CHAPTER 1

THE PRESIDENTIAL ADDRESS— AN EXERCISE IN DIALECTIC: SHOULD ARBITRATION BEHAVE AS DOES LITIGATION?

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You will not get novelty and innovation here today, at least not on substantive matters. The wine will not be new. Maybe the bottles will be.

It is essential that anyone bold enough to speak to this distinguished audience have at least sufficient mother wit not to try to regale you with dull stories about his cases. He must be careful also not to go to the other extreme and lay out airy new theories about arbitration unless he has air-tight arguments to support them. This room right now probably contains more knowledge about arbitration, both theoretical and practical, than will be gathered again in one place in this country or in Canada this year. Thus, the speaker should proceed with full regard for the plight of the man who was caught up in and lived through the catastrophic Johnstown Flood of 1889. For the rest of his life he enjoyed holding forth about the enormity of the disaster. The stories naturally expanded somewhat as the years passed. The man died, appeared at Heaven's gates, and St. Peter greeted him and asked what he would like to do in Heaven. The man thought a bit and explained that he had been through the great Johnstown Flood and that he enjoyed telling about his narrow escapes and heroic deeds, and that he would like to continue doing that in Heaven. St. Peter said that would be all right, but that it would be a good idea for him to remember that *Noah* would be in the audience.

This is one of my problems. There are a lot of Noahs in this audience.

I come now to the substance of some thoughts I would like to

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go over with you today. I should explain first what prompted me to discuss the subject I have chosen rather than one or more of the several hundred other aspects of arbitration. Some years ago and then again rather recently I had occasion to look at the so-called "services," subscribed to, I think, exclusively by managements, that gather performance data about arbitrators, collect citations of opinions, comments from management persons who have had cases with given arbitrators, and purport to give ratings, recommendations, batting averages, and preferences and predilections of arbitrators. By the way, those reports say that they accept as objective the comments of management representatives. That acceptance seems to me more an act of faith than of reason. The services I have seen were in the East, and in my experience, that is no accident. I have developed a theory, solely from my own observations, that there is a tilt to this country—the United States at least (I will not indict our Canadian members and guests in this)—that the farther east you go, the stronger and maybe nastier the litigious instinct grows. Our hosts here, Californians, have had to put up far too long with the base canard that someone tilted the country by raising it in the East so that everyone who was at all loose or flaky rolled into California. My litigiousness theory assumes a tilt in the other direction, in which those with a contentious bent rolled to the East, probably to New York. I say this in jest, but if there be anything to it, the eastern "services" are well placed near the demand.

In any event, as I read the comments about arbitrators, many of whom I knew, I noticed that it was said time and again, of this arbitrator or that, that he did or did not allow irrelevant material into the record, did or did not give weight to pertinent citations, did or did not substitute his judgment for that of management, did or did not recognize management's reserved rights doctrine, was or was not a strict constructionist, did or did not give more weight to arbitration awards in other bargaining relationships than to evidence and arguments as to the interpretive issue on the language of this agreement, wrote an opinion and award that did or did not settle the issues completely, was or was not *overly* legalistic regarding the rules of evidence—notice that the suggestion is that the fault lies not just in being legalistic, but in being overly legalistic—and that his awards have or have not been set aside by courts. These are only examples. Much more was said as well.

I can see that a wrong answer on some of those factors might frighten a given management representative thinking of selecting or striking an arbitrator, but I cannot see that very much in the reports would enlighten anyone. But I do not speak to that now. I do not advise companies to subscribe or not to subscribe to those services or to be impressed or not by the comments. Those decisions are for them.

My purpose in bringing up those services here today was that, as I read such comments as those quoted above and other similar ones, I began to wonder what assumptions about the nature, function, and purposes of the arbitration process were held by the minds that wrote those comments and why it was that they probably were so different from my own.

