CHAPTER 5

BUILDING THE EVIDENCE RECORD: THE BOUNDS OF "ARBITRAL ADVOCACY"

I.

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Building the evidence record during a labor-management arbitration hearing is not uncharted water to those present. On the contrary, to many of you the hearing procedures are well mapped, they proceed along predictable lines, and in most instances the actual hearings are usually routine. Issues are framed, opening statements presented, witnesses examined and cross-examined, documents submitted, closing arguments made, and the evidence record ultimately closed.[1]

Much has been published about this process and a good many of the authors are present today. Opinions have been expressed on just about every imaginable angle, nuance, and perspective of the arbitration hearing. The Academy has experienced the "golden years,"[2] passed the "crossroads,"[3] adapted to the transitions,[4] weathered ethical storms, debated the usage of external law, and is now staring down creeping legalisms.[5] To use an appealing metaphor, like fine wine, labor-management arbitration has been swirled, smelled, tasted, retasted, compared, chemically profiled, and historically traced from grape seedling to the tasting room.

What more need be said? Certainly not another discussion of the mechanics! However, continuing the theme of this year's

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[1]Waltz & Kaplan, *"The Record": What It Means and How It Is "Made"*, in Evidence: Making the Record (Mineola, N.Y.: Foundation Press, 1982).

[2]Feller, *The Impact of External Law Upon Labor Arbitration*, in The Future of Labor Arbitration in America (New York: American Arbitration Ass'n, 1976), 83–112.

[3]Edwards, *Labor Arbitration at the Crossroads: The "Common Law of the Shop" v. External Law*, 32 Arb. J. 65 (1977).

[4]Gross, *The Labor Arbitrator's Role*, 25 Arb. J. 221 (1970).

[5]Nolan & Abrams, *The Future of Labor Arbitration*, 37 Lab. L.J. 438 (1986).

Annual Meeting, the exercise of arbitral discretion is and will continue to be a very real challenge.

The purpose of this paper is to provoke thought, to be critical but not judgmental, and to open discussion as to the exercise of arbitral discretion in the context of building the evidence record. Subsumed in this discussion will be references to the arbitrator's approach, demeanor, temperament, and "style" during the hearing; however, the emphasis will be on the arbitrator's involvement. The intent is to stimulate interest in mapping the common boundaries which circumscribe the arbitrator's conduct in controlling the hearing and in building the evidence record.

Exercise of Arbitral Discretion

In reviewing the substantial body of commentary regarding the arbitration hearing, the concept of arbitral discretion was identified, but in most instances this identification was in general terms. More specifically, the comments relate to the exercise of this discretion. The subject was directly or impliedly intertwined in every aspect of the hearing process. There were further comments, though few in number, regarding the bounds of arbitral discretion as exercised during the building of the evidence record. Unfortunately these comments were all too brief and generally conclusionary. Arbitrators could do just about as they pleased unless expressly prohibited by the agreement, the framed issue, or other general guidelines which often call for arbitral interpretation. Even then, however, arbitrators may do things during the hearing in the name of "equity" or "justice" as an extension of arbitral discretion. One author characterized this as "the 'license to do good' school."[6] Boundaries exist, but where?

There were no suggestions by the commentators that the exercise of arbitral discretion be unbridled. On the contrary, it is clear that the exercise of arbitral discretion should be neither unlimited nor exercised with impunity. Arbitrators exceeding their authority and abusing discretion are grounds for possible

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[6]Davey, *Situation Ethics and the Arbitrator's Role,* in Arbitration of Interest Disputes, Proceedings of the 26th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1973), 162, 224.

vacature of the award in most jurisdictions. Thus, boundaries do exist, but they are not easily identified and defined.

Arbitrators are guided procedurally by the broad rules which govern the particular case and are then given wide latitude to interpret the application of those rules. As will be noted later, the Code of Professional Responsibility provides ethical instructions in this regard; however, these instructions are often subject to individualized "situation ethic" interpretation and applications.[7] One can rationalize almost any conduct if one determines to do so.

The exercise of arbitral discretion is the product of experiential development influenced by the growth and expansion of arbitration as an adjudicative dispute resolution forum. This is highlighted by the transition of arbitration in many instances from simple problem-solving procedure to a more defined, adversarial model.[8]

When questions are raised by advocates, arbitrators, or knowledgeable observers regarding the propriety of a particular approach or style for the control and flow of the evidence record or the propriety of an arbitrator's intervention during an advocate's presentation, the simple, straightforward answer, if it is not an ethical concern, appears to be: "Oh, that is a matter of arbitral discretion." Thus, the inquiry is considered answered, but is it?

In my readings I did not find anyone who disagreed with the proposition that the arbitrator enjoys considerable discretion and latitude with respect to the conduct of the hearing, both as to its control and the making of evidentiary rulings as witnesses are called, documents introduced, and procedural arguments made. What was left unsaid were details as to the "bounds." What are the boundaries for the exercise of arbitral discretion during the building of the evidence record?

Surveying the Boundaries of Arbitral Discretion

Advocates inquire, and understandably so, as to these boundaries, since there surely must be defined limits. Advocates query, if the arbitrator has this broadly accepted discretion, there must be boundaries to ascertain when the exercise of that discretion

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[7]*Id.*

[8]Dunsford, *The Role and Function of the Labor Arbitrator,* 30 St. Louis U.L.J. 109 (1985).

crosses the line into the area of possible abuse and thus misconduct. Without some mapped directions it is difficult even to identify gross departure. Such a departure could constitute what the U.S. Supreme Court has recently called "affirmative misconduct" and thus trigger a vacature action.[9]

Vacature actions in various jurisdictions have produced volumes of decisional law regarding the exercise of arbitral authority or discretion and its abuses; however, most of these recent decisions turn more on the actual decision or award and pre or post arbitral "misconduct" rather than the actual exercise of arbitral discretion during the building of the evidence record. Not allowing relevant evidence into the record and making comments which manifest a predisposition on the disputed issues may constitute "affirmative misconduct." However, "in those cases which held that the arbitrators had exceeded the bounds of their authority, the courts consistently note the strong public policy favoring arbitration and the need to support this alternative dispute-resolution forum."[10]

It is somewhat paradoxical that advocates ask for the identification and establishment of more clearly defined boundaries for the exercise of arbitral discretion. Why? Because the advocates have within their power the ability to limit this exercise either through the collective bargaining agreement, which establishes the arbitration procedures with their built-in arbitral limitations or through a submission agreement, which frames the issues in dispute. These two sources can and often do circumscribe or map the boundaries for the exercise of arbitral discretion. A host of court decisions have reminded arbitrators of these two sources, when reviewing whether arbitrators have abused their discretion in particular cases.[11] However, it is interesting to note that most of these cases support the conclusion that great deference must be accorded the arbitrator's interpretation of the submission agreement.[12]

Over the years advocates have not been bashful about drafting new limitations into the arbitration provisions of their agree-

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[9]*Paperworkers v. Misco,* 484 U.S. 29, 126 LRRM 3113, 3118 (1987).

