Leading questions are not the only way that memory is affected. Another means of contaminating memory is to have the witness engage in conversation with other witnesses. Exposure to media can also contaminate memory.

What is the message in all this? It is captured best in the quotation: "Some things that will live longest in my memory never really happened."

II. EVIDENCE: TAKING IT FOR WHAT IT'S WORTH

THOMAS T. ROBERTS*

Let me state my view of the matter to be discussed this afternoon—for what that view may be worth. The program you have received suggests you might be in for some sort of a tome on evidence. The field of "evidence" is, however, simply too large a bite substantively to be digested in the time allotted, even conceding the skill and adjudicatory sophistication of this distinguished audience—and you can take that remark for whatever it may be worth!

I have, therefore, focused my remarks upon a single aspect of the treatment of evidence in arbitration. I do this in the hope that some support may emerge for the thesis I advance herein. For what it may be worth, I strive in this exercise to advance the cause of limiting the arbitration hearing to what is *relevant* and to what is *material.*

It is my firm conviction that no single development in the evolution of labor arbitration as it is practiced in this decade has been as unfortunate as the widespread acceptance among arbitrators (and, indeed, even among a few advocates) of the belief that some precept of forensic therapy demands that any and all proffered evidence be received "for what it may be worth." No matter that the result is an unnecessarily prolonged hearing, increased costs attendant to an elongated record, plus wasted time and effort devoted to responding to evidence that may well have already been subjectively discarded by the arbitrator. Additionally, the practice permits the introduction of a distraction to the focus and concentration of the proceeding. I

*President-Elect (1987-1988), National Academy of Arbitrators; Rolling Hills Estates, California.

say the dubious and elusive therapy that may be latent somewhere in this thicket of irrelevancy and immateriality is not worth the price.

In my judgment, an arbitrator who cannot provide a fair and orderly hearing confined to the issue presented by the grievance (or framed by a submission statement) transforms the proceeding into a sort of round table session where anyone is free to come forward and talk of "ships and sails and sealing wax—of cabbages and kings." If that is the result sought, why not simply hire a sound recorder? Why pay the premium cost of a referee presumably engaged to exercise quasi-judicial responsibilities and "run" the hearing?

There is no great trick to identifying what is relevant and what is material. Relevant evidence is evidence, in whatever form, that tends to establish the existence of a fact that is of consequence to the judgment of the arbitrator when considering and determining the merit of a grievance put at issue. Such evidence, if proffered, should be entertained by the arbitrator. I am also willing to concede that, if the question of relevance is close in a particular situation, the arbitrator should lean toward admittance. But if the proposed evidence is clearly not relevant, and an objection to its admission is advanced, it should be rejected at the hearing and not with a surprise statement tucked somewhere in the award that follows.

It is further important to note that not all evidence is material to the inquiry raised by a given grievance. Evidence of facts that are not necessary to the judgmental function of the arbitrator as circumscribed by the issue or issues presented is not material evidence. Such evidence is extraneous to the search for a proper disposition of the grievance, and it should therefore be rejected when the opposing party resists its admission. Note here that I reserve to the parties the opportunity to introduce irrelevant or immaterial evidence if through their silence they signal acquiescence. It is their hearing and they may have an unspoken need to do so. Where a timely objection is raised, however, and where that objection has merit, it should be faced head-on and a ruling issued. I favor a ruling of exclusion.

To receive any and all proffered evidence "for what it is worth" is to take the coward's way out. Arbitrators should meet their obligations to run an orderly hearing confined to the issues presented . . .

*McDermott:** Wait just a moment! What is this nonsense? You may run a tight hearing, but you certainly are loose in your thinking. I simply cannot sit still and placidly accept such pedantic pronouncements—even after a satisfying lunch and at the final hour of the program.

Roberts: Well, I must say, this is the first time I have felt I would rather be a sitting judge than an arbitrator. If I were a judge, I would have my bailiff remove you from the courtroom!

McDermott: I am not surprised by that petulant response, and I'll take it for what it is worth—nothing.

Roberts: You speak as one who has in the past exercised institutional authority to promulgate your own arbitral concepts—almost as though you were a past president of the Academy. Good Lord! It is Mickey McDermott, in fact a past president of our guild! The Irish are at it again—bushwacking a Welshman from the safety of the crowd. You will not get away with it, Mickey. Stay on your feet and let's test the mettle of your complaints.

