resources as a good way to resolve employment law litigation.

4. Work with the management and employee bars to promote use of arbitration over litigation and use of the existing labor arbitrators over new, untested, and inexperienced arbitrators. Attorneys will respond if they perceive, as perhaps they should, that arbitration is indeed a useful tool in resolving the cases that are piling up on their desks and irritating their clients to distraction. But the parties must also perceive arbitrators as possessing the requisite skills to effectively arbitrate employment law disputes.
5. Establish a pool of arbitrators who possess the skills necessary to arbitrate the highly complex and technical employment law disputes.

Conclusion

The practice of labor and employment law is ever changing. These changes present difficult challenges for advocates and arbitrators. Clearly the great rise in disputes over employment matters offers opportunity to expand the scope of arbitration. Without major effort to promote the value of experienced labor arbitrators, however, I fear we may see an unfortunate decline in the quality of arbitration hearings and decisions. I hope the NAA can find its place in helping to resolve the new breed of employment law disputes.

LABOR PERSPECTIVE

GREGORY N. FREERKEEN*

Introduction

Evolutionary adaptation is something we can see in the world of arbitration as well as in the world of living organisms. For instance, if a species of animal becomes extinct, other species adapt in an evolutionary fashion to occupy the extinct animal's niche in the environment. The environment causes the newcomer species to adapt in a fashion similar to the predecessor, and thus the new species may assume many of the predecessor's characteristics in response to the same environment.

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For example, scientists postulate that through adaptive radiation tiny shrew-like mammals filled the environmental categories left by extinct dinosaurs. After the dinosaurs died out, the tiny mammals were able to move freely into the world formerly dominated by the giant reptiles. After being exposed to the same environmental pressure in which the dinosaurs existed, the little mammals adapted in various fashions which, through natural selection, caused them to resemble their reptilian predecessors.

Similarly, winged mammals, bats, adapted to fill the place in the sky left empty by the extinct winged reptile, the pterosaur. Heavy, horned, lumbering mammals like the rhinoceros came to assume the void left on the planet by such ponderous and plodding horned dinosaurs as the triceratops. The killer whale adapted to the sea in a fashion similar to predecessors such as the ichthyosaur, a large swimming dinosaur with big teeth and fins.[1]

Labor arbitration is now on the brink of where those tiny mammals were when this planet was abandoned by the dinosaurs. The question is how labor arbitration will adapt and how it will diversify.[2] Judges are in the process of surrendering their role in providing dispute-resolution services for many, if not most, classifications of employment and labor disputes. Arbitrators wait to fill that void because employment disputes formerly heard in court will in the future likely be heard elsewhere.

In addition, where entirely new rights are created, such as the Americans with Disabilities Act[3] and potentially the Uniform Employment Termination Act,[4] thereby making fresh categories of disputes, the trend is to resolve these new claims outside the courtroom. Lawsuits over employment issues, therefore, are in relative decline, and the evolutionary niche is being filled by arbitration, together with its cousin, the administrative hearing.[5]

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[1]Mader, Biology, 3d ed. (1990), at 305.

[2]What does evolution have to do with arbitration? Actually the answer is probably nothing. The eminent evolutionary theoretician, Stephen Jay Gould, warns that comparison between biological evolution and human cultural change has done more harm than good. However, just like Gould, I will do it anyway because of the fun involved. *See* Gould, *The Panda's Thumb of Technology*, in Bully for Brontosaurus: Reflections in Natural History (W.W. Norton, 1991), at 63–64 (wherein Gould comments on the "evolution" of the typewriter keyboard). Nevertheless, we must be wary not to make this analogy into some sort of scientific principle concerning cultural change.

[3]Pub. L. No. 101-336, 104 Stat. 327–337 (July 26, 1990).

[4]Uniform Employment Termination Act (1992).

[5]Administrative hearings often provide for the appointment of an independent hearing officer drawn from a list of arbitrators. An excellent example of this is the Illinois statute, allowing a community college professor to have a statutory termination hearing

As this shift continues, arbitrations and arbitrators will diversify and adapt to fill the niche left by the judicial system. Much of the evolution will be shaped by the forces in our society which seek to make arbitration proceedings more and more like the advocacy trial proceedings being replaced. However, labor employment arbitrations will not "evolve" into trial proceedings; rather, certain aspects of trial-type advocacy and decisionmaking will become part of at least one of the emerging styles. This arbitration style will become dominant where it is a substitute for a lawsuit. Because society and the parties will expect arbitration to act as a surrogate trial, arbitration will resemble court proceedings in substance and procedure.

