CHAPTER 6

SHOULD ARBITRATORS BE LICENSED OR "PROFESSIONALIZED"?

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One of the many evils of after-dinner speechmaking is that the introduction is often better than the main event. It would be impossible, after Rolf's gracious introduction, for me to say anything that would not sound helplessly anticlimactic. But that is the least of my problems. For the past two days I have listened to a series of outstanding presentations anticipating just about everything I had planned to say. Accordingly, my remarks this evening will amount to no more than a minor variation on the dominant theme of this annual meeting.

I have chosen to comment rather generally on some current proposals for the so-called "professionalization" or licensing of arbitrators. But let me say a few prefatory words of assurance. There has been a certain amount of talk during this meeting about the definition and use of research, and it may have struck you, as it did me, that the more the speakers relied upon research, however defined, the longer they talked. You need have no worries on that score this evening. My model is the legendary medieval warrior, Chevalier Bayard, the knight "sans peur et sans reproche." I am tackling my subject "sans peur et sans recherche." Whatever my address lacks in profundity, I shall try to make up for in brevity.

The terms "profession" and "professional" convey a variety of meanings, but traditionally a profession has embraced a specific discipline, such as law or medicine. Similarly, the term "professional" (used as a noun) has been applied in its traditional sense to one who has evidenced a mastery of a particular discipline by successfully completing a prescribed course of study, passing an examination administered by the state, and receiving a license to

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practice. Judged by these standards, arbitration is not a profession; it may more appropriately be described, perhaps, as a craft or calling or, for many of us, an avocation.

Members of the Academy, as well as many other arbitrators, however, have not considered that because arbitration fails to meet the traditional definition of a profession, its practitioners should be under less stringent standards of behavior than those prescribed by the legal or medical professions. In this respect our new Code of Professional Responsibility is an accurate and correct description of the principles of conduct by which we have agreed to govern ourselves.

Increasingly in recent years, however, questions have been raised about the suitability of permitting nonlawyers to serve as arbitrators. This questioning comes largely from the legal profession itself, and at least some of it can be attributed to the natural propensity of any organization that can effectively enforce a closed shop to broaden the area under its control. Nevertheless, it is interesting and, to me, disturbing that the results of a recent informal and unofficial poll of the 400 members of the Committee on Labor Arbitration and the Law of Collective Bargaining Agreements of the American Bar Association's Section of Labor Relations Law, to which there was about a 45-percent response, revealed that management attorneys strongly favored requiring that arbitrators be admitted to the practice of law, or at least have a law degree from an accredited law school, as a condition of serving in that capacity, while labor attorneys were about equally divided on the question. It has been suggested that the poll reflected not so much the views of the respondents as those of their clients; if that is true, then the results cannot be dismissed as simply an indication of a desire on the part of lawyers to engross the occupational field of arbitration.

Questions of the same kind have also been raised by others who have no interest in widening the sphere of control of the organized bar. As we have all been reminded once again, there is *no* solid consensus among arbitrators that they either should or should not take into account the external law in interpreting and applying collective bargaining agreements. As Jim Jones suggested yesterday, however, nonlawyer arbitrators who do consider external law in arriving at their judgments may find their credibility, and acceptability, with the parties somewhat diminished. Nor is that all. Arbitrators who expressly decline to consider external substantive law may, nevertheless, find themselves forced to

deal with procedural questions that cannot be separated from statutory or constitutional commands. Those who are not legally qualified may themselves feel at a disadvantage in dealing with those problems; and even if they do not, the parties may conclude, not necessarily correctly, that their respective interests are more likely to be protected if the arbitrator is also a lawyer.

There is a further concern about the alleged incompetence of some arbitrators (all outside the Academy, of course), which has led to one suggestion, among others, that arbitrators should be licensed in order to assure the parties of an acceptable minimum of skill.

Is there, then, validity in the proposition that arbitrators must be qualified lawyers, or that they must have earned a law degree from an accredited law school? Or, alternatively, does it make sense to require that arbitrators be licensed by the states in which they practice? My answer to both propositions is, no.

