to allow them to do what they believe is reasonably necessary even though their conduct does violence to a code. Perhaps we have been unaware of the stated prohibition. In any event, I believe this matter confirms the contention that the establishment of guidelines rather than rigid rules should be the objective of the committee and of this Academy.

Additionally, I believe those guidelines should speak to the functions of everyone involved in the arbitration process. Profes-

sional conduct within the arbitration process implies more than a standard for arbitrators alone. The product of the joint committee should be addressed to the conduct of the appointing agencies and of the parties, and their representatives and witnesses, as well as to Academy members and nonmember arbitrators. This Academy is now a very mature institution, and it is time for it to take a position with respect to the conduct of everyone in the process. I am satisfied that what the Academy does in that regard will be accepted by the parties and by institutions such as the courts, the NLRB, and other agencies, as responsible action on the part of the professional members of the Academy to create the finest environment for arriving at just and equitable arbitration decisions.

Professor Davey, I congratulate you for presenting a stimulating and provocative paper. I appreciate the opportunity to participate in the response to it.

Comment—

PAUL PRASOW *

No one would quarrel, I am sure, with Harold's many strictures against the sins of the arbitrator (mortal, venial, or other) about overcommitment and delays in getting out awards. I also agree with his rejection of such vague abstractions as "love" and "reason"—especially love. Even if it were permissible or desirable, I doubt whether the concept "love" would have any meaningful use in contract interpretation. As Harold observed, "Love is not an acceptable basis for decision-making by arbitrators."

I do take issue, however, with Harold's tendency to juxtapose two extremes or polar opposites; that is, *situation ethics,* love, reason, justice, etc., on the one hand, and the *sanctity of the written contract,* on the other. In my opinion, arbitrators do not have to be and are not so "straight" or "square" in their professional work as Harold suggests.

It seems to me there is often a middle ground which arbitrators frequently follow—where some aspect of situation ethics (as I understand the term) can and does play a role in grievance arbitration. The arbitrator must, of course, adhere to the contract

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because it, more than any document, represents the accommodation the parties have made to each other. It represents the current balancing of their interests. But a good arbitrator—a mainliner, if you like—knows that he must not fall into the trap described so vividly by Benjamin Cardozo in his classic work, *The Growth of the Law*:

> "Judges march at times to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it, none the less, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the alter of regularity. . . . [T]hese sacrifices would have been discovered to be needless if a sounder analysis of the growth of law, a deeper and truer comprehension of its methods, had opened the priestly ears to the call of other voices. We should know, if thus informed, that magic words and incantations are as fatal to our science as they are to any other. Methods, when classified and separated, acquire their true bearing and perspective as means to an end, not as ends in themselves." [1]

Dean Pound stressed the same point in reference to avoiding a tendency toward "mechanical jurisprudence."

Contrary to Harold Davey's position, I suggest that there are times when so-called equitable and ethical considerations do play a part in decision-making in grievance arbitration.

I submit that the use of (1) the de minimis principle, and (2) the rule of avoiding harsh, absurd, or nonsensical results in contract interpretation are illustrations of situation ethics in practice. Arbitrator Harry Dworkin, for example, refused to interpret a paid-vacations provision for employees which required them to be in the "active employ" of the company on a specified date, so as to disqualify them if they were absent on such date due to illness or any other valid reason. To do so, he ruled, would produce an "absurd and untenable" result, that is, of disqualifying employees absent on such day due to illness or other valid reason.[2]

In another case, Arbitrator Gabriel Alexander ruled that the rehabilitation of an employee discharged for reporting to work under the influence of alcohol warrants reinstatement without back pay even though the rehabilitation occurred *after* the dis-

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[1] Benjamin N. Cardozo, *The Growth of the Law* (New Haven, Conn.: Yale University Press, 1924), 66.

[2] *Rockwell Spring & Axle Co.*, 23 LA 481 (1954).

charge. Gabe acknowledged that just cause for discharge ordinarily is determined by the situation at the time of discharge, but in this case he held that events subsequent to the discharge had a bearing on the propriety of the penalty.[3]

It is my experience that in appropriate cases arbitrators have developed a singular ability to discover ingenious ways to recognize and give effect to the clear and compelling equities of the case. Where the equities appear to be diametrically opposed to the contract provisions, arbitrators can become acutely sensitive to extrinsic factors which might create a latent ambiguity. Or, in order to recognize underlying equities, they may discover ambiguities in contract language which the parties themselves have not argued.