McDermott: I intend to, and for starters let me say you are all wet when you assert arbitrators should emulate judges and enforce rigid rules of evidence as they relate to relevancy and materiality.

Roberts: Now wait! I don't argue for court-like proceedings. I am simply advocating hearings confined to what is at issue without also sweeping up whatever may be extraneously upsetting a party at the time of the hearing.

McDermott: There you go again! You seem to feel arbitration is simply a look-alike substitute for litigation rather than a continuation of collective bargaining during the term of the applicable agreement.

Roberts: Arbitration is clearly more than an alternate form of litigation. But it is also something short of a resumption of negotiations. In any event, however, whatever analysis may be applied, I think it hardly need be said that to waste time and compound costs is subversive to the process. The parties hire an arbitrator to hear and decide a dispute—not as a sounding board for any and all "good and welfare" items that may spring into the consciousness of the participants during the course of a hearing.

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*Clare B. McDermott, Member, National Academy of Arbitrators; Pittsburgh, Pennsylvania. Grateful acknowledgement of my indebtedness is due to Mr. McDermott for taking part in this dialogue.

The arbitrator is, by reason of the office, the judge of what constitutes relevant and material evidence. Where an objection to the introduction of such evidence is made, the arbitrator is obligated to respond. To react by stating any and all proffered evidence will be admitted "for what it may be worth" is to abdicate the responsibilities accepted at the time of appointment. There exists no requirement, either statutory or court imposed, to hear all offered evidence. To the contrary, the bargain of the parties actually incorporates a commission that calls upon the arbitrator to make a judgment regarding what is relevant to his or her disposition of a contested grievance.

McDermott: If you are going to be so technical about the rules of evidence, you will create a requirement that all arbitrators be lawyers.

Roberts: Not at all. I am not speaking here of the technical rules of evidence but only of what is germane to the dispute presented. One need not be a judge or lawyer to discern what is relevant. The very issue presented by the grievance defines the relevancy of proffered evidence, and the experience and training of the arbitrator signals what is material.

McDermott: But at the outset of a hearing the arbitrator may not yet know what is going to be relevant and material.

Roberts: If such an absence of clarity is present, all the arbitrator need do is inquire of the representatives of the parties. If they don't know what is at issue (as well as what would be relevant to that issue), they are not prepared for arbitration. When an objection based upon relevancy or materiality is advanced at the hearing, the arbitrator may, and indeed should, put the objector to the task of stating the grounds for the objection. The proponent of the evidence should then be provided an opportunity to respond. In this process the matter is clarified, both for the arbitrator and for the parties.

McDermott: Here we go with more formality and more of the trappings of the courtroom!

Roberts: Again, not at all. What is so formal about stating the purpose of proffered evidence? No recitation of legal precepts is required. All that results is an explanation of the parameters of the hearing and a ruling by the arbitrator defining the scope of the proceeding. In stating the ruling, the arbitrator gives guidance to the parties in the construction of their presentations. This is not legalism. This is not formalism. This is, in fact, due process in its truest form—that is, a record confined to those

matters (and only those matters) that will determine the outcome. Confusion and distraction are removed. The search for truth is made more direct.

McDermott: You seem to ignore the reality that in most discipline and discharge cases the grievants are anxious to state their case in whatever manner they deem most appropriate. It seems to me that the grievants should certainly be provided that opportunity.

Roberts: I will concede that grievants who have suffered a disciplinary sanction or, more severely, separation should be provided latitude so that they leave the hearing with a conviction that they have had an opportunity to present their entire defense. They are indeed entitled to the full protection of a complete and fair hearing. Yet even in this type of case, it makes no sense and serves no purpose to permit excursions into evidentiary sinkholes that will play no role in the ultimate outcome of the process.

McDermott: I am still not convinced. If you exclude proffered evidence with a heavy hand, don't you run the risk of a reversal by a reviewing court?

Roberts: I don't believe so. The courts recognize that arbitrators are in control of the hearings. In that function they must necessarily make rulings regarding evidentiary matters. In my own state, California, the Code of Civil Procedure at Section 1282.2 provides that "The neutral arbitrator shall preside at the hearing, shall rule on the admission and exclusion of evidence and of questions of hearing procedure and shall exercise all powers relating to the conduct of the hearing."