[10]*Conduct of Hearings: The Arbitrator's Authority,* 5 Lawyers' Arb. Letter, (1981).

[11]*Delta Lines v. Teamsters,* 55 Cal.App.3d 960, 966, 136 Cal. Rptr. 345 (1972); *County of Santa Clara v. Service Employees Local 715,* 159 Cal. Rptr. 352, 357 (1979); *Newspaper Guild Local 35 (Washington-Baltimore) v. Washington Post Co.,* 442 F.2d 1234, 1236, 76 LRRM 2274 (D.C. Cir. 1971).

[12]*Mobil Oil Corp. v. Oil Workers Local 8-831,* 679 F.2d 299, 302, n.1, 110 LRRM 2620 (3d Cir. 1982).

ments. The usual limitation that the arbitrator may not "add to, subtract from, amend, or modify the agreement" has been expanded by the addition of such qualifying terms as "or nullify, ignore, establish new terms and conditions and shall be expressly limited to a decision upon the question of alleged violation of an express term of the agreement." A classic limitation was found which stated:

> The arbitrator shall not render any decision or award, or fail to render any decision or award, merely because in his/her opinion such decision or award is fair or equitable.

There are additional reference points which provide some general insight as to boundary locations, such as the Code of Professional Responsibility, the Voluntary Labor Arbitration Rules of the American Arbitration Association, the regulations of the Federal Mediation and Conciliation Service, the state arbitration statutes, decisional law, and other particularized requirements imposed by special panels. These are broad guidelines, and arbitrators are granted considerable latitude in interpreting and applying them. Thus, it is understandable that arbitrators disagree as to what constitutes a "full, fair, and impartial hearing."

Arbitral Discretion's Rubicon and the Debate

Advocates have expressed strong opinions when they perceive that an arbitrator has crossed discretion's Rubicon. Some have characterized this as overreaching, while others have been less kind and described it as "activism." Still others have been quite nasty and have described arbitrators as overt advocates—advocates in the sense that arbitrators by their conduct during hearings, reasonably appear to be pleading the cause of one party to the dispute or providing too much guidance as to what theory to develop, what witnesses to call, or what questions to ask. In precise terms, the arbitrator "tried or defended the case for either party."

In the view of many advocates, the arbitrator who moves in the direction of advocacy has ceased to be the neutral trier of fact called to resolve the matter at the terminal step of the grievance procedure, and has demonstrated partiality at a minimum or at the maximum has usurped the role of a participating advocate.

Thus, the genesis of the internally inconsistent term "arbitral advocacy." One advocate's appraisal of an arbitrator's conduct was polemical when he called an arbitrator a "self-appointed, arbitral advocate."

The arbitral rejoinder to these characterizations is generally a pious "pursuit of truth": "I must get to the truth of the matter," or in more forceful terms: "You abdicated your responsibilities as an advocate, the facts were not forthcoming, or the record was becoming too clouded or confused." Thus, the arbitrator would continue, "The circumstances required it . . . . I had to intervene to protect the grievant, protect other employees' interests, maintain the completeness of the evidence record, clarify the issues, preserve the integrity of the procedure and arbitration as an institution," or some other similar reason persuasive to the particular arbitrator. Even the statement to render "justice under the contract" as an "educator-facilitator," as some authors have suggested, has been put forward as a recent approach to support increased arbitral activism and intervention during the hearing.[13]

Justice Louis Brandeis once commented, "A judge rarely performs his functions adequately unless the case before him is adequately presented."[14] An arbitrator's view of "adequately" is one of the areas of arbitral discretion that will be debated for some time to come.

Parallel Tracks: The "Involvement Continuum" and the "Style Continuum"

In building the evidence record, the exercise of arbitral discretion is strongly felt in two areas: the arbitrator's involvement and the arbitrator's philosophy or style. Intertwined in both areas is the arbitrator's demeanor or temperament. For analysis purposes these areas can be described as resting or running on two parallel tracks or existing on two continua.

The first is the involvement continuum. At one end is a passive, seemingly detached arbitrator dutifully and quietly taking notes, and at the other end in a "full-court press" is an arbitrator who has been previously characterized as an arbitral advocate.

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[13]*See* Sacks & Kurlantzick, Missing Witnesses, Missing Testimony and Missing Theories (Stoneham, Ma.: Butterworth Legal Pubs., 1988), 10–20.

[14]Brandeis, *Living Law,* 10 Ill. L. Rev. 461, 470 (1916).

Between these two extremes rest varying degrees of what can be called arbitral activism or intervention.

The second track is the style continuum. At one end is an arbitrator who follows the philosophy of laissez-faire as to the receipt of evidence and hearing formalities, usually allowing everything into the evidence record (the "kitchen sink" approach), and at the other is an arbitrator who should be wearing a robe because of the legalistic approach and judicial-like formality.[15]

An arbitrator's placement on either continuum rests with his or her philosophy of how arbitral discretion should be exercised. This includes the arbitrator's understanding of the boundaries and the interpretation and application of the guidelines directly or impliedly in place for any given hearing. There is diversity among arbitrators in these areas and this is healthy for the process. However, this diversity should not be used as a shield from inquiry as to the bounds of arbitral discretion.

The Involvement Continuum

Experience has taught me that the traditional arbitration hearing requires some degree of arbitral activism. Procedural and evidentiary rulings, such as relevancy, must be made. Activism per se should not be tagged as improper arbitral conduct during the hearing. "Activism," however, must be tempered and exercised with prudence, fidelity, and integrity.