Now to the one fundamental difference I have with Harold's paper: his urging that the arbitrator *tell the parties what they should or should not do* with respect to such matters as filing posthearing briefs, engaging in verbal argument, accepting a short arbitration opinion or an award without any opinion, or agreeing to a procedure of issuing the award only. These suggestions are made to the parties to ease the burden of the overcommitted arbitrator.

While I do concur with most of the points that Harold makes, I take issue with the following four which appear under number 4 on pages 173-174 of this volume:

> "(c) Discourage the filing of posthearing briefs whenever possible. Never permit both verbal argument for the record *and* briefs. Practitioners do not need (and have no right to) two bites at the argument apple. . . . (d) Encourage the parties to agree in advance to an opinion that is to be written short for their benefit. The goal would be an opinion setting forth only the issue and a full rationale supporting the award of 'grievance denied' or 'grievance sustained.' (e) Encourage the parties to accept awards without opinions, whenever the case lends itself to such an approach. (f) Alternatively, particularly in discharge cases, encourage the parties to agree to a procedure of issuing the award only, after completing study of the record. The understanding would be that the supporting opinion will be issued, if desired, at the earliest possible time thereafter. This approach has obvious advantages in any case involving potential financial liability."

By accomplishing some of these things, the arbitrator might be

[3] *Chrysler Corp.*, 40 LA 935 (1963).

depriving himself or the parties of an important basis for understanding the case or the award. He also would be discouraging the parties from putting on their case as they might prefer. If the arbitrator upholds a discharge, I think, *in all cases,* the grievant is entitled to know the arbitrator's reasoning.

The best article I have ever read on how arbitrators decide cases was a field research study conducted by none other than the same Harold Davey. At this point I am going to cite *Davey* v. *Davey*. In his research findings on "How Arbitrators Decide Cases," the scholarly Professor Davey has this to say:

> "Generally speaking, . . . [the arbitration] process has become more sophisticated and tougher over the years. Also, *in general,* practitioners are doing a better job of preparing and presenting cases than in past years. The decision-making task is more difficult due to the factors just mentioned. Also, generally speaking, better screening is being done.
>
> "Experienced practitioners know whether their case is strong or weak from a contractual standpoint. They also recognize cases that are close enough to go either way. *In every case, however, the practitioners know more about the case than the arbitrator.* All that the latter can (or should) know is what the parties elect to place in the record and what he may elicit through his own interrogation of witnesses. An 'easy' case to a practitioner may thus appear 'tough'—even to a veteran arbitrator." [4] (Emphasis added.)

The foregoing extract, which can be confirmed by most veteran arbitrators, provides a most persuasive argument for allowing the parties to adopt reasonable procedures, unhampered by arbitral arm-twisting, however well intended. The parties should be allowed to follow whatever procedure they prefer and mutually agree upon, including both oral and written briefs. I would argue that posthearing briefs usually represent the considered and well-prepared arguments of the parties, rather than the impromptu oral exposition hastily put together at the end of an exhausting day of hearing.

A fitting epilogue to this extremely well-articulated observation of Harold's is the closing comment made by Charles Killingsworth, in his paper "Arbitration Then and Now," presented in 1972 at the Boston annual meeting of the Academy:

> "We are constrained by a contract, but that contract is validated by the mutual consent of those living under it. Within that constraint,

[4] Harold W. Davey, "How Arbitrators Decide Cases," 27 *Arb. J.* 280 (1972).

> we are free to be fair and to do justice. I suggest to you that today the average working man under a contract has a much better chance to get justice done him in his workplace than in the law courts of his community. No arbitrator would claim infallibility, but few of his mistakes are the product of carelessness or callousness. . . . *But the arbitrators must also recognize that the true architects, builders, and proprietors of this unique institution of arbitration are the uncounted thousands of labor and management representatives who bestow upon the arbitrator the privilege of serving.*" [5] (Emphasis added.)

In summary, Davey's observation is worth reiterating—that ". . . the practitioners know more about the case than the arbitrator." And I trust he would accept an inescapable conclusion that follows logically from the premise of his statement, namely, that the arbitrator should be guided by the wishes of the parties in such matters, for example, as submission of written briefs (especially in the absence of a transcript). I have found posthearing briefs nearly always helpful, and in many cases indispensable. While it is true that the parties may often prolong a hearing (from the arbitrator's point of view), their judgment in this area, because they know more about the case than the arbitrator, is usually better than the arbitrator's. To override their judgment can be a perilous undertaking.

[5] Charles C. Killingsworth, "Arbitration Then and Now," in *Labor Arbitration at the Quarter-Century Mark,* Proceedings of the 25th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1973), 27.