Let us consider first the matter of legal qualification. There are several weighty and, to me, convincing arguments against that proposed requirement. Most of us have learned from personal experience that neither a law degree nor a license to practice law is a guarantee of competence as an arbitrator, or even as an advocate in an arbitration case. The reason is obvious: A person may go through college and law school, and then pass the bar examination, without ever having had a course in, or been examined about, any matter falling within the purview of industrial relations, labor law generally, or arbitration in particular. Neither the law degree nor the license, by itself, assures even familiarity with collective bargaining and grievance settlement, to say nothing of competence in that area. Of equal or greater importance, it is no guarantee of informed perception and balanced judgment, essential elements in the qualified arbitrator's make-up.

Another compelling objection is that the basic subject matter of arbitration, especially in the private sector, is not external, public law, but internal, private law, a body of rules and practices that has gradually developed in a particular plant, enterprise, or industry. Knowledge of this system of rules and practices, which Sumner Slichter called "industrial jurisprudence," is not derived from the study of law; indeed, only a relatively small part of it can be learned in a classroom or from books. The essence of it can be grasped only through direct observation and participation; it is not so much learned as absorbed through a process of intellectual osmosis.

The final, and perhaps most persuasive, objection to excluding persons other than members of the bar or holders of law degrees from the practice of arbitration is that such a rule would deprive the parties of the services of a number of extraordinarily able persons. I shall not mention present nonlawyer members of the Academy as examples, for fear of offending some whom I might inadvertently omit; but I think it suffices to recall the names of just a few of the giants of our craft who are no longer with us—Leiserson, Millis, Selekman, Slichter, Taylor, Wallen, Witte—to make the point. And, in this connection, let us not forget our late president, David Miller, who devoted years to the task of raising and protecting the Academy's standards of excellence, which he so impressively exemplified in his own work. Without the special contributions of these nonlawyers and of many others, living and dead, labor arbitration would not have achieved the high degree of acceptability to employers and unions, which is the reason why it today plays such a key role in our national labor policy.

The proposal to license arbitrators also seems to me to lack merit, chiefly because a license would be no guarantee of even minimal competence. The nature of the arbitrator's function is such that an examination of his or her capability would necessarily focus almost entirely on relatively minor procedural questions. Whether or not one is inclined to take external law into account in rendering an award, the chief business of arbitration, at least in the private sector, remains the interpretation and application of collective bargaining agreements with respect to matters not covered by external law. Therefore, a passing grade in an examination on external law would not necessarily demonstrate competence in dealing with the bulk of arbitration work.

Moreover, we have a much more reliable gauge of arbitral expertise: the judgment of the parties themselves. And what is more important still, the judgment of the parties is the best indication of the arbitrator's acceptability, which is not the same thing as technical competence and which is another essential ingredient in the arbitration process.

I do not think it is necessary to flay this dead horse any longer; so I shall say nothing about the argument that requiring arbitrators to be licensed in every state in which they work, with the certainty that such states as California, New York, and Florida, to name a few, would not grant reciprocity to licensees in other jurisdictions, would be an unconstitutional burden on interstate

commerce, as well as a serious blow to the financial health of the airline industry.

Some of you are undoubtedly thinking that I have been wasting my time and yours by jousting against phantoms. Perhaps you are right, although each year witnesses a new attempt in one state legislature or another to pass a law requiring all arbitrators to be lawyers. My real purpose in raising this issue, however, is to get at the reasons why that idea can be seriously considered by a reasonably objective person with no personal stake in the result. Why have we arbitrators become the targets of the worthless proposals to which I adverted? To my brothers and sisters in the Academy I say: The fault, dear colleagues, is not in our stars, but in ourselves. Perhaps too many of us not only have come to accept as true Justice Douglas's excessive praise of our unique expertise, but we have also made the fatal mistake of assuming that this special competence extends to issues involving the impact of external law on the collective bargaining agreement. And because some of those external laws—of which Title VII of the Civil Rights Act of 1964, the Occupational Safety and Health Act of 1970, and the Employee Retirement Income Security Act of 1974 are among the most recent examples—are the cutting edges of new social policies still in what Mr. Justice Frankfurter called "the process of litigating elucidation," arbitrators—the lawyers among them included—interpret and apply such laws at their peril.

To be sure, the most serious peril is not that laws will be passed requiring either that arbitrators be separately licensed or that they be lawyers or holders of law degrees. The graver danger is that the courts and administrative agencies such as the NLRB will adopt broader standards of review, not only disregarding arbitration awards purporting to deal with issues over which the courts or other adjudicative bodies have primary jurisdiction (which seems to me reasonable enough), but also applying stricter scrutiny to awards based solely on the interpretation and application of collective agreements, which would signal a return to the bad old days when courts, under the guise of reviewing arbitration awards, substituted their judgment for that of the arbitrators.