What arbitrators may want to do is not always what they should do! Justice Harlan Stone once stated in the context of judicial restraint, "The only check upon our own exercise of power is our own sense of self-restraint."[16] Thus, the term "prudent activism" as used in this paper incorporates as its touchstone the concept of self-restraint. Application of this concept keeps in check movement toward an abuse of discretion in the form of arbitral advocacy.

An arbitrator is concerned with the quality of the evidence record, for it is from this record that the decision and award will be issued. When required, "prudent activism" must be exercised to make certain issues are joined, rulings on evidentiary matters

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[15]Raffaele, *Lawyers in Labor Arbitration*, 37 Arb. J. 14, 17 (1982).
[16]*United States v. Butler*, 297 U.S. 1, 78 (1936).

are decisively made, and leadership is provided to ensure the orderly building of a complete and clear evidence record. In one sense the arbitrator is there to see that the "quality assurance" of the hearing's product, the evidence record, is maintained.

Arbitral activism may move toward the arbitral advocacy extreme on the continuum when the parties mutually request such a move or when the circumstances dictate to the arbitrator that such movement must be accomplished to maintain the quality of the evidence record. Justice Oliver Wendell Holmes said, "The character of every act depends upon the circumstances in which it is done."[17] This is certainly apropos as to the exercise of "prudent activism."

The structure and diversity of arbitration hearing procedures may also dictate movement on the involvement continuum. From experience the exercise of arbitral discretion may vary, and properly so, in these contrasting record building situations: expedited versus traditional, rights versus interest matters, ad hoc versus permanent umpireships, and public versus private sector cases. Continued survival as an arbitrator in these many situations requires adaptation to the changing hearing circumstances—a type of Darwinian approach.

Some degree of arbitral intervention or activism is triggered when the arbitrator perceives an inability of the advocates to build a quality evidence record. This takes us back to Justice Brandeis' comment about performing "adequately." The arbitrator must determine the appropriate degree of "prudent activism" necessary to build a complete evidence record short of arbitral advocacy.

Advocates may position the arbitrator on the involvement continuum at one location, while the arbitrator may draw the line in a different location. Each may have sufficient justification for the location. The greater the distance between the locations, the greater the possibility of friction and spirited confrontations between advocates and arbitrators as to their respective roles.

Parenthetically, movement on the style continuum may produce similar reactions when the advocates anticipate a hearing that will follow the laissez-faire approach only to find an arbitrator with a judicial-like style.

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[17]*Schenck v. United States,* 249 U.S. 47, 52, 63 L.Ed 470, 473, (1919).

Roles of Advocates and Arbitrators

Within the traditional arbitration setting,[18] the advocate and the arbitrator have roles to play and functions to perform in building the evidence record. This division of responsibility has been acknowledged in the "how-to" literature for many years.[19] It is a joint involvement with shared responsibilities. As one author put it, a "cooperative endeavor."[20]

The responsibility of preparing, presenting, and proving the facts in a case rests with the advocate, and the responsibility of "trying a case" or finding facts and drawing inferences from the facts rests with the arbitrator. The arbitrator as the "trier of fact, fact finder or decision maker," tests and candles the facts as presented by the advocates with care, reason, and trained scrutiny. The advocates bring the facts to the arbitration table through testimony, writings, or material objects and, like an artist, use this evidence to paint for the arbitrator the fact portrait. As part of their responsibility, arbitrators must make credibility determinations, separating truth from fiction without the benefit of a divining rod, regardless of some arbitral claims, and must make judgments as to the probative value of the presented evidence.[21]

The arbitrator must also provide a hearing environment that allows for a full, impartial, and fair hearing for the parties and the aggrieved. The extent of any "right" of the aggrieved employee, independent of the exclusive bargaining representative in the traditional bilateral grievance/arbitration procedure, has been and will continue to be discussed and debated.[22] Regardless of where one stands on this subject, the arbitrator's role must be to assure a clear and complete evidence record.

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[18]In this paper the "traditional arbitration setting" means an arbitration hearing as the terminal step of the grievance procedure in a collective bargaining agreement when a neutral, third party is brought in to resolve the dispute.

[19]*Labor Management Arbitration,* Bulletin No. 013 (Asian-American Free Labor Inst., 1977).

[20]Garrett, *The Role of Lawyers in Arbitration,* in Arbitration and Public Policy, Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Spencer D. Pollard (Washington: BNA Books, 1961), 102, 106.

[21]*Supra* note 8.

[22]Aaron, *The Role of the Arbitrator in Ensuring a Fair Hearing,* in Arbitration 1982: Conduct of the Hearing, Proceedings of the 35th Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1982), 30, 38.

It is easy to understand why some advocates take a strong position on arbitral advocacy when the analogy to painting a portrait is used. An arbitral advocate takes the brushes, palette, and canvas from the advocate and uses them to paint over what the advocate has painted. The advocate looks at the finished product only to find it impressionistic rather than the intended abstract. This conduct by the arbitrator is clearly an abuse of discretion, though it may be motivated by good intentions.

The arbitrator must determine the appropriate balance between these considerations and the traditional role of the arbitrator as a trier of fact. Wherever arbitrators place themselves on the involvement continuum and style continuum, they must have full, fair, and impartial hearings that produce clear and complete factual portraits. It is hoped that, in the final analysis, neither advocate can state with evidence-record support that two advocates presented one side's case—one being the arbitrator at the end of the hearing table.

The demeanor and temperament are important. Arbitrators not only must be impartial but also must conduct themselves with reference to the parties, witnesses, and representatives so that all concerned clearly receive the impression of impartiality. This holds true during the actual hearing and during the informal periods before and after the hearing.[23]

In discussing the roles of the participants, particularly those of judge and attorney, in a criminal matter, Scott Turow in his fine novel, *Presumed Innocent,* made this statement, often heard in the hallways of the criminal courts: "There are two defense lawyers in the courtroom, and the one who's hard to beat is wearing a robe."[24] This is something to think about as we consider arbitral discretion.

Establishing Boundaries for Arbitral Discretion

As already indicated, there exist certain general guidelines for the exercise of arbitral discretion, in addition to the terms of the agreement and the submission agreement. It is instructive at this point briefly to review and to place in focus the better known and

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[23]Adapted from Harris, Robinson, Warnlof & Brandt, Practicing California Judicial Arbitration, §4.13 [CEB, 1983 w/ '89 Supp.].