It seems to me that the best, or at least one, way to expose and examine the differences in those assumptions (mine and the services') would be to lay out the way in which I view arbitration and then the assumptions about it that I think necessarily are revealed by the comments in the management services referred to above. I still start from the old battleground of the two diametrically opposed views of arbitration. I think the way you prepare for an arbitration hearing, the way you behave during the hearing, the poise or lack of it with which you accept an arbitration opinion and award, and the standards by which you measure whether arbitration is succeeding or failing its mission are seriously influenced, if not totally governed, by which of the two views of arbitration you have adopted.

In order to set up the background for these suggestions, I should make clear my basic assumptions, which probably color all other thoughts about arbitration. I think it so sensible as to be practically beyond reasonable argument to the contrary that arbitration is more a continuation of collective bargaining than it is just a substitute for litigation.

(A voice from the audience):** Just a moment! I never could stand that nonsense! That is the most fatuous of many such remarks I have heard at Academy meetings. I must protest and will explode if I don't do so right now.

McDermott: This is what I believe is described as highly irregular. I think I need the help of the Arrangements Committee

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**Thomas T. Roberts, Member, National Academy of Arbitrators, Los Angeles, Calif. Grateful acknowledgement of my indebtedness is due to Mr. Roberts for his kindness in taking part in this dialogue.

Chairman to restore order here. Good Lord, he *is* the Arrangements Committee Chairman. But, if I can't defend my views in the cozy surroundings of an Academy meeting, I probably would not escape alive if I were to advocate them at a meeting of corporate industrial relations officials or a union staff conference. So, Tom, stay on your feet and let's have it at each other.

Roberts: I intend to, and I warn you to be on your guard, for I will not tolerate any more of your loose thinking.

McDermott: Fair enough. I am forewarned.

We must settle first whether we can agree on some fundamental principles.

I don't suppose you would disagree that a system for rational resolution of labor-management disputes is to be preferred to strikes, lockouts, and other economic muscle.

Roberts: I'm an arbitrator. Of course, I agree.

McDermott: Would you agree also that an arbitration system, tailored to the parties' sense of their own needs and comfort is superior to the public system of litigation, at least for those collective bargaining relationships that are not already dead or dying?

Roberts: Yes, but your original outrageous statement was what got me up here, and now you've turned to pontificating. Will you get on with it?

McDermott: I will try. Another significant principle is that morale of employees and of front-line and middle-level supervision is essential to successful operation of an industrial enterprise and, in turn, a third is that a successful arbitration system is very significant, if not downright essential, surely for good employee morale and probably for good supervisory morale as well.

Roberts: Well, if you snookered me up here just to help you shoot fish in a barrel, then I'm going back to my seat, whence I may hiss at appropriate points, of which I think there are likely to be many.

McDermott: You are not a very patient fellow, are you?

Of course that was like shooting fish in a barrel, but we must begin someplace, and the beginning seemed like a good place. Moreover, I think that much of our trouble as arbitrators is caused not by those parties who don't know or have forgotten the finer points, but by those who ignore the basics. Basics can stand repeating.

Bear with me for a few more assumptions in which all who

engage in arbitration indulge. Two that are universally indulged in and that help remove arbitration from the realm of coin-flipping and witchcraft are that there really are rational answers to these industrial relations problems and that, given any kind of decent exposition at the arbitration hearing, we are smart enough to discern what the answers are under the facts and the terms of the labor agreement. And a third is that our entire loyalty is to the record so that objectivity is assured, to the extent that any human mind ever can know itself well enough to guarantee objectivity, by not caring a hoot about whether the company or the union should prevail in the end.

To return, finally, to what apparently got you so steamed up in the first place, I still am persuaded by George Taylor that arbitration is more accurately described as a continuation of collective bargaining during the term of the agreement than I am by Noble Braden that it is a mere substitute for separate occasions of litigation. Those phrases may overlap in a given setting. They are just shorthand expressions for more complex thought, but they will do for present purposes.

Roberts: You said that before. Merely repeating the conclusion does not establish your point. I need the evidence and reasoning that make you think that that ridiculous conclusion is valid.