As you see, I too am preaching the gospel of Meltzer and Feller and am urging arbitrators to stick to their last and to confine themselves largely to the terms of the collective agreement, leaving the issues raised by external law to be resolved in other for-

ums. I say "largely" because there are always some exceptions to every rule. In this area, the largest exception may be grievance arbitration in the public sector; but the reasons for that observation, touched upon briefly this morning by Theodore Sachs, are too complicated to elucidate on this occasion.

I might say in passing that I thought I had always been consistent in my acceptance of the Meltzer-Feller gospel. But Feller's research assistant dug up an early decision of mine that revealed a heretical departure from that teaching, which David duly reported in his paper presented to the American Arbitration Association's Wingspread Conference. Confronted by this humiliating but indisputable evidence, I can only follow the example set by Mr. Justice Stewart, when he explained why, having voted with the majority in *Sinclair Refining Co.* v. *Atkinson*, he also voted with the majority in the *Boys Markets* case, which overruled *Sinclair*. Quoting Mr. Justice Frankfurter, Stewart declared, "Wisdom too often never comes, and so one ought not to reject it merely because it comes late."

I concede that closer judicial scrutiny of the procedural aspects of arbitration will compel consideration of the desirability of modifying some fairly common practices presently in use, especially in cases in which the grievant and his or her bargaining representative do not see eye to eye, or in which the union is supporting a claim of one individual or group within the bargaining unit which, if upheld, would adversely affect the rights or interests of another individual or group within the same unit. But the requirements of due process are nothing more than rules of fair play, something about which the majority of arbitrators—lawyers and nonlawyers alike—have always been keenly sensitive. And let us remember that the more controversial practices affecting procedural due process are established by the parties themselves. If changes are needed, it is they who must bring them about; insisting that the arbitrator be licensed or be a lawyer is neither a necessary nor a sufficient means to accomplish that result.

In sum, I see no virtue in grouping arbitrators with lawyers, physicians, veterinarians, chiropractors, barbers, cosmetologists, seeing-eye dog trainers, funeral directors and embalmers, structural pest-control operators, and members of other licensed professions or occupations. I have referred to the practice of arbitration as a calling or an avocation, also a craft. Technical skill is an important part of the craft, but there is another element that sometimes rises to the level of art. It consists, for permanent

umpires, of mastering even the most minute and complex details of an enterprise or industry, or to use a phrase of George Taylor's, "getting into its bloodstream," and of building a sense of rapport and confidence between the umpire and the parties, based in part on their belief that he or she understands their special kinds of problems. For all of us, whether permanent umpires or ad hoc arbitrators, it consists of a knowledge of and sensitivity to the institutional framework within which a given dispute occurs, and the ability to interpret and apply the ubiquitously ambiguous terms of collective bargaining agreements against the background of the web of rules and practices that constitutes the "industrial jurisprudence" of an enterprise or industry. This is an art that no discipline teaches and that no license can guarantee; it is one that deserves our utmost respect and our constant effort to achieve; it is, in the last analysis, what the practice of arbitration is all about.

This morning we heard from David Feller, who started out by giving us the bad news about the imminent demise of the Golden Age of Arbitration. Doubtless, many in the audience were hoping for some good news to follow; but Feller's extended discourse and brilliant, Spenglerian analysis led to the conclusion that there is no good news. Instead, he told us that arbitration will, inevitably, turn in one of three almost equally undesirable directions.

Like Charles Morris, the chairman of this morning's session, however, I am more optimistic. To the question, "Can arbitrators find true happiness in the coming age forecast by Feller?" my reply is, yes—if we can learn to be content with the modest satisfactions of thinking small, of cultivating our own particular garden. A moment ago I spoke of the importance of developing the artistic, as distinguished from the technical, aspects of arbitration. Most of us will never fully achieve that particular goal, but to reach beyond one's grasp is a mark of nobility, not of failure; indeed, as Professor Thomas Reed Powell once remarked, we have the poet's authority in favor of the differential.

Here endeth my discourse. To those whose attention may have wandered, I offer the following compact summary of what has gone before:

Arbitration is not a profession:
It's an art—and a cherished possession.
So let's remain students
Of shop jurisprudence,
And let law be the lawyers' obsession.