Certainly some, perhaps many, labor arbitrations will proceed in the same old way because they will serve the same old union and management groups. Survival does not require every arbitrator to change or every arbitration to evolve, but many arbitrations must adapt in response to the new situations. To survive in these circumstances, arbitrators and the arbitration process must adapt by taking on new and different features. In particular, we all must be prepared to adapt to the pressures that caused lawsuits to evolve as they have.

The Ice Age for Employment Litigation

Try to imagine a great sheet of ice moving across the court system, freezing out employee lawsuits against employers. These disputes are not vanishing. They are simply shifting into the areas of arbitration, administrative hearing, and alternative dispute resolution. Sometimes this occurs by choice of the parties and sometimes by legislative or judicial decision.

The reasons for the switch from litigation to arbitration are easily catalogued. One reason is that judges, unlike arbitrators, do not believe that mundane employment disputes belong before them. Judges often consider employment cases as pesky nuisances, and they look forward to the day when these cases will simply go away. In part, this is because historically labor matters

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before an arbitrator. In this instance the arbitrator's award is reviewable by administrative review. *See* Ill. Rev. Stat. ch. 122, §103B-4 (1989). A related example is the fact that the hearing officers appointed pursuant to statute by the Illinois State Board of Education to hear school teacher dismissal cases (Ill. Rev. Stat. ch. 122, §24-12 (1989)) are almost exactly the same group of individuals who may be appointed pursuant to an arbitration clause in a collective bargaining agreement.

were kept out of court. The age-old employment-at-will doctrine is at the heart of the situation. This doctrine considers the employer-employee relationship more akin to dance partners than marriage partners.[6] It takes two to tango and either partner is free to choose someone else for the next number. Thus, if employees do not like the terms or conditions of employment, they are free to quit at any time and seek a different boss, and the boss too is free to switch.

This common law principle has required the courts to look upon the vast majority of employment disputes as an encroachment on this basic principle. If to the common law proposition we add the current conservative federal judges appointed by the Reagan/Bush administrations, who have deliberately cut back on the claims employees potentially have against their employers, we have a very unfavorable forum for employees with such claims. Lest this statement be assessed as extreme, consider that the Civil Rights Act of 1991[7] was enacted in direct statutory response to the Supreme Court's deliberate erosion of employment discrimination claims announced in five cases.[8]

> The targets of the legislation . . . were five decisions of the Supreme Court in 1989. These decisions had (1) narrowed the coverage of civil rights statutes, (2) broadened the situations under which affirmative action plans could be challenged after the fact, (3) narrowed the situations under which a discriminatory seniority plan could be challenged, (4) made it more difficult for plaintiffs to prevail as to "disparate impact" claims, and (5) made it more difficult for employees to establish liability in cases where the employer's motivation was a mixture of legitimate and discriminatory reasons.[9]

The Reagan/Bush appointees now dominate the federal court system. They often come from a political background which is genuinely offended by employment cases. And, frankly, these judges sometimes take a downright punitive view toward those who bring these cases into their courtrooms. When sanctions are

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[6]I disagree with Stephen Hayford about the prospects for widespread passage of the Uniform Employment Termination Act as promulgated by the National Conference of Commissioners on Uniform State Laws. I predict with some confidence that the concept of "at will" employment will continue as the general rule with more and more contractual and statutory exceptions to the common law rule as time goes on.

[7]Pub. L. No. 102-166, 105 Stat. 671-1100 (Nov. 21, 1991).

[8]*Patterson v. McLean Credit Union*, 491 U.S. 164, 49 FEP Cases 1814 (1989); *Martin v. Wilks*, 490 U.S. 755, 49 FEP Cases 1641 (1989); *Lorance v. AT&T Technologies*, 490 U.S. 900, 49 FEP Cases 1656 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 49 FEP Cases 1519 (1989); *Price-Waterhouse v. Hopkins*, 490 U.S. 228, 49 FEP Cases 954 (1989).

[9]Larson, Civil Rights Act of 1991 (Matthew Bender, 1992), at 5–6.

entered against an attorney for bringing a frivolous lawsuit, they are more often entered against a plaintiff's attorney in an employment discrimination or civil rights case than in any other category of case on the federal docket. The chilling effect this has had on attorneys who practice in the area of employment discrimination has received much comment.[10] I use this example simply to challenge the notion that attorneys representing unions and employees should be fighting to keep these matters on the federal judicial docket and outside arbitration. It is fair to say that employment cases are increasingly discouraged from darkening the courthouse door by judges who narrowly interpret employee rights and who are capable of taking offense at specific individual employment cases brought before them.