McDermott: I can give you the evidence. It stems largely from experience about the fallibility of human beings. In a few words, it is that human minds are not sufficiently intelligent and foresighted to anticipate and provide for all or even many of the labor-management problems that will and do arise during the life of the two-year or three-year labor agreement and that English or any other language (not nearly as exact as that of mathematics) is not sufficiently precise to set out without some ambiguity the parties' agreed-upon solutions to all those problems even if they could have anticipated them.

Roberts: Isn't that a rather unflattering view of the parties' mentality?

McDermott: No. I don't suggest that arbitrators are any smarter. That comment applies to all humans, not just the parties. I am not saying that only the negotiators suffer from that inability. All of us do—laymen, lawyers, judges, and arbitrators, too.

But if that view be accurate, then the parties could not assert with any sense of reality that the labor agreement they nego-

tiated contains their *expressed, joint* solution to every problem that may arise during its life.

Roberts: But what about the concept of "meeting of the minds"? Somebody on one side or the other in my hearings is always telling me about a "meeting of the minds." Don't they do that in your hearings?

McDermott: Of course they do. But most of the time the speaker has not thought his way through that thicket.

Roberts: And the reason must be, if you are right, that the only thing the negotiators' minds met on was the form of words they would use to express their separate, individual intentions. Their minds did not meet on a joint and specific solution of every problem. They could not have. Some problems could not have been foreseen, must less jointly provided for in the agreement.

But the phrase must mean something!

McDermott: It seems to me the most it could mean is that at about 3:00 a.m., in a foul hotel room, red-eyed and beat to their socks, sick and tired of each other and even of the other persons on their own team, and with the employees about to go out at 7:00 a.m., the negotiators finally decided, almost in desperation, that some form of words would just have to do. The union negotiator agreed to a form of expression with reluctance, but he still could say to himself as he staggered back to his room for some sleep that, although he would have liked the stronger expression he had been advocating, he was satisfied that under the language they had agreed upon he still would be free to argue with some force to an arbitrator that the union position was the better supported. In similar fashion, the management negotiator could feel some satisfaction in reasoning to himself that, although he would rather have had somewhat weaker language on the point, he still could argue not unreasonably to an arbitrator that the company position was the one more firmly grounded in the agreement language that they had agreed upon.

Roberts: I just awoke to the feeling that you're hypnotizing me with platitudes. What practical consequences does any of this have?

McDermott: I think it has some, if only the principle that clear expression and clear thought ordinarily go hand in hand.

One practical consequence of looking at arbitration more as a continuation of collective bargaining than as a substitute for

litigation is the development of a rather healthy skepticism about the sometimes sanctimonious reverence exhibited toward clauses in collective bargaining agreements prohibiting the arbitrator from "adding or subtracting" to or from the express terms of the agreement.

Roberts: Now you really have gone round the bend. Your elevator does not go all the way to the top or you don't have both oars in the water. Are you seriously suggesting that the arbitrator should ignore the terms of the agreement?

McDermott: There you go again, reading my words for the most they *might* mean rather than the least they *must* mean.

All that I intend by urging that we be less than reverent about clauses prohibiting "adding or subtracting" is that those party spokesmen who are given to heavy reliance on them ordinarily appear to view arbitration merely as an exercise in semantics. And he is no friend of arbitration who would treat it as no more than that. It may include that, but it involves much more that is considerably more significant. For instance, decision of the early contracting-out cases in nearly all industries and many of the grievances involving deep-seated differences in incentive administration in some industries clearly required more than a semantical approach. It required that the arbitrator poke and probe and knead the record, and the parties, too, if necessary, in order to get the best and most confident impression he could of how the language on which their minds did meet—the language of their agreement—would be understood in the context in which it was negotiated by an objective, informed, and independent person. And when all the dust had settled after those decisions, something has been "added" to those agreements, but without changing anything substantive.

Roberts: But the lawyers' cry of outrage will be heard throughout the land!