[24]Turow, Presumed Innocent (New York: Farrar, Straus & Giroux, 1987), 55.

established boundary markers. Three principal markers are as follows:

(1) The Code of Professional Responsibility. The Code directs the arbitrator to "conscientiously endeavor to understand and observe, to the extent consistent with professional responsibility, the significant principles governing each arbitration system in which he or she serves." The pivotal section of the Code as to the conduct of the hearing is Section 5.

In essence, Section 5.1 states that the arbitrator "provide a fair and adequate hearing" and, in accomplishing this responsibility, assure that both "parties have sufficient opportunity to present their respective evidence and argument." Section 5.1.a reaffirms that the arbitrator "conform to the various types of hearing procedures desired by the parties," and Section 5.1.e states that the arbitrator "not intrude into a party's presentation so as to prevent that party from putting forward its case fairly and adequately." Section 5.1.b enumerates a number of discretionary functions the arbitrator "may" perform during the building of the evidence record. These discretionary functions may upset an advocate if fully exercised; however, they are in place. I would suggest that it is reasonable to draw from these sections of the Code the concept of "prudent activism" as previously discussed.

2) Rules of the Federal Mediation and Conciliation Service. Section 1404.14 of these rules follows the general approach of the Code and directs in mandatory terms that the arbitrator "shall" conduct the hearing "in conformity with the contractual obligations of the parties." To this end, "[t]he conduct of the arbitration proceeding is under the arbitrator's jurisdiction and control, and the arbitrator's decision is to be based upon the evidence and testimony presented at the hearing or otherwise incorporated in the record of the proceeding."

(3) Voluntary Labor Arbitration Rules of the American Arbitration Association. These rules detail the scope of arbitral conduct. Given the level of sophistication of this audience, and the apparent ability of the group to recite these rules as liturgy, let me note only two: Rule 26 and Rule 28.

Rule 26 mandates that the arbitrator "afford [a] full and equal opportunity to all parties for the presentation of relevant proofs." Rule 28 directs that the "arbitrator shall be the judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary."

A common thread runs through these guidelines. The arbitrator is to serve the parties in accord with the procedures designed by the parties within established professional guidelines, and to provide a full and fair hearing so that the parties can present their evidence without inappropriate interference or intervention. In other words, unless the evidence record is in serious jeopardy, it appears from these general guidelines that advocates should be allowed to use their brushes, palettes, and paint to complete their desired fact portrait.

Control of the Hearing

An integral aspect of building the evidence record is an arbitrator's control of the hearing. As already indicated, the hearing is the vehicle through which the evidence record is built and from which the ultimate decision and award will flow. As stated by Sam Kagel, the hearing "can be legalistic or informal; strictly conducted or free-wheeling. But at all times it should be under control of the arbitrator."[25]

As part of this responsibility the arbitrator should discourage personal attacks, improper tactics such as abusive cross-examination, argumentative questioning, witness badgering, shouting at witnesses, and intimidation.[26] Acrimonious exchanges and advocate abuse of the hearing process must be equitably and firmly addressed with authority.

Both advocates and arbitrators agree that the arbitrator must "run the hearing in a professional manner" and that the advocates must conduct their presentations in an orderly and equally professional manner, absent bitter and caustic remarks or personal invective.

The Advocate as an "Indirect Witness"

Most experienced arbitrators have developed an approach when faced with inappropriate conduct by an advocate. The first consideration, however, is whether the conduct is indeed "inap-

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[25]Kagel, Anatomy of a Labor Arbitration (Washington: BNA Books, 1961), 79. *See also* Jaffee, *The Arbitration Hearing—Avoiding a Shambles,* in Proceedings of the 18th Annual Meeting, National Academy of Arbitrators, ed. Dallas L. Jones (Washington: BNA Books, 1965), 76.

[26]See Scheinman, Evidence and Proof in Arbitration (Ithaca, N.Y.: ILR Press, 1977), 1 ff.; Haughton, *Running the Hearing,* in Arbitration in Practice, ed. Arnold Zack (Ithaca, N.Y.: ILR Press, 1984), 46.

propriate." Assuming arguendo that it is properly determined to be inappropriate, advocates should keep in perspective, whether they desire it or not, that their advocacy may affect belief in the evidence and arguments presented. As described in one trial advocacy text for the judicial forum, the advocate is "an indirect witness" who may face in an indirect manner the divining rod of credibility.[27]

On the Field at Curtis School—An Analogy

The most common complaint raised by advocates to this arbitrator is that arbitrators are reluctant or fail to make clear and definitive rulings on disputed matters during the building of the evidence record. As one commentator described this situation, "the arbitrator may be in charge of the proceeding but does not take charge."[28] In other words, too much is allowed into the evidence record. Rulings are reserved, and the weight to be accorded certain evidence is postponed to the posthearing scale in the arbitrator's office, where probative weights are attached in privacy.

By way of illustration, let me make a brief personal detour. I had occasion to referee a fourth grade girls' soccer game, in which my daughter was an active participant. The outcome of the game determined which team would move to the finals. The referee did not show, and I was asked to referee the game. After making the full disclosures necessary, a type of *Commonwealth Coatings* disclosure,[29] I took to the field with my borrowed whistle. The whistle was blown and the game commenced. It is one thing to view an athletic contest from the sidelines, but it is quite another to be in the middle enforcing the rules before a live audience of highly partisan observers.

To make a long story short, I can inform you with great assurance that you must make immediate, definitive, and clear decisions even if you may not have seen everything. Even when you are absolutely certain on a call, one side will release a chorus of uncomplimentary words. Parents with their little "alter egos" running on the playing field have no patience with equivocation. There is no time for protracted colloquies or "I'll take it under

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[27]Given, Advocacy: The Art of Pleading a Case, §2.07 (Trial Practice Series, 2nd ed.) (New York: McGraw-Hill, 1985).

[28]*Supra* note 6 at 223.

[29]*Commonwealth Coatings Corp. v. Continental Casualty Co.* 393 U.S. 145 (1968).

advisement," or "I'll give it the weight it deserves," or "It's too close to call." Enough said!

Clear and definitive rulings provide a window into the arbitrator's thoughts, and most advocates seem to appreciate this opportunity.