During the first half of the century, labor unions lobbied hard to keep courts from interfering in labor matters through injunctions. The labor unions' efforts succeeded in the passage of, among others, the Anti-Injunction Act.[11] Back in those days, unions knew that courts and judges were not sympathetic to their cause. Accordingly, they avoided the courthouse as an untrustworthy place to resolve employment disputes. Only when a more liberal court became friendly to labor did organized labor change its view and look upon the court as an appropriate place to resolve disputes with employers. Even now unions generally take the view that federal, constitutional, and statutory protections ought to remain in federal court rather than go to arbitration.[12]

But now that the conservative court is ascendant, will organized labor again hesitate to bring employment disputes into federal court? Is labor now back to where it was when it feared it could not receive fair treatment in the court system? I think the answer to these questions is obviously "yes," but I also think that labor has been slow to come to this realization because it retains nostalgia for the old liberal federal courts dominated by the judicial appointments of Presidents Kennedy, Johnson, Carter, Ford, and, yes, even Nixon.

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[10]Statistics from the reported cases show that civil rights and employment discrimination plaintiffs are the targets of a disproportionate number of Rule 11 cases. Plaintiffs are sanctioned at a much higher rate than in other cases. *See* Vairo, *Commentary, Rule 11: Where We Are and Where We Are Going*, 60 Fordham L. Rev. 475 (1991).

[11]Duston, 7 Lab. Law. 823, 826 (1991). *See, e.g.*, Norris-LaGuardia Anti-Injunction Act, 29 U.S.C. 101 *et seq.* (1932).

[12]*Id.*

The conservative shift in the judiciary is certainly not the whole reason that employment cases will be increasingly going to arbitration rather than lawsuit. A second reason is that the large backlogs in both state and federal courts have depleted judicial resources and, by necessity if not desperation, there is an increased determination generally to shift dispute resolution from the judicial forum to private arbitration and to alternative dispute resolution. This applies not only to labor and employment cases (which have traditionally annoyed judges) but also to all cases which the court system views as a nuisance. We see, for instance in the area of civil law, that personal injury claims are increasingly handled by panels of arbitrators—usually attorneys—who hear cases and make recommendations. This is called "court-annexed" arbitration, usually involving financial detriment for the party who rejects the award of the arbitrators and proceeds to court.[13] Although initially the goal was to rid the court system of the mundane "slip and fall" and car accident cases, the displacement to court-annexed arbitration may soon include catastrophic personal injury cases and commercial matters.

There is also court-referred mediation. Although this is supposed to be voluntary, sometimes the penalty for refusing to resolve an employment claim through mediation is that the court will take a very long time to reach the case for trial. The sanction for refusing a mediated settlement, therefore, can in effect be the denial of a judicial trial by the simple means of delay.

I should also note that often the parties are not eager to go to trial. Discovery and motions are often used to wear down an opposing party or to prevent a trial by raising the amount of time and expense. Settlements often occur because the parties cannot afford to go to trial. Thus, delay is sometimes caused as much by the desire of one or both parties to avoid trial as it is by the traffic jam of cases to be tried.

In the world of litigation, only a small percentage of cases actually proceed to trial and verdict. The majority of cases are settled or disposed of by motion. Only the smallest fraction of employment cases go to trial on their merits, because the parties cannot get a trial or because they do not want a trial.

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[13]*See, e.g.*, Ill. Rev. Stat. ch. 110A, §86-95 (1991).

In short, employees who have employment claims typically need quicker, more thrifty solutions than the judicial system has to offer. They are unable to afford the time and expense of extended litigation. Although there are many complaints about employment matters being directed to arbitration, arbitration may be the only viable alternative because of the inhospitality of the court system due to overload, quite apart from an unfavorable attitude on the part of the judiciary.

The third reason employment cases are headed for arbitration is exemplified by the case of *Gilmer v. Interstate*.[14] As a result of all the factors discussed above, it was predictable that the United States Supreme Court would make the shift that it did in the *Gilmer* case. In *Gilmer* the Court is no longer looking at arbitration as a dubious approach for labor dispute resolution. In fact, the Court is turning its back on the *Alexander v. Gardner-Denver*[15] precedent, which stated that arbitration was inappropriate to vindicate constitutional and federally protected rights. Although the Supreme Court has left itself room to withdraw without overruling *Gardner-Denver*, there is very little probability that it will retreat. It is hard to imagine that the Court would call into question the *Alexander v. Gardner-Denver* line of cases[16] on a mere whim. The attitude expressed in *Gilmer* is hardly one of ambivalence. The opinion shows that a majority of the Court is ready to lock the courthouse door on employment discrimination claims when there is a contract requiring such disputes to go to arbitration. Nothing in *Gilmer* precludes the Court's analysis from applying to collective bargaining agreements containing antidiscrimination clauses, or to employment contracts, or even to unilaterally imposed conditions appearing in a personnel handbook and agreed to merely by the employee's acceptance of employment.[17]

However, I disagree with my colleague, Stephen Hayford, when he predicts that the Supreme Court will reconcile *Gilmer*

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[14]*Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647, 55 FEP Cases 1116 (1991).