McDermott: Probably. But the cry should be expected only from those lawyers who think discerning the meaning of a consensual document and applying it is the same as a carpenter's measuring a plank. It is not—or, at least, it rarely is. Only the naive lawyer should be surprised at what I have said, for the same process and result occur every time a court interprets and applies a contract. The cry ordinarily is to have arbitrators act as judges supposedly would. When they do, the lawyer should not complain. Indeed, even the routine discipline grievance under a typical "just cause" standard in a collective bargaining

agreement requires more than mere semantics. It requires that the arbitrator pour the appropriate content into "just cause," much as a judge must do in filling out the specific contours of a "due process" clause, over the years and case by case.

My point here is that a wooden and mechanical approach to arbitration is more likely to be taken by those who think arbitration is just a substitute for a judicial proceeding than it is by those who, I think, view it more realistically as a continuation of the collective bargaining process.

An ironic twist arises when it is so often seen that a representative (often not a lawyer, but an overly impressed layman) urging the strictly judicial approach to arbitration shows that he does not know what the judicial approach in a given setting would be. Indeed, lawyers now have seen that pressure for settlement in some pretrial conferences can be almost brutal, that formal pleadings may be amended with considerable freedom, and that it is not at all unusual for a judge to seek recommended findings of fact and conclusions of law from the parties or, indeed, a party. Thus, the judicial approach, too, sometimes acts in ways that the advocates of a "judicial approach" to arbitration apparently are not aware of and surely would not approve. Syl Garrett pointed this out in greater detail at the Annual Meeting in Santa Monica in 1961.

Roberts: I suppose if I wait long enough, you will at least try to tie all this in with the services that advise about arbitrators.

McDermott: I will try right now. It seems clear to me that the comments from the services that I read earlier, including references to irrelevant evidence, pertinent citations, substituting the arbitrator's judgment for management's, management's reserved rights doctrine, strict constructionism, and having awards set aside by courts pretty clearly disclose that the people who rate arbitrators by those standards see arbitrators largely as trial judges and would give them passing or failing grades depending upon whether they acted more or less as judges. That is where we part.

Roberts: Wait a moment! Don't you think the parties are entitled to try to find out about and understand a given arbitrator in advance of picking him or her before the arbitration hearing?

McDermott: Of course they are. I simply do not see what degree of "understanding" they get from the material they receive. Have you ever seen the "hot dope" on you?

Roberts: No.

McDermott: Well, years ago I saw a report about me and about several other arbitrators, too, and the material was so general that I do not believe it could have done anyone any good. It might have frightened some parties. Although general and very broad brush, some of the things said were very rough. I know the arbitrators. They were seasoned and top-flight professionals, and many of the remarks about them were totally unjustified.

Roberts: How did you make out?

McDermott: I came out in pretty good shape at first. The report said that McDermott runs a decent hearing and sticks reasonably close to the agreement, but then, after that good start, things just went to hell. The report concluded by saying that he sometimes was slow and that it would not be a good idea to hold your breath until you got an opinion and award out of him.

I wonder whether a party's desire for assessments of arbitrators by others who will not be engaging them stems from the thought that there were some occult rituals that could be conducted before the hearing when picking the arbitrator that would make all the rest fall nicely into place without much further effort and without regard to whether the case was strong or weak on the merits. I wonder that they appear to put more stress on the identity of the arbitrator and less on their own efforts, rather than acting as if the result in arbitration would depend more on the quality of their case and their own efforts than on the happenstance of the identity of the arbitrator.

Roberts: I would not think you would want to ride that horse too far. You seem to be suggesting that the identity of the arbitrator is irrelevant, as if arbitrators were fungible.

McDermott: By no means! No arbitrator with a healthy assessment of his own worth would suggest that. The identity of the arbitrator can make a great difference in the quality of the product, but it cannot be as conclusive on winning as opposed to losing as some parties appear to think. If the parties show the arbitrator that they want a stiff and formal proceeding, they should be able to get that from the arbitrator, no matter who he or she is, but if they have a very able arbitrator, they should get that kind of proceeding at a higher level of professional performance than with a less able arbitrator. My concern is that the parties who rely on those reports seem to think that there are

categories of grievances which they simply could not lose, no matter how weak their case on the merits, if they could just get the "right" arbitrator. I deny that or, at least, I hope that is not true.