Profile of an Arbitral Advocate

As one final consideration in today's discussion, it seems appropriate that the significant features of the arbitral advocate be portrayed—a type of profile.[30] The hearing context for this profile is as follows: a grievance arbitration in the private sector with reasonably competent advocates, and the arbitrator selected in an ad hoc manner.

It takes little for the arbitral advocate to swing into a domineering role. The arbitral advocate has the attitude that intervening heavily in the advocate's presentation is an acceptable exercise of arbitral discretion. Minimum justification, if any, is required.

The arbitral advocate thinks nothing of calling witnesses who are not called by the parties. Rather than the exception, this is normal and routine. The arbitral advocate does not find it unthinkable to introduce a new theory for the advocates, because that is the theory the arbitral advocate finds most appealing or appropriate. If there is a question by the advocates as to this new theory, an immediate classroom is set up to educate.

Being dissatisfied with direct and cross-examination, the arbitral advocate takes over the questioning of witnesses, often with the approach of an investigative reporter on "60 Minutes" or an inquisitor from the Spanish Inquisition period. Parenthetically, it takes a truly strong advocate to object to the form or content of the arbitral advocate's questions. This same arbitral advocate makes comments during the hearing which demonstrate he or she has already reached findings and conclusions, often before one side has even started to present its evidence.

If so moved, the arbitral advocate will force mediation or settlement when neither side requests or even indirectly makes comments which could reasonably be construed as suggesting

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[30]Davey, *What's Right and What's Wrong With Grievance Arbitration,* 28 Arb. J. 209, 224 (1973).

this approach. The justification is that this is "in the best interests of the parties." It may very well be, but!

After intervening during the advocate's presentation, the arbitral advocate declares, "I've heard enough!" At this point the arbitral advocate turns to the opposing advocate and asks him or her to proceed, "if you have anything to add to the contrary."

In a discharge case the arbitral advocate will turn to the union at 1:30 p.m. and state that the union may proceed with its evidence, but that a plane must be caught at 3:00 p.m., and there are no available dates within the forseeable future to resume the hearing. It is hoped that the arbitrator will not rule against the union on the basis of the sufficiency of the evidence.

Not an attractive profile, even if one attempts to mask certain aspects in whole or in part with euphemistic titles, such as "educator-facilitator."[31]

Abuse of Discretion—Examples

Given a rights grievance in the private sector with reasonably competent advocates and an arbitrator selected on an ad hoc basis, the following are examples of abuses of discretion, listing the most serious first:

(1) introducing a new theory into the hearing;
(2) calling witnesses not called by the parties;[32]
(3) making comments during the hearing which clearly demonstrate a predetermination of the matters in dispute;
(4) forcing mediation or settlement; and
(5) taking over the direct and cross-examination of witnesses.

Other Discretionary Aspects

Certain evidentiary and procedural rulings by arbitrators during the building of the evidence record do not neatly fit on either continuum identified today. Such rulings nonetheless should be illustrated:

(1) Should the employer be allowed to call the grievant as the first witness in a discharge case?

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[31]*Supra* note 13.

[32]*See* Gosline, *Witnesses in Labor Arbitration: Spotters, Informers and Code of Silence*, 43 Arb. J. 44, 50 (1988).

(2) Should the arbitrator allow into the record evidence of postdischarge misconduct by the grievant?
(3) Should the arbitrator allow into the hearing room the grievant's personal attorney when his or her presence is objected to by either or both sides?
(4) Should witnesses be excluded from the hearing?

The answers to these questions require the exercise of arbitral discretion; however, a reading of the texts and articles in the field indicates that positions and practices have evolved. Advocates look for certainty, and arbitrators look for the preferred view as expressed in the texts. As to the four illustrative questions, there appears to be a majority view and a minority view.

The real question is whether these preferred or majority views should be codified as a type of "Code for the Exercise of Discretion." If such a code were developed, it would remove some of these difficult discretionary calls and bridle the would-be arbitral advocate. It would provide greater certainty, uniformity, and consistency in building an evidence record and could function in a manner similar to the Rules of Evidence in the judicial forum. Reviewing courts in vacature actions could easily identify errors and abuses; thus, they could add this code to their "rationality," "essence," and "public policy" tests.

This possibility is mentioned to illustrate positions represented to me by advocates in the past. This moves the hearing on the style continuum toward legalism, a direction I feel is not in the best interests of the arbitration process. In my judgment, the "Code for the Exercise of Discretion" should be appropriately buried with full honors.

Final Troubling Aspects

As already noted, the traditional labor-management arbitration hearing and the building of the evidence record within that hearing are guided in large measure by an arbitrator's exercise of discretion. The arbitrator is governed by very general guidelines, and these guidelines are subject to the arbitrator's own interpretation and application. Circumstances and guidelines applicable in a particular case will dictate where the arbitrator will be located on the involvement continuum and the style continuum. Extremes are always dangerous and attempting to legislate control over the extremes is equally treacherous ground.

Mutual acceptability and selection of arbitrators, one of the hallmarks of this dispute-resolution forum, may be the best control over abuses and aberrant behavior in the exercise of arbitral discretion; however, "prudent activism" should not be confused with arbitral advocacy. It is granted that they are degrees of intrusiveness.

No one would question the responsibility of the arbitrator to ask clarifying questions, to request of an advocate that the witness be allowed to testify and not the "indirect witness" during direct examination, or that compound, complex, or unintelligible questions be corrected in order that a "yes" or "no" answer stands in response to such questions. "Prudent activism" would call for arbitral intervention to arrest these situations and make the evidence record clear and complete.

The final troubling area in this excursion into the exercise of arbitral discretion, which may or may not be troubling to many of you, is the real possibility that two very different evidence records can be built by two different arbitrators located at the extremes or close to the extremes on the involvement continuum and/or the style continuum in the same case. Differences as to credibility determinations and probative weight considerations are expected. Differences on procedural rulings are also expected. Are differences in the evidence record caused by expansive arbitral intervention into the advocates' role to be expected?

It is difficult enough to have the potential of different awards from the same factual situation based on credibility, probative value, and procedural rulings. Should the advocates have to face the arbitral advocacy variable as well?

The judicial forum gained some assurances in this regard through the Rules of Evidence and civil procedural requirements. The arbitration forum has not followed this lead. Should a "Code for the Exercise of Discretion" be resurrected so quickly! I would certainly hope not, as I just buried it a few pages back! If creeping legalism is dangerous, this code is even more dangerous. However, I do not view insisting on a well-built evidence record to be a legalistic approach.