[15]415 U.S. 36, 7 FEP Cases 81 (1974).

[16]The *Gardner-Denver* progeny include *Barrentine v. Arkansas-Best Freight*, 450 U.S. 728, 24 WH Cases 1284 (1981) and *McDonald v. City of West Branch, Mich.*, 466 U.S. 284, 115 LRRM 3646 (1984). While these cases dealt with collective bargaining agreements, the lower courts applied the *Gardner-Denver* precedent equally to individual employees who desired to proceed with Title VII or ADEA lawsuits in the face of an agreement to arbitrate prospectively obtained by the employer. *See, e.g., Alford v. Dean Witter Reynolds, Inc.*, 905 F.2d 104, 53 FEP Cases 529 (5th Cir. 1990); *Nicholson v. CPC Int'l*, 877 F.2d 221, 49 FEP Cases 1678 (3d Cir 1989).

[17]The current Supreme Court has shown itself to be conservative.

with *Gardner-Denver* and when he foresees that *Gardner-Denver* will remain the law with regard to arbitration under traditional collective bargaining agreements. My crystal ball anticipates a different result.

The *Gilmer* case can easily be distinguished by reason of its factual dissimilarity with *Gardner-Denver*, but it cannot be distinguished because the agreement to arbitrate was individually negotiated between employer and employee. Just the opposite is true. Plaintiff Gilmer was a securities representative required by his employment with Interstate to register with several stock exchanges, including the New York Stock Exchange (NYSE). Gilmer's registration application with NYSE was on a standard form wherein he, among other things, agreed to arbitrate any dispute or controversy as required under the NYSE rules. Thus, the agreement to arbitrate was not even a contract with his own employer. Further, NYSE rules were a separate document from Gilmer's application form, and Rule 347 (presumably one of many rules) required registered representatives to arbitrate with their employers any controversy arising out of termination of employment as registered representatives. Consequently, Gilmer never made an agreement to arbitrate with his own employer. The arbitration agreement was contained in papers Gilmer signed with a third party, i.e., the New York Stock Exchange.

The significance of this point is that, if the Supreme Court will allow NYSE to require its registered representatives to waive their rights to bring a lawsuit against their employers, so much the sooner will the Supreme Court allow labor unions to waive those rights on behalf of their membership. The only thing that can stop *Gilmer* is a congressional derailment. In view of the inhospitality of the federal court system generally to employment claims, it is questionable whether unions and employees ought to lobby Congress to turn back *Gilmer* to keep discrimination claims on the federal docket. Further, there is no consensus among attorneys who represent plaintiffs (or defendants either, for that matter) concerning the merits of arbitration.[18] This ambivalence will probably prevent Congress from developing a consensus to turn the Supreme Court back on this issue.

The fourth force pushing employment disputes away from the judicial forum is the current political movement to contract

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[18]Duston, *supra* note 11, at 847.

out or privatize government services formerly considered solely public functions. Privatization of the judicial system is only one aspect. It is significant that the current administration has made the private school vouchers program, under the rubric of "educational choice," the hallmark of its educational program.[19] This is privatization of the public school system. Similarly the current administration has made alternative dispute resolution a keystone of its proposed reforms of the legal system.[20] In both instances the administration seeks to reform government by privatizing it. At least in the area of alternative dispute resolution, there has been bipartisan support, as evidenced by the Civil Rights Act of 1991, which specifically encourages the resolution of employment discrimination suits through arbitration and mediation.[21] Thus, we have a combination of judicial and legislative initiatives indicating that arbitration of employment disputes will be the rule rather than the exception.

The Dawn of the Age of Arbitration for Employment Disputes

Arbitration of employment claims looms as a much larger business in the near future, resulting from the inhospitality of the courthouse for these lawsuits. Basic principles of traditional labor arbitration will need to evolve, adapt, and adjust to this new environment.[22] Whereas arbitration was traditionally a substitute for a strike, it will more commonly be a surrogate lawsuit. The expectations of the parties and of the legal system will require these arbitrations to adopt some of the trappings of a trial and of the judicial system.