Roberts: Isn't it about time that you give me some concrete examples of the difference your two theories would create?

McDermott: Well, the hearing stage is the one where it is easiest to see the difference between the attitudes and approaches of a representative who leans toward the judicial or quasi-judicial theory of arbitration from one who tends to accept the idea of arbitration as a continuance of collective bargaining. It shows up even before that, of course, in the degree of open-handedness or tight-fistedness with which they reveal or conceal the facts they rely upon and the theory of their case under the agreement. How often do we hear, halfway through the hearing, the lament that this or that line of evidence or argument is new and never has been disclosed before? Sometimes that may have occurred because of careless conduct of the grievance proceedings. But it seems equally obvious that it arises more often because a party looks upon arbitration as a game (although a very serious one) to be won by a game plan, part of which is that as much of the case as possible be concealed until it unfolds with all its surprising effect at the hearing, by which time the hope is that it is too late for the other party to do the digging necessary to meet it. The delusion that arbitration is a substitute for litigation feeds the gamesmanship approach, with all its ploys.

Roberts: I've let you go on too long. Are you saying that each party should disclose to the opponent, the enemy, all of the case before the hearing?

McDermott: Pretty nearly all. How else assess realistically the necessity or advisability of settlement? But, before we deal with that, look back at your name-calling. The other party is the company or the union. It is not an "opponent" and surely not an "enemy." Thinking of the other party in those militaristic pejoratives helps to create and sustain the paranoid delusion that arbitration is a game or a battle in which the other party is to be hindered by every formal petition, motion, and objection carried over from the law.

Roberts: Paranoid delusion! What preposterous charges! You are not suggesting, are you, that arbitration has nothing to learn from the law?

McDermott: Of course not. But it should not be made to learn

only from the law, and it should not accept unquestioningly *all* that the lawyers seek to encumber it with. It should learn from all trades, professions, and disciplines that can shed any helpful light on sensible methods for pursuing the goals that are peculiar to it, which are not *necessarily* the same as those of judicial proceedings. Judicial proceedings are more appropriate for parties who never saw each other before (some tort situations) or, if they had some more or less amicable relationship during which they carried on consensual transactions, something pretty terminal must have happened to their relationships in the past so that they now despise each other, to the point that the well-being of the one is no longer of any material concern to the other.

Roberts: You speak as if you never have seen or heard spiteful actions or words in an arbitration proceeding.

McDermott: I have, and I guess everybody has. I have often wondered, however—and I say this only partly in jest—whether some of that insensitive behavior had not seeped into arbitration from habits sometimes used by some lawyers in some judicial proceedings. That is, I wonder if, when the parties hire the gun, they also hire the gunman's forensic devices. Unpleasant though they may be, they perhaps have a purpose in litigation, but only when the well-being—indeed, the survival—of the other party no longer matters.

In contrast, and aside from a few psychopathic collective bargaining relationships, that simply could not be said with any accuracy about the great bulk of the parties to arbitration proceedings. They not only will continue to see each other every day in the plant, as most parties to judicial proceedings will not, but much more—they must continue to cooperate with each other every day in the future in the efficient operation of the enterprise. Whatever they do, or make, or sell, their long- and short-range interest is in continuing to do it efficiently, and they cannot do that if their various spokesmen and representatives are treated in arbitration as if all were liars, cheats, and scoundrels, or as if what one party or the other sees as a serious problem were time and again shut off from rational treatment on the merits by overly formal objections borrowed from the public system of the law, which might be appropriate to moribund or dead relationships, but which should have no place in a private, rational, dispute-resolution procedure set up for that purpose by parties whose endeavors must go on *jointly* if either

is to survive *separately*. I am saying that arbitration is for those who simply must continue to care about each other, in contrast to litigation where concern for the well-being of the other is rather far down on the list of priorities.