The responsibilities of the arbitrator regarding the receipt of evidence are further identified in the California statutes. California Evidence Code Section 350 declares, "No evidence is admissible except relevant evidence." This mandate, it seems to me, is an instruction to the arbitrator to rule on the admission and exclusion of evidence and a caution that only relevant evidence is admissible. True enough, the California Code of Civil Procedure at Section 1286.2 states as a ground for vacating an arbitration award a "refusal of the arbitrators to hear evidence material to the controversy." This last statutory provision has been cited on occasion by supporters of the let-it-all-in camp as an indication that a risk of judicial reversal arises out of exclusionary arbitral rulings. But note that only the exclusion of

material evidence places an award in jeopardy of court attack. Where evidence lacking in materiality is excluded, the award stands.

McDermott: I will think about that. In the meanwhile, tell me why the people presenting a case in arbitration should not be afforded the solace of having their evidence received "for what it is worth."

Roberts: The difficulty in such a practice lies in the fact that the advocates are left with no indication of the weight, if any, the arbitrator will afford the evidence in question. This means they must necessarily respond in detail in an effort to discredit the contested evidence. This in turn prolongs the hearing, introduces uncertainty, precipitates protracted concluding argument, and increases costs. Such a jumble is anything but a happy result. The parties are entitled to know what admissibility standard will be employed and what evidence will be afforded weight. A ruling at the time of the proffer of evidence as to its relevancy and materiality avoids a need to rebut doubtful items in the record or, in the alternative, the risk that lies with an assumption by counsel that the doubtful evidence will have no persuasive effect upon the arbitrator.

McDermott: You seem to have overlooked the pronouncement of the Code of Professional Responsibility wherein it states, "An arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument."

Roberts: No! I don't believe I am ignoring the precepts of the Code. A fair and adequate hearing is not a hearing open to any and all evidence and argument advanced on whim and without relevancy to the grievance. There is no fairness in constructing a record that is not relevant to the issues submitted. Providing an opportunity to offer evidence is not tantamount to a requirement that all such evidence be admitted. After all, due process runs both ways. The proponent of evidence should not be permitted to burden the record with items that do not reasonably tend to prove or disprove a fact at issue or with matters that are too remote to be worthy of consideration.

McDermott: It is obvious to me that you are too firm in your beliefs on this subject to be persuaded otherwise, and especially at this late hour. In fact, it is a wonder you haven't already summarily ruled me out of order. To avoid such a happening, I will sit down.

Roberts: The principal burden of the rank and file members of the Academy has, in recent times, been the need to tolerate occasional well meant but irreverent outbursts from certain of our aging past presidents. I am sure that after this most recent such happening all of you in this room will agree that I have now paid my dues in spades!

The interruption by Mickey does, however, suggest one matter that deserves further comment. I refer to a situation where the collective bargaining agreement itself identifies items that are to be viewed as not permissibly relevant to the inquiry of the arbitrator. For example, we are all accustomed to encountering clauses that declare reprimands or other documentation of discipline shall not be considered by the arbitrator if entered on the record of the employee more than six months, or perhaps one year, prior to the incident grieved. Another example of contractual constraints upon the arbitrator may be found in the salary arbitration provisions of the Basic Agreement in major league baseball. The parties have therein incorporated a detailed inventory of what evidence is available to the arbitrators and what evidence may not be considered. The Basic Agreement thus specifically tells us what standard to apply. Examples of these bargained criteria are the quality of the player's contribution to the club during the past season (including but not limited to his overall performance, qualities of leadership and public appeal), the length and consistency of his career contribution, the record of past compensation, comparable baseball salaries, and the recent performance record of the club. The Basic Agreement also delineates what may not "be taken for what it is worth." The arbitrators are told, for example, that they may not entertain evidence of salaries paid in other sports, the financial position of the player or the club, press comments and testimonials (other than recognized annual player awards for playing excellence). In all of this, the arbitrators are told by the parties what is permissibly relevant and what is not.

In conclusion, I return to the principal note of my theme, a theme composed of a simple but continuing harmonic. Objections advanced at arbitration regarding a lack of materiality or relevance are entitled to a contemporaneous arbitral ruling accompanied by a statement of the grounds for admission or exclusion. When arbitrators in effect withhold such a ruling through the device of a continuing acceptance of any and all proffered evidence, they do nothing to advance the search for

relevant facts. To the contrary, an orderly hearing confined to only those issues raised by the particular grievance under scrutiny results in a clear record, due process for all of the participants, and a reduction of cost, to say nothing of a lessening of adversarial tension and trauma. I believe this is a laudable goal and one within the talents of the arbitrators of today. And you can take that for what it is worth!