Changes will result because there will be much less emphasis on issues important to the collective union membership. Many if not most of these newcomer arbitrations will have no union participation at all; they will tend to involve more individual employee disputes with the employer. These arbitrations will only infrequently raise issues of such great importance to the collective union membership that the members would be

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[19]Hawkins, *Becoming Preeminent in Education: America's Greatest Challenge*, 14 Harv. J.L. § Pub. Pol'y 367 (Spring 1991).

[20]Broder, *Quayle Charges Some Lawyers Are "Ripping Off the System,"* Washington Post, A-2 (Sept. 7, 1991).

[21]*See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 671-1100 (Nov. 21, 1991); 42 U.S.C.A. ¶1981, Historical and Statutory Notes (1992).

[22]Duston, *supra* note 11, at 847.

inclined to walk out because of an individual's dispute with the employer.[23]

This is true even now in conventional labor arbitrations where the focus is on individual rights. Typical is the termination grievance. Although the union files a grievance contesting whether the employee has been fired for good cause, the union membership as a whole is usually indifferent to the poor employee who has been sacked. It is not unheard of for union members to side with management in a termination proceeding. The reason is that the union is not seeking to vindicate the collective right of the membership to harbor deficient employees but is merely discharging its responsibility to a member to ensure a fair hearing. Individual representation of members in disputes with the employer is part of the service a union is expected to provide to members. A union does this, not because of the threat of a duty of fair representation lawsuit (which is a rare event), but because of its obligation as a "full service" union to its members.

However, as the grievance becomes more individual and less collective in importance, it is less urgent to resolve it immediately. Generally, it is unlikely that the entire work force would walk out of the shop because a termination proceeding is taking too long. That would certainly not be true if the employer unilaterally shortened the lunch break.

Further, since the matter is of less collective importance to the membership as a whole, there is less reason to avoid the celebration of form over substance. Thus, if an individual dispute of limited application can be resolved by a procedural technicality, and the decision will neither offend the collective work force nor bind the employer in the future, so much the better. Both union and management feel free to engage in procedural maneuvers in cases involving individual rights and limited application.

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[23]Labor arbitrations which truly serve as a substitute for a strike have evolved adaptations reflecting this evolution. These arbitrations stress immediacy and the need for timely resolution because arbitration must defuse the sense of collective indignity which would otherwise lead to a walkout. Such a proceeding must take place in days or weeks, not months or years. The immediacy relates to the fact that the issue (e.g., a change in the way overtime is distributed, an unsafe working condition, or a new sick leave policy) is important to the work force as a whole, and the collective work force will not wait passively for a long period awaiting the decision. These arbitrations also tend to honor substance over procedure because the sense of employee injustice, which could fuel a walkout, cannot be assuaged by an arbitration decision based upon petty technicalities. Thus, rules of evidence, discovery, and dilatory motions are out of place in these hearings because they are foreign to the role of the strike used by employees against an allegedly unfair employer regarding the terms and conditions of employment.

Moreover, both union and management may allow individual grievances to pend for months when the issue relates solely to individuals and does not impinge upon some general discontent in the workplace. Employment arbitrations which concentrate on individual as opposed to collective rights will look more and more like the trial proceedings for which they are a substitute rather than a form of "shop justice" imposed upon the parties in lieu of an employee walkout. Inevitably, delays and a willingness to accept a decision based upon a procedural technicality will characterize arbitration relating to individual rights.

Judicial review is also inevitable. When arbitration is a substitute for a strike, the injustice represented by an arbitrator's error may be theoretically cured the next time the collective bargaining agreement is negotiated. The loser, whether employer or union, may give up something to change the collective bargaining agreement and expressly rectify the arbitrator's oversight. The only question is how much the losing party wishes to give in exchange for the correction. In this situation there is no need for judicial review of arbitration awards because, if the arbitrator's erroneous interpretation of the agreement is sufficiently important to the collective union membership or to the employer, it will be changed.

On the other hand, collective bargaining cannot remedy an injustice which occurs on an individual basis or to a minority of the membership. An example is a termination which goes to arbitration. After losing the arbitration, the employer can hardly go into collective bargaining with the union and negotiate for the dismissal of the employee who prevailed at the dismissal hearing. The union is similarly hard pressed to reinstate through bargaining an employee whom the arbitrator found had been fired for cause. The same reasoning applies to claims of sex, race, and age discrimination. An employer who loses an arbitration claiming sex discrimination should not be allowed to negotiate reinstatement of the discriminatory practice. Similarly, the union membership is unlikely to give up a collective benefit, such as a pay raise, to correct a practice that discriminates against only a minority of their colleagues. The politics of a democratically controlled union mitigate against such a solution.