Roberts: You are terribly hard on the law and lawyers!

McDermott: Again, you misunderstand, and if you have, perhaps others have as well. I should hasten to add, therefore, that I do not suggest that *all* lawyers behave disrespectfully or even discourteously toward the other side or with undue formality even in court, nor that all do so when they find themselves in arbitration. I seek to compare the two processes at what I judge to be about the average level of performance, and that comparison has convinced me, at least, that many attitudes and devices found satisfactory in court are entirely unsatisfactory when transferred to arbitration—so much so that they distort what arbitration is meant to do and, if not fought with tooth and nail, will destroy it.

Of course, I do not speak here of parties whose labor agreement indicates that they want a totally arm's-length, bare-knuckles procedure, with the panoply of petitions and motions and stops and starts from the law. If that is what the parties want, they should have it. That is one of the major advantages of arbitration. On the other hand, I never have seen any such labor agreement.

What I really am concerned about is the rather easy time lawyers seem to have had in persuading so many parties, almost by default and without half trying, to join in their assumption that because a certain procedure, motion, or objection is appropriate to litigation, it automatically and almost in the very nature of things should be applied in arbitration. Who said so? What labor agreement ever adopted common law procedure, or that of Code States, or the Federal Rules? I never saw one that did, and yet it often happens that as soon as a lawyer makes a motion or objection in arbitration, everybody in the room acts as if they were in court and begins to deal with the motion or objection as would the law. I rarely hear a response that says, "I don't care what the law would do with that point. We are not in court, and that is by choice and not by accident. The result sought by the motion or objection is not consistent with the very different purposes of arbitration, and the motion should be ignored or at least denied, without consideration of what its fate might have been if it had been made in court."

Sometimes you hear the sincere response that says, "I object to your objection." Considerable sense lurks in that ingenuous remark.

Roberts: But are you advocating some kind of formless, "be nice" procedure where everybody just wings it and hopes for the best?

McDermott: There you go, oversimplifying again.

I am saying only that arbitration should be conducted with those proceedings, from whatever source, that best will promote its own goals which are very different from those of the law. If a particular procedural device from the law fits, arbitration should wear it. But the law should not be the sole source of arbitrational inspiration.

Let us move on. What causes most of the procedural arguments and heat in your hearings?

Roberts: Without a doubt, rulings on objections to the admission of evidence.

McDermott: That is true in my hearings as well, and the degree of emotional heat engendered seems higher when I sustain the objection than when I deny it. But, now that I think of it, nearly all my rulings allow the evidence to come in.

Roberts: So you, too, are one of those lazy arbitrators who take nearly everything "for whatever it may be worth."

McDermott: Of course, don't you? Trial judges do, too, I think, at least when sitting without a jury, and they are reversed much less frequently for admitting evidence than for excluding it. And laziness has nothing to do with it.

Roberts: Baloney! It's either laziness or refusal (perhaps inability) to learn the rules of evidence. I hope your opinions are more tightly reasoned than your arguments so far here today.

McDermott: Well, maybe some questions will force you to show me what is wrong with my reasoning.

Have you ever seen a labor agreement that required the arbitrator to follow the rules of evidence? If you have, I would be interested in knowing "whose rules of evidence." The state where the hearing is held, where the plant is located, where the company is incorporated, or some center-of-gravity state? Or should the arbitrator adopt an "outcome determinative" rule? Indeed, why the rules of evidence of any *state?* If the parties are in commerce, as most are, is there not authority to develop and apply a body of federal law of arbitration? Perhaps better wording would say that the rule when applied, whatever its source,

automatically would become *federal* law in those circumstances.