What then is the solution to the arbitral advocate and movement on the involvement continuum in that direction? The solution I offer today is one used by Greek and Roman playwrights who got snarled in a plot and could not extricate themselves by the final curtain—*deus ex machina*. This theatrical

phrase calls for the gods or a god to enter the scene and, through the magic only gods can create, straighten things out.

I hope that during the following discussion groups, you can assume the *deus ex machina* role and address possible bounds to the exercise of arbitral discretion in the building of the evidence record.

II. A MANAGEMENT VIEWPOINT

RICHARD L. MARCUS*

Alluding to what he describes as "the Darwinian approach," Joseph Gentile has observed that "continued survival as an arbitrator . . . requires adaptation to . . . changing hearing circumstances." As a management advocate whose clients' fortunes and perceptions of their counsel's talents may be significantly influenced by arbitral decisions rendered by members of this august body, it would no doubt be most prudent for me to avoid heretical proposals. That having been said, I will nevertheless express a thesis which will, I fear, be rejected as totally unacceptable by many of you.

The parties to a collective bargaining agreement have made their deal. In any but the interest arbitration context (and, it can be argued, in that context as well), one side is claiming that the other is not living up to its part of the bargain. Given this basic format, there are sound legal and practical reasons to suggest:

First, the party making such a claim is duty bound to prove it or accept the consequences.

Second, the arbitration process has been in place long enough and employers and unions have become sophisticated enough to know the ground rules and to understand and appreciate all of their ramifications.

Third, it is both presumptuous and inappropriate for any arbitrator to assist either the charging party in presenting its proofs or the charged party in defending against them via what we would all be ready to condemn as "arbitral advocacy."

I would go further to suggest that the end result is no more palatable if produced under the guise of arbitral activism or discretion, or under the rubric of "fact gathering" or "making a

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complete record," no matter how well intentioned or where, on Gentile's "continuum line," such an exercise falls.

The rationale for my thesis can be explained as follows:

First, unlike a judicial proceeding, there is essentially no opportunity for review of an arbitration proceeding. If there were any doubts on this score, many recent court decisions have effectively dispelled them.[1] As Judge Richard Posner of the Seventh Circuit said not too long ago:

> [W]e want to make clear that we take seriously the twin propositions that (1) the reviewing court's function (whether the district court's, or this court's) is at an end when it concludes that what the arbitrator did was interpretation of the contract, and (2) when in doubt the court must find that it was interpretation. We do not want to be plagued by cases in which companies or unions refuse to comply with arbitration awards merely because they think the arbitrator clearly misinterpreted the collective bargaining agreement. If parties to collective bargaining contracts are unhappy with arbitration awards they can bargain for a different method of selecting arbitrators, or for panels of arbitrators, trial or appellate.[2]

There is, in short, no effective way to set aside an award which is the product of arbitral advocacy in even its most virulent form.

Second, unlike most judicial proceedings, when arbitration is over, the parties are still living with each other. Accordingly, if either or both parties are dissatisfied with the results produced by arbitration proceedings, they have the wherewithal to change any or all operative elements of those procedures, either ad hoc (interim arrangements) or permanently (through negotiations). We have all seen contract provisions of this kind: e.g., restrictions against posthearing briefs, prohibitions against participation by attorneys, specific allocations of burden of proof, and use of mediation-type processes in lieu of formal arbitration proceedings. Indeed, the parties can decide and, in some cases, have decided to abandon the arbitration process altogether.

The reasons which underlie adoption of these changes are myriad. Most important, such provisions come about because the basic system—collective bargaining—works very well and, by its very nature, is designed to accommodate these myriad needs. Since arbitration is only one (albeit important) element of that

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[1]*See, e.g., Paperworkers v. Misco,* 484 U.S. 29, 126 LRRM 3113 (1987); *Pack Concrete, Inc. v. Cunningham,* 866 F.2d 283, 130 LRRM 2490 (9th Cir. 1989); *Berklee College of Music v. Teachers Local 4412,* 858 F.2d 31, 129 LRRM 2465 (1st Cir. 1988); *Daniel Constr. Co. v. Electrical Workers (IBEW) Local 257,* 856 F.2d 1174, 129 LRRM 2429 (8th Cir. 1988).

[2]*Ethyl Corp. v. Steelworkers,* 768 F.2d 180, 187, 119 LRRM 3566 (7th Cir. 1985).

system, it is vitally important that arbitrators refrain from imposing their own conceptions of how it should work and whether, in the arbitral mind, it is "fair" for it to work one way as opposed to another.

Even if a discharge grievant's claim is rejected, the parties who have codified their faith in the arbitral process are still together; and, I submit, that is what matters most. Their relationship is intact and, if they believe that the process produces unfair results, they can change that process at any time. As for the discharge grievants, the "just cause" criteria written or imputed into the contract are properly shaped by the parties' intentions and by the very procedure which the parties have adopted to apply them, including most significantly the actions taken by the parties at the arbitration hearing manifested by their own choices as to what evidence to produce and how to produce it. These contractual just cause criteria and the methods by which they are tested, whether vague or specific, are subject to revision at any time the signatory parties choose. As for the grievant and the arbitrator, the very definition of contractual just cause criteria must be considered as governed by reference to what the contractual parties consider at that time to be relevant and material. Given the Supreme Court's holdings, there is little reason for the arbitrator to be overly concerned with or deferential to "just cause" rights dehors the contract. There clearly are forums available for the adjudication of those rights.[3]

Third, the suggestion that arbitral activism at the hearing is justified by the absence of pretrial discovery procedures does not hold up under scrutiny. The parties clearly have the right to demand information at the various steps of the grievance procedure and at any time prior to arbitration. Refusal to produce such evidence may be actionable under the NLRA.[4] Testimony concerning the refusal of a party to produce information should be and, in my experience, is considered relevant at the hearing. As relevant testimony, it can properly be accorded significant weight by arbitrators in reaching conclusions and rendering awards.

More specifically, I am suggesting the following guidelines for arbitral conduct and demeanor in labor arbitration proceedings:

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[3]*See, e.g., Lingle v. Magic Chef, Norge Div.*, 486 U.S. ___, 46 FEP Cases 1553 (1988); *McDonald v. City of West Branch, Mich.*, 466 U.S. 284, 115 LRRM 3646 (1984); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Cases 81 (1974).