In most instances no meaningful review is available in termination cases under just cause provisions in the collective bargaining agreement. It is a case of individual hard luck, and it is too bad if the poor employee failed to get the benefit of the union

contract. But our society will not allow such error in the enforcement of constitutional and statutory protections against race, sex, and age discrimination. Nor will the courts expect collective bargaining to remedy violations of civil rights because the collective interest is rarely the same as the individual or minority interest. As arbitrations increasingly address individual civil rights and employment discrimination, awards will eventually become reviewable by some administrative or judicial body, at least on the issues of civil rights and discrimination.

The legacy of *Gardner-Denver* may be restricted to footnote 21, which portends that arbitration of federally protected rights will be allowed as long as the arbitrator's award gives full consideration to the employee's statutory rights and there exists a judicial forum for the ultimate resolution of discriminatory employment claims.[24] The Supreme Court is describing the process of judicial review in footnote 21, and through judicial review the courts can ultimately enforce *stare decisis* and judicial precedents, a role which the Supreme Court is not likely to abdicate.

Along with judicial review will come lawyers. Labor arbitration, particularly labor arbitration in lieu of a strike, does not like lawyers and abhors legal customs and practice. The most extreme example is the coal industry, which for many years excluded lawyers from representing the parties at arbitration hearings.[25] This is also true of arbitrations which are not union sponsored.[26] The other side of this issue is that the legal system abhors the idea that someone other than a licensed attorney may represent a person in a proceeding concerning that individual's rights.[27] The court system and lawyers call this the "unauthorized practice of law."[28]

Traditional labor arbitration assumes that the grievant's position is advocated by a union representative in the initial stages of the grievance. The management counterpart in this process is

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[24]*Alexander v. Gardner-Denver Co., supra* note 15, at 60 n.21.

[25]*T & S Coal Co.*, 73 LA 882, 884 (Leahy, 1979).

[26]Ross, *More Companies Giving Workers Their Day in Court*, San Francisco Chronicle, D-1 (May 6, 1992).

[27]What comprises the unauthorized practice of law provokes a fair amount of litigation. *See, e.g., Surety Title Ins. Agency v. Virginia State Bar*, 431 F. Supp. 298 (E.D. Va. 1977), *vacated*, 431 F.2d 205 (4th Cir. 1978) (title insurance company's role in real estate closing); *State Bar of Mich. v. Cramer*, 399 Mich. 116, 249 N.W.2d 1 (1976) (do-it-yourself divorce kit).

[28]Comment, American Bar Association, Model Rules of Professional Conduct, Rule 5.5 (1983). The ABA specifically notes that the definition of the "practice of law" varies from jurisdiction to jurisdiction.

usually a lay person as well. When the matter goes to arbitration, the union and the management representatives simply continue their respective roles and advocate their positions before the arbitrator, who may also be a nonattorney.

All of this is possible because arbitration is considered a "private" matter and thus immune from charges that either the union's business agent or the company's human resource manager engaged in the unauthorized practice of law. The "private" aspect of arbitration reflects the private agreement between the employer and the union as the collective representative of the employees. The "private" aspect is emphasized by limiting arbitration proceedings to interpretation and administration of the collective bargaining agreement, which is, of course, a private document.

To the extent that arbitration begins to adjudicate rights, which may not be created by the collective bargaining agreement (i.e., which are legally created by Congress or state legislatures, such as Title VII or the ADEA), the parties will need representation by lawyers. It is one thing for a business agent to represent a union member on an issue pertaining solely to the collective bargaining agreement that the union itself negotiated; it is something quite different for that same business agent to represent a union member on the issue of whether a policy of the employer created a disparate impact upon the female employees, which would invoke the congressionally created protections of Title VII. It takes legal training to know where to find Title VII, to research the pertinent case law, to Shepardize the case law, to distinguish similar cases, and to make a legal argument of law. Most business agents are in no position to competently represent members with regard to constitutional, statutory, and common law claims against employers.

Assuming that nonlawyers cannot represent parties in arbitration proceedings which turn on statutory or common law rather than a collective bargaining agreement, the question that naturally follows is: Can arbitrators who have not been admitted to practice law decide matters of statutory and common law that go beyond the contract? Hayford urges arbitrators to "just do it." Arbitrators, in fact, do it because there is no alternative; i.e., there is no judge around to do it. Arbitrators do it because, if they do not, it will not get done. This is fine as long as it is done by the rule of necessity.