It will not be necessary here to go all the way back to borrow analogies from *Swift* v. *Tyson, Erie Railroad* v. *Tomkins,* or *Clearfield Trust* and their progeny. It is enough to say that the questions just asked must demonstrate that even those who shout most loudly in demanding application of the rules of evidence often do not know whose rules they are insisting upon and rarely have thought of the point. Thus, the most that could be said of them is that they are advocating adoption of somebody's formal rules of evidence, probably what the law schools would call the "better rule."

Roberts: Well, you really become very lawyer-like when you are accused of poorly reasoned awards. You seem quick to take refuge in lawyers' talk when your attacks against the law are challenged.

McDermott: You bet! And the reason is that I think the lawyers can be beaten on their own ground on this point.

First, however, you again misread me. I am not attacking the law or lawyers. I am not *attacking* anybody or anything. The situation is quite the other way around. I am trying to *defend* the arbitration process against what I see as a wholesale invasion by the law, and I am concentrating right now on evidence just because the major invasion so far has come on the rules of evidence.

Roberts: You must have been smoking something funny during lunch. You sound as if you want a chaotic hearing, with no forms and everybody speaking at once.

McDermott: It is at least an open question as to which one of us was smoking something, straight or funny. Why must it always be all or nothing with you?

I am not saying that an arbitration hearing should operate as an anarchic "Good and Welfare" meeting. On the contrary, in my hearings the parties take turns and only one person speaks at a time. That prevents chaos. That deals with who may speak and when. The rest is *what* may be said, and that is evidence. And on that point, aside from pretty wildly irrelevant matters and unaccepted offers to settle or compromise the grievance, I am prepared to listen to just about anything a party wants me to hear. I think that is not only *a* defensible position, but very nearly the *only* position that is defensible at all.

Of course, you must understand that I am not speaking of situations where the collective bargaining agreement says that

certain matters shall not be used or mentioned in arbitration, such as the parties' negotiating proposals and discussions on them or a grievant's disciplinary record more than one year or five years old. If the parties *jointly* make it clear that certain information shall not come out in the hearing, I do my best to see that it does not come out. But that is not the typical problem. The parties, in my experience, are pretty good about policing their own jointly stated "rules of evidence."

On the other hand, the routine evidentiary problems of our hearings arise when one party wants something in and the other wants it out. We then get into the nuances and quiddities of hearsay and its thirteen exceptions, best evidence, parol evidence (perhaps not a rule of evidence at all), opinion evidence, leading questions, and such. I am ashamed to admit that not too long ago I found myself seriously trying, with the parties, to plumb the difference between past recollection recorded and present recollection revived. I must admit that there was some personal fun in it, but it was a disservice to the process. Imagine the unspoken thoughts of the employees and supervisors in the hearing room. Without intending to patronize them, I fear that they must have thought that the representatives and I had taken leave of our senses, and if they had, that would not be good. If those for whom arbitration was established begin to feel that it is being conducted more as a kind of exotic sport by and for the parties' representatives and the arbitrator, they will lose whatever faith they have developed in it over the years as their own private system, in place of a strike or lockout, for settlement *on the merits* of their problems under the agreement.

Thus, I let in nearly all that either party wants to have in and largely for that reason alone. That, of course, is the cathartic explanation for allowing more evidence in an arbitration record than in some court records, those with a jury, but I don't want to pursue that now for, adequate though it is, it is not the best reason for not adhering to the rules of evidence in arbitration.

Roberts: What better one can there be?

McDermott: The one that puts the burden on those who seek to apply extra-contractual rules to the arbitration hearing. We have agreed that when the agreement says that certain matters may not be introduced, they are not. Aside from that, however, not only do labor agreements not require adherence to the rules of evidence, neither do the procedural rules of the appointing agencies. So it is not just the wild-eyed, power-hungry arbitra-

tors who are less than enamored of the rules of evidence in arbitration. Other directly interested institutions are of the same mind.

Roberts: But you said you had a better rule and then you mentioned only a general, burden-of-proof principle.

McDermott: All right. The better reason is that the formal rules of evidence deal entirely with stark admission/exclusion alternatives. When all the arguments pro and con are said, a ruling is made and the evidence is either in or out. That must be why you feel such an affection for the rules of evidence. They appeal to your all-or-nothing instincts.