[4]*Island Creek Coal Co.*, 289 NLRB No. 121, 129 LRRM 1244 (1988).

(1) I agree fully with Gentile that the arbitrator need not and should not tolerate abuse of witnesses or demeaning conduct of advocates. In this connection let me add that I have often told associates that the arbitration result for which they should strive (and the best they can hope to accomplish) is a disgruntled grievant telling fellow employees that the case would have been won but for the stupid arbitrator who messed up or didn't understand the case. If the result is the same person saying the case would have been won but for the sleazy company mouthpiece who wouldn't let the story be told, the management advocate hasn't won very much. There will be a day of reckoning (called contract negotiations).

(2) Let the parties present as much or as little evidence as they desire, in whatever form they choose. It is infinitely more desirable—and, I submit, far more faithful to the terms of the arbitrator's engagement—to issue an award saying, "The record fails to disclose" than to ask at the hearing, "What are the facts?"

To put it bluntly, I strongly disagree with Gentile's contention that "some degree of arbitral activism is triggered when the arbitrator perceives an inability in the advocates to build a quality evidence record." Indeed, I believe that the error of this statement is proven by his follow-up observation that "this perception may not be shared by the participating advocates." If the parties' chosen representatives are satisfied with the record they have developed, it is in fact for their purposes (and, I submit, for all properly relevant purposes) a "quality evidence record," and it is wholly inappropriate for the arbitrator to conclude otherwise.

(3) I have no quarrel with the principle that arbitrators are not bound by federal or state rules of evidence. On the other hand, arcane as some of these rules may be, there are significant, legitimate reasons for judges and arbitrators alike to disregard certain proffered evidence, most notably blatant hearsay. Hearsay is (a) inherently unreliable, (b) there is no practical way for hearsay to be effectively rebutted, and (c) hearsay often raises additional issues or matters which, at best, are insignificant (but prolong the proceeding) or, at worst, saddle the parties with the dilemma of having to decide whether to seek out additional evidence to rebut testimony which the arbitrator has "let in for whatever it's worth."

(4) If, in the most extreme case, you find after the presentations by both sides that you simply do not understand the *issue* of

the case, make your dilemma known to the advocates, requesting either an oral explanation or an elucidation in the briefs (if there are any to be filed). I would urge that this request be used very sparingly. The distinction between conceptual difficulty with the issue and curiosity concerning facts that may crucially affect the outcome is a difficult one to draw. But it is most important that the arbitrator make the distinction; for while failure to understand the issue will likely result in disservice to both parties, inquiry concerning even crucial facts can and should be perceived as either (a) a disservice to the one party whose case is lost because of the arbitrator's production of evidence which the other side failed to adduce on its own, or (b) a disservice to one or both parties who, for reasons of their own, simply did not want such evidence adduced at all.

[*Editor's note*: The Union Viewpoint was presented by Gilbert Cornfield, Cornfield & Feldman, Chicago, Illinois.]

III. WHOSE HEARING IS IT ANYWAY?

GEORGE NICOLAU*

It's always difficult, at least for me, to speak to an audience such as this. The expectation is that something profound will be said. But I have no profundities, just the experiences and views of one arbitrator.

When you think of it a bit, the question before us—"Whose Hearing Is It Anyway?"—is a fascinating one. It's simply loaded with tension, tension that goes far beyond the subsidiary questions we intend to address.

Let me, by way of introduction, dwell on that thought for a moment. We've all been schooled in the maxim that we're the creature of the parties and that the process is theirs. Yet, we also know that arbitrators "may vary the [hearing's] normal procedure," that they are the sole judges of the "relevance and materiality of the evidence offered" and that the parties are required—are *required,* mind you—to "produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute."[1]

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*Member, National Academy of Arbitrators, New York, New York. This paper was presented at the Academy's Continuing Education Conference in Milwaukee, Wis., October 30, 1988.

[1]The quoted portions are from Rules 26 and 28 of the American Arbitration Association's Voluntary Labor Arbitration Rules, as amended and in effect January 1, 1988.

Imagine, if you will, how the tension inherent in these very different arbitral guideposts (the arbitrator as the parties' creature versus the arbitrator as envisioned in the AAA Rules) is heightened when you are a young, relatively new, and inexperienced arbitrator who walks into the hearing room to find relatively experienced, sophisticated, and sometimes jaded advocates who picked you because they thought they could con you or, failing that, push you around.

You are the creature of the parties, of course. If it wasn't for them—if they hadn't selected you—you wouldn't be there. But, in a very real sense, at least in my view, the hearing is not theirs, but yours. Some may disagree, but as our esteemed Academy President well knows, that's baseball.

Surely, you bow to the parties to the extent that they have a procedure on which they agree and to which your dissent or distaste is not so basic as to impel you to take the next plane out of town. If, for example, you can live with a two-sided clock that allows each party only a half-hour on a discharge case of an employee with 20 years of service, so be it. I wouldn't suggest or recommend that you do any such thing, but to some, such a procedure might be acceptable.

My point, however, goes beyond time limits or mere matters of mechanics. Our goal, in those cases where truth is an issue, is the *search* for truth. And in all cases our goal must be an orderly procedure, one most conducive to a marshalling of *all* the facts and *all* the arguments necessary to a full understanding of the case, an understanding that will reveal to you what is necessary to a reasoned and fair disposition of the dispute.

This is not always easy, my friends. Often enough, one side or the other doesn't want you to know that much. If you did, the answer to the ultimate question the parties have put to you might be much clearer than it first appeared. Apart from exercises in obfuscation, there are all kinds of folks out there, more each day it seems, who don't think of arbitration as an extension of the collective bargaining process or as a "cooperative endeavor," but as a substitute for the courtroom or the football field where witnesses and even clients are expendable casualties of the battle of the moment, and Vince Lombardi's credo of combat holds sway. They too are not overly interested in the truth or the most reasonable and appropriate answer, but strive primarily for victory, often irrespective of the cost in labor relations terms.

Let me suggest to you that the process might be theirs, but the hearing should be yours. As the contract reader and the decision maker, you are entitled under the AAA Rules, under our Code, and plain common sense, to an orderly hearing and all the evidence you deem necessary.