However, I believe the odds are against nonlawyer arbitrators interpreting statutory and constitutional law on any but the narrowest of issues. While a statute may permit an arbitrator to decide "just cause for termination," it is more complicated when issues such as statutory construction, jurisdiction, res judicata, and due process notice are involved. While an arbitrator's decision on a matter arising from collective bargaining is typically unreviewable, this is not likely on matters of constitutional and statutory import. If an arbitrator fails to interpret the statutory or external law correctly, a judge is likely to take a look at the award to see whether the arbitrator applied the law properly. To increase the odds that an award will survive judicial review, the arbitrator must be a lawyer. Arbitration will significantly change because of this very point. Our system of justice cannot and should not allow nonattorneys to interpret constitutional, statutory, and common law and then permit these possibly erroneous decisions to be immune from judicial review.

All of this leads to the conclusion that one variety of arbitration will allow only lawyers to represent parties and only arbitrators who are also lawyers to render legal decisions regarding constitutional, statutory, and common law principles. If arbitrations are to serve as substitutes for lawsuits, it is further destined that these proceedings must be subject to specific written rules governing the order of proceedings, the rules of evidence, motions, and discovery of documents and witnesses.

Arbitrations, quite frankly, have gone along too long without specifically prescribed rules on these matters. Many, perhaps most, in this field think that rules should be an ad hoc matter decided as the hearing progresses. Since the arbitration proceeding is based upon an agreement, the view is that the rules also must be agreed upon. Often this means that the rules unfold on the spot as the hearing progresses. This is unfortunate. Those who believe that it is unnecessary to have written rules beforehand fail to realize that the lack of rules lends itself to the strategic advantage of an unpredictable first strike.

Unless arbitrators set and enforce ground rules concerning discovery and the rules of evidence, the proceeding will be marked by surprise witnesses, surprise documents, and a strategic advantage to the party who initiates the surprise attack. I am particularly unimpressed with the fairness of informal discovery between parties where each side is to exchange pertinent docu-

ments with the other. Almost never do arbitrators sanction a party for failing to give the other a pertinent document in a timely manner prior to the hearing. This attitude harkens back to the role of arbitration as a substitute for a work stoppage. It honors substance over procedure, even if in so doing it allows one party the strategic advantage of surprise.

As arbitrators adapt to trial proceedings, however, this will change. Upon assignment of a case, an arbitrator should either unilaterally, or by agreement of the parties, write down the obligations of the parties to provide discovery to each other. When a breach of the rules occurs, the arbitrator should have the courage to bar the document or the witness as a sanction. Failure to do so rewards the surprise artist for attempting to gain unfair advantage by incomplete disclosure.

Much of the same analysis applies to rules of evidence. For example, one of the biggest problems is the truth of matter recorded in documents. Evidence based upon misinformation, speculation, conjecture, and guess, although contained in a written document, often worms its way into an arbitration. This erroneous information could normally be challenged, explained, or proven false upon cross-examination of a live witness. Unfortunately, the document containing the mischievous information is simply given to the arbitrator "for what it is worth."

Arbitrators like to think that they can sort out the value of this material. When an objection is made based on lack of a document's foundation, the arbitrator may or may not take this lack of foundation into account when deciding how much "weight" to give the document. If a document reports, for example, that the grievant's physician suspects drug addiction, this is not something that can be put on a scale of 1 to 10. Nor is the mischief of the statement cured by the grievant's categorical denial of drug addiction. Worst of all, after the hearing is over, the live testimony is a mere memory, whereas the doctor's written statement about drug addiction sits in concrete form before the arbitrator while drafting the award.

This same reasoning applies to computer-generated data, statistical reports, employer records, and publications. Especially when combined with the element of surprise, these records and reports can cause real mischief because one cannot cross-examine the documents or test the basis upon which the statement was made. Rules of evidence can be relaxed as to the

foundation of such documents, but this should occur only when the documents have been fully disclosed sufficiently in advance of the hearing to permit a meaningful rebuttal.[29]

Very little benefit is derived from ignoring the rules of evidence.[30] Often both the arbitrator and the parties avoid using the rules of evidence because they are unfamiliar with these rules or because they want to avoid petty procedural arguments. Evidence is allowed in "for what it is worth" merely to avoid wasting time. As laudable and efficient as that aim may be, it will not satisfy parties who were expecting a "real" court proceeding but received arbitration instead. Part of the idea that parties will receive their "day in court" through arbitration requires court-like rulings on evidence by an arbitrator who is familiar with those rules.

A significant aspect of the evolutionary change in arbitration turns on economics. Money controls who will get a service and whether the service will exist. Arbitration is a service, and arbitrators will be required to consider how attorneys are to be paid for their services in the proceedings. Lawyers typically quote $150 per hour with retainers of $8,000 to $9,000 (representing more than 50 hours of work) to begin work on employment cases.[31] The total fee for a complicated employment dispute can easily go beyond $50,000 (representing 333 hours of work). When a labor union picks up this bill, there is seldom an issue for the arbitrator since this is the union's problem. But the new cases entering the system will more often than not be individual, not union sponsored. It is axiomatic that, if individual employees are required to pay these fees, there will be no arbitrations because individuals normally do not have thousands of dollars to finance an arbitration.