The trouble with application of rules of evidence in arbitration is that they would only keep the evidence out or let it in, and they give no help at all in selecting one of the many and varying ways to assess its weight, if it be admitted—that is, as carrying much, some, little, or no persuasiveness. That is where the bind comes.

Look at the development of the rules of evidence. They stemmed at least several centuries ago in large part from the mistrust of English judges in the reasoning ability of English lay jurors. Now, with the last name of McDermott and a first name of Clare, after a country in Ireland, I am not one who is inclined to dispute it when some Englishmen say that other Englishmen cannot think straight. I never have had any trouble accepting that.

Seriously, however, notice the gulf of difference between the circumstances in which rules of evidence developed in court and those of arbitration. What if the jurors could not think straight in court? There are no jurors in arbitration. Thus, the lawyers' thought, and the thought of those laymen who have become more technical than lawyers, that the rules of evidence should be easily transferred from court to arbitration is not sound. The circumstances are not the same. I may agree that an English juror cannot think straight, but it would be entirely different to suggest that an Irish-American arbitrator, sitting with no jury, could not think straight. Without a jury in arbitration, much of the basis for the development and application of the rules of evidence simply is not present.

Here is another example of the tendency of some of those who want to apply the law in arbitration not fully understanding even the way the law would operate in given circumstances. For instance, a judge sitting without a jury is much less concerned with

the importance of strict adherence to the rules of evidence than he is when sitting with a jury. Therefore, those who want to transfer the rules of evidence from court to arbitration, first, should get straight what situations they are seeking to make negotiable from one forum to another. If the judge, without a jury, can let in much evidence and then treat it as persuasive or not, why cannot an arbitrator do the same, sitting without a jury?

Roberts: Are you saying we should ignore the rules of evidence in arbitration?

McDermott: Just about—or better yet, develop a rather charitable sense of relevancy and then work out arbitration rules for deciding the proper weight to be given to evidence once it is in. That's what counts in any event. More often than not, at least in my experience, the opponent of the evidence is not really so concerned about the evidence's coming in. He is more concerned, should it come in, about the time he might have to spend and the lengths he might have to go in order to dig up countervailing proof. Thus, if the doubtful evidence were admitted, the proponent would be satisfied, and if the opponent then were told that, although the evidence is in, it will carry almost no weight because it is only remotely relevant or because it is very unpersuasive hearsay, then the opponent would be satisfied, too. If the proponent thereafter were not successful on the merits, he could blame it on the arbitrator's stupidity, but he could not say that the arbitrator did not even listen. And there is a world of difference between those two positions—between losing after full argument and losing after having been shut off from making any argument because of rules that are not fully understood even by all lawyers and surely not by very many employees or supervisors.

An arbitration system that followed the rules of evidence and thus might have weeded out undeserved union claims or management defenses by refusing to hear them at all might reach the right ultimate result, but I fear it quickly would lose the essential support of men and management, and that collective bargaining relationship would be back in court or on the street, that is, on strike or locked out. In contrast, an arbitration system that admitted almost all the evidence for those claims and defenses and heard them on the merits and, after considering and explaining the results under the terms of the labor agreement, reached the very same answers, would, I think, be far superior and would retain the respect of men and management.

Roberts: Well, even though I might admit that some of that sounds pretty good when you say it quickly enough, you must run a "loose" hearing, and I would fear that some of them would never end, as I fear this dialogue never will end.

McDermott: Well, if you are going to get mean about it, I'm going to stop. I will close by borrowing Jim Hill's reply to a similar accusation. I will say I am loose only when I am tight.

The burden of my argument here today is that litigation and its formalistic trappings are for dead and dying relationships, whereas arbitration is for living ones, and that it could be dangerous to arbitration's health if some practitioners were to succeed in transplanting techniques suitable to the law into arbitration, without very careful and critical analysis.