For the newer arbitrators, taking control of the hearing is a delicate and, some think, a dangerous task. After all, a good deal, if not everything, rides on acceptability. But you have to do it if our goals—the search for truth, an orderly process, and the facts one needs for a fair and reasoned disposition—are to be attained. The trick is to be quietly, but determinedly assertive. If you exercise that assertiveness with tact and skill, with what Jack Dunsford has described as "mandarin courtesy," most parties, I venture to say, will think no less of you; some may indeed be grateful.

While gently taking control of the hearing is by no means painless in the early stages of a career, it becomes less difficult as you progress from case to case. This is not only because you become more comfortable with experience, but also because the parties react to that experience. Jack Dunsford wisely recognized the phenomenon at work in such circumstances, as he has recognized a number of other things many of us see but don't adequately perceive. He described it this way:

> As the reputation and degree of acceptability possessed by the arbitrator grow in the marketplace, his conduct, rulings, and decisions at the hearings may be taken as representing the expected standard of performance. The parties may then begin to orient their understanding of the process to the actions of the established arbitrator.[2]

It's what might be called the reverse Hawthorne effect—that which is observed changes the behavior of the observer. Or it might be dubbed as the "You've been around a long time and have a helluva good reputation, so you must know what you're doing" syndrome.

One example of this was vividly brought home to me when attorneys for both sides in a longstanding collective bargaining relationship independently advised that they liked to select me as an arbitrator. The reason each one gave was that with some

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[2]Dunsford, *The Role and Function of the Labor Arbitrator,* 30 St. Louis U.L.J. 109, 113 (1985).

other arbitrators his adversary tended to get out of control and behave in an obnoxious manner. I perceive myself as a pussycat. Apparently, if these two attorneys are to be believed, that's not the image that's received.

In any event, whatever image you project, try never to forget, the hearing is yours. Remember too, what Tom Roberts' good friend Peter Ueberroth is fond of saying, "Authority is ten percent given and ninety percent taken."

Obnoxious Advocates

There is no place in an arbitration hearing for obnoxious advocates. They contribute nothing to the proceeding. In my view, they subvert it. Moreover, they damage the relationship and the very concept of arbitration, for such behavior serves only to confirm what many suspect: that arbitration is not really designed to advance understanding or to give everyone a "fair shake," but to reward the cunning or the clever or those with the sharpest killer instinct.

The trick is to get the obnoxious advocate to stop. There are various techniques; which one you use is largely a matter of judgment, though the gradual escalation of pain is generally the preferable tactic. There is the "let's have a talk in the hallway" approach, where you can appeal to notions of honor or, that failing, instill anxiety or fear. There's the direct confrontation in the hearing room, perhaps gentle at first, then increasing in severity and, in the end, if it comes to that, the "arbitrator's walkout" during which you say over your shoulder something like, "We'll resume when you advise that you're ready to conduct yourself in an appropriate and civil manner."

It's hard, I fear, to deal with obnoxious advocates without lecturing. Try as you might, there are times when no alternative is left if your hearing, *your hearing,* is going to proceed in the fashion you need.

Unequal Representation

At first blush, this issue seems a strange candidate for the topic "Whose Hearing Is It Anyway?" but it's not.

While the hearing is yours, the presentation of the case is not. The issue of unequal representation highlights that distinction.

The question, of course, is how far you should go to aid a party whose representation is inadequate.

There is, I suspect, no unanimity among us. Some would go further than others. I think it evident, however, that you can't take over the case or suggest what a party should do or what arguments should be made. Nor, in my view, should you. As long as both sides understand the procedures (educating the uninitiated in procedures I consider my job), this arbitral restraint applies even if one side is represented by an attorney and the other is not and even if one side is unrepresented, as we commonly understand that term.

What you can do in these situations, to go back to what I said before, is make certain that you have enough for an informed decision. If you do, that should be the end of it. If you don't, then you have to ask yourself where the gaps are and how you can close those gaps and get what you need without taking over a presentation or favoring one side. While what you do to close those gaps may have the effect of aiding a presentation, that is not its purpose. Its purpose is to give you what you need for an informed judgment and, in my opinion, you have a right, indeed a duty, to do that.

Having made that point, I must also say that there's an area with respect to this issue where I might be more assertive even if I have, at that moment, everything I really need for the decision. Where I see something happening or not happening that might jeopardize the finality of the award, something, for example, affecting the duty of fair representation, I might be inclined, if I can, to take steps to eliminate that possible infirmity. Absent that consideration, however, if I have enough for a decision, I leave presentation to the parties.

Sequestering Witnesses

I really don't see sequestration as an issue. If such a motion is made and I'm satisfied, after the shortest of inquiries, that witnesses will be testifying about the same event or events, they are excused. The grievant may stay, of course, as well as one representative from each side other than counsel. Once a sequestered witness testifies, that witness may stay for the remainder of the proceeding regardless of whether rebuttal testimony is expected.

There is one other matter I'd like to comment on before I close. It's tangentially related to sequestration and certainly germane to our overall topic: It is the tendency of the party who does not have the burden of going forward to reserve its opening statement until the other party's case has been presented. In a discipline case the union representative often reserves, treating the matter as a criminal trial and behaving as if there had been no discussions during the grievance procedure. In a contract interpretation case company counsel will frequently seek to forgo an opening, saying that the company wants to know just what the union's case is before revealing its position.

I hope it doesn't show at the hearing, but I bristle at such tactics. They don't advance the process. Arbitration is not a game of surprises. Each party's position should have been revealed in the grievance procedure. To forgo that is to forgo the opportunity for settlement, which is what the grievance procedure is all about.

Apart from that, failing to reveal one's position is a disservice to you as arbitrator and to the party one represents. If you are kept in the dark regarding a party's position, you may spend time concentrating on irrelevancies and miss the whole point that party is seeking to make or never fully appreciate its significance.

More than wasting your time by letting you peer into ultimate blind alleys is the disservice such tactics perpetrate on the client. More often than not, you come into the proceeding knowing little or nothing about the case. The opening statement is *the* opportunity to grab and focus your attention, to shape and color the perspective, to paint the picture, to create an almost indelible impression. To throw that opportunity away is a basic mistake of advocacy.

Thus, you will find me saying on occasion, "I understand your viewpoint, counsel, but don't you want to tell me just a little bit about what I should be looking for?" It usually works and everyone's the better for it.