Fortunately for clients and lawyers, however, Congress intended to attract lawyers to represent plaintiffs in employment cases by allowing attorney fees to be paid by the employer when the plaintiff wins the case.[32] Lawyers who lose go unpaid, at least

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[29]In the Illinois mandatory arbitration rules doctor reports, medical bills, property repair bills, wage statements, and reports of expert witnesses are allowed into evidence without foundation so long as they are provided to the opposing party 30 days prior to the hearing. Ill. Rev. Stat. ch. 110A, §90(c) (1991).

[30]Actually there are various rules of evidence. The Federal Rules of Evidence are the most widely accepted. 28 U.S.C. Federal Rules of Evidence, 1 *et seq.* But, just like Robert's Rules of Order, these rules can be used to fit the occasion.

[31]Ross, *supra* note 26.

[32]*See, e.g.*, 42 U.S.C.A. §§2000e-5(k) (1992).

from the employer, and that serves as a penalty to the unfortunate lawyer who accepts a poor case.

There are volumes written on how judges have decided fee petitions.[33] If arbitrations are to take over this function, arbitrators must learn to fairly administer the rules concerning fee petitions. So that no subtlety is lost upon this august body, let me emphasize that if arbitrators wish to be selected for individual arbitrations without subsidy from a labor union, they must take particular care to ensure that the plaintiffs' attorneys are paid for their time when they win. Unless plaintiffs' counsel have sufficient financial incentive, there will be no arbitration for arbitrators. Without such incentive privatization of employment disputes will be a sham. On the other hand, if the work is lucrative for plaintiffs' attorneys practicing in the field of labor arbitration, that will result in lucrative practice for arbitrators.

Arbitrators must also raise their fees to indicate that they are resolving issues of statutory and perhaps constitutional importance. Those arbitrators who are able to fill the role of substitute judges should demand compensation accordingly. Since arbitrators will be duty-bound to know and apply the law and since they will be expected to know and apply procedural rules and rules of evidence, they will be able to demand increased compensation for these skills. Judge-like responsibilities are not fairly valued at the current rate, which is hovering around $500 per day. The parties will expect more from the arbitrator when their dispute is in lieu of a lawsuit and they will have to pay appropriately.

One final responsibility relates solely to the plaintiff's bar. To make individualized arbitration serve the interests of fairness and equity, we who represent employees must organize and disseminate summaries on the performance of arbitrators. Employers will always be repeat customers in the arbitration game, and they will continue to select arbitrators who act fairly to employers. If employers are the only repeat customers for arbitration, the customer will always be right and the employer will always win. The plaintiff's bar must organize a system so that we too are recognized as repeat customers. In that way arbitrators who are not fair to employees will be penalized for lack of objectivity. Only through this process will there arise a pool of truly neutral arbitrators. Those of us who represent plaintiffs

[33]Speiser, Attorneys' Fees (Lawyers Co-op., 1973).

must communicate with each other and catalogue those arbitrators who permit us to prosecute our cases on an equal footing with employers.

Conclusion

As our legal system makes the transition in channeling employment disputes from the courthouse to the arbitration room, attorneys representing employees should keep in mind that, unlike judges, labor arbitrators are always delighted to receive new employment cases; this is how they make their living. In contrast to judges, arbitrators do not consider employment cases an aggravation. Arbitrators will, in exchange for their daily rate, gladly spend whatever time is necessary to give the parties a full and fair hearing. Thus, the quality of our professional lives may improve as well as our clients' chances for success.

As these changes occur, it is important that arbitrators realize they are expected to act as surrogate judges and to resolve employment disputes in a manner which discharges the expectations of lawsuits. Careful attention must be paid not only to substantive law but also to procedural safeguards and evidentiary rulings. Most important, if this new system is to work, it must provide both arbitrators and lawyers with a professional living in exchange for much needed professional services.

Finally, in adapting to the characteristics of judicial litigation, we must be careful not to emulate too closely the courtroom setting or we may well reactivate in arbitration the very problems which caused employment disputes to leave the judicial forum. Backlogs, delays, and unwarranted celebration of procedural technicalities can ruin arbitration as a forum for the resolution of employment disputes. Perhaps while we evolve and adapt, we will be able to avoid the pitfalls of our predecessors and prevent extinction for ourselves. Let us all look forward to a new dawn in the age of arbitration.