I. Evaluating Testimony

If witnesses would simply tell the truth, it has been said, congested court calendars could be unburdened and the mounting backlog of unresolved grievances substantially curtailed. Is it for the most part perjury that makes the sharply conflicting testimonial evidence such a common occurrence in contested proceedings? Doubtless, there are witnesses who lie, but we believe that deliberate falsification accounts for a relatively small proportion of the contradictory testimony heard daily by judges and arbitrators. As regards this latter point, several panel members made the observation that the grandeur and solemnity of a federal courtroom probably is more conducive to "truth telling" than the informal setting of an arbitration proceeding.

In our opinion, however, the principal reason for testimonial conflicts is not the result of a reluctance to tell the truth, but is caused by marked differences in the capacity of individuals to *observe, hear, recollect,* and *communicate* external reality. Another factor is the emotional commitment that witnesses have to support testimonial declarations that have been elicited from them, lest their credibility be undermined or demolished. In addition, conscious or unconscious bias may influence their testimony. As a result of such factors, witnesses who testify with great sincerity and conviction, resolved to tell the truth, often are capable of relating only their perceived version of the external circumstances which they observed or heard—meaning, their version of the truth.

This inability to reconstruct witnessed events with reasonable accuracy was underscored by the account of a panel member who related what he described as a humbling experience while driving on a Los Angeles street. A collision occurred directly in front of him; he witnessed it. Yet, moments later, when he related his observations to the police, the investigating officer demonstrated to him, quite convincingly, why his version could not be reconciled with the actual events. It should be reiterated that our panel member was a disinterested observer. As to those directly involved in the collision, consider the potential for expanding the ambit of human error because of the emotional impact inevitably produced by such an occurrence, not to speak of conscious or unconscious motives of self-interest for slanting their testimonial recollection of events.

To some extent, the trier of fact is subject to related human propensities. In Justice Cardozo's words:

> "All their lives, forces which [judges] do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of 'the total push and pressure of the cosmos,' which, when reasons are nicely balanced, must determine where choice will fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own."[2]

At least one other major impediment to an objective presentation of all the pertinent facts in a case should be noted. The impact of the adversary system, common to both litigation and arbitration, spurs the contending parties with the single-minded objective of winning the case, rather than furnishing the trier of fact with all the pertinent evidence—evidence, of course, contrary to the client's interests. It is not our purpose to disparage the adversary system. Like Churchill's famous observation about democracy as the worst system of government except for all the others, we baldly assert that the shortcomings of the adversary system are less than those of all other systems of jurisprudence. The core of the adversary principle, cross-examination of witnesses by the contending parties, has received no better defense than the perceptive declaration by Wigmore:

> "The vital aspect is that we are not to credit *any man's assertion* until we have tested *it* by *bringing him into court* (if we can get him) and *cross-examining him.* Now the development of this art of cross-examination, during two centuries, is the great valuable contribution . . . and modern psychological science . . . has shown us something of the hundred lurking sources of error that inhere in all testimonial assertions; and we perceive that our traditional expedient of cross-examination was the main way to get at these sources of error, and that it owes its primacy to permanent traits of the human mind. To abandon our insistence on the necessity of this test [cross-examination] would be to surrender the best single expedient anywhere invented for getting at the truth of controversies." [Emphasis in original.][3]

Since the adversary process featured by stringent cross-examination by opposing counsel is a human process, it cannot be expected to produce invariably a full and complete disclosure

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[2]*Id.*, at 12–13.

[3]John Henry Wigmore, A Treatise on the Anglo-American Systems of Evidence at Trials at Common Law, 3d ed. (Boston: Little, Brown & Co., 1940), Vol. I, at 277.

of all relevant facts. More often than not the trier must decide cases on the basis of incomplete information. As between a judicial and an arbitration proceeding, the established role of discovery in the former is frequently more effective in ferreting out pertinent information than is the grievance procedure in the latter, a point elaborated in our discussion of "Discovery."

In evaluating the problem of conflicting testimony, a principal focus of our examination was the innate inability of witnesses to perceive, recall, and reconstruct events accurately. Despite the pronouncements of adherents to mechanical jurisprudence, no small number, we have yet to devise a simple application of logic, a formula as it were, for separating one version from another when dealing with conflicting perceptions of the same event. All we can do is what judges have done for centuries past, namely, analyze the evidence and argument carefully, apply established guidelines,[4] and then reach a decision recognizing fully that, like physicians and even football coaches, we may be wrong.

Human experience in business transactions has resulted in a preference for the written word over later recollection—a preference reflected in the Goldwynism that: "An oral contract is not worth the paper it's written on." This well-worn aphorism, while not quite legally correct, reveals considerable insight into the decision-maker's reluctance to choose between contradictory testimony when more reliable evidence is available. Written instruments, for example, although seldom free of ambiguity, generally are deemed a more reliable basis for ascertaining intent than recollection of what was said when the language in question was formulated. The trier can, therefore, ordinarily be expected to rely upon documentary evidence when the alternative choice means an evaluation of contradictory testimony.

Probably no criterion of credibility has been treated more

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[4]A standard list of credibility guidelines is set forth in California Evidence Code Section 780, as follows: "... the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: (a) His demeanor while testifying and the manner in which he testifies. (b) The character of his testimony. (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies. (d) The extent of his opportunity to perceive any matter about which he testifies. (e) His character for honesty or veracity or their opposites. (f) The existence or nonexistence of a bias, interest, or other motive. (g) A statement previously made by him that is consistent with his testimony at the hearing. (h) A statement made by him that is inconsistent with any part of his testimony at the hearing. (i) The existence or nonexistence of any fact testified to by him. (j) His attitude toward the action in which he testifies or toward the giving of testimony. (k) His admission of untruthfulness."

skeptically, despite benediction by appellate courts, than the criterion of demeanor. The discussion on this point prompted one of the lighter moments of our meetings when Professor Bernstein asked Judge Ferguson, "Can you recognize a liar when you see one?" With characteristic exactitude, Judge Ferguson responded, "No, he's got to talk to me first!" Professor Bernstein observed that, as regards demeanor, what witnesses say is far more important than facial expressions or other body language, a point endorsed by all panel members.

It must be acknowledged, however, that the importance of demeanor as a credibility criterion is sometimes useful as one factor among many in evaluating testimony if considered with appropriate reservation. The limitations of demeanor were highlighted in the following observation of a veteran arbitrator:

> "Anyone driven by the necessity of decision to fret about credibility, who has listened over a number of years to sworn testimony, knows that as much truth must have been uttered by shifty-eyed, perspiring, lip-licking, nail-biting, guilty-looking, ill-at-ease, fidgety witnesses as have lies issued from calm, collected, imperturbable, urbane, straight-in-the-eye perjurers."[5]

In many cases, credibility may decide the outcome; in most, however, it is simply one important element of the decision-making process, the subject to which we now turn.

II. Decisional Thinking

Judges and arbitrators decide cases daily; yet, most of us would find it difficult to raise to a conscious level the complex reasoning processes that guide our choice one way or another. Relatively few legal scholars have undertaken to describe the inner nature of decisional thinking. A most notable contribution is by Judge Jerome Frank, a leading exponent of the school of American Legal Realism. His provocative writings have stimulated considerable discussion and controversy over the past half-century. The field of psychology, however, has contributed the most significant findings concerning the nature of human consciousness at work in resolving complex problems. We ven-

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[5]Edgar A. Jones, Jr., *Problems of Proof in the Arbitration Process: Report of West Coast Tripartite Committee,* in Problems of Proof in Arbitration: Proceedings of the Nineteenth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1966), at 208.