support the discipline with evidence sufficient to persuade the arbitrator, without relying on the inherent sympathy accorded a victimized patient or child, or on public policy grounds. In defending the employee, the union must do more than argue that the word of the employee should be credited over that of the patient or child. The union's argument that a mental deficiency per se—whether intellectual, emotional, or developmental—should render a witness less than credible will rarely carry the day.

What is different in hearing and deciding abuse cases is often the seriousness of the charges and the shocking details of the alleged abuse. Nevertheless, the arbitrator must approach decisionmaking in the same way other cases are decided. The credibility standards that Richard Mittenthal set out for us remain as relevant and useful today as they did not when he presented them in 1979.

Comment

EDWARD P. ARCHER*

Carol Wittenberg's paper has significant both for abuse cases and for other cases in which her defined "problem" witnesses are called to testify. Since I have not had the misfortune of hearing significant numbers of abuse cases and with luck will continue to avoid these cases, I welcome her sharing of her expertise here today. Wittenberg's paper is very helpful in presenting abuse cases involving mentally disabled witnesses to illustrate the application of Richard Mittenthal's[1] well thought out standards for addressing credibility for "problem" witnesses. I am reassured that application of those standards, with some commonsense adjustments based upon the nature of the witness's disability, will lead arbitrators to reasonable and defendable decisions regarding the crediting of those witnesses. Wittenberg's sharing of her insights specifically regarding abuse cases is also helpful, such as the more extreme code of silence in the caregiver industry and the compelling reasons for that code of silence.

I bring, if not expertise, an inquiring mind as to ways to address the crediting of "problem" witnesses. Those of us who do not

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[1]Mittenthal, *The Search for Truth: II. Credibility—A Will-o'-the Wisp*, in Truth, Lie Detectors, and Other Problems in Labor Arbitration, Proceedings of the 31st Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books, 1979), 61.

arbitrate significant numbers of abuse cases nevertheless will address problems related to crediting mentally ill, mentally retarded, and other mentally disadvantaged witnesses as a result of the mainstreaming of these persons into our industrial system, which will surely occur as the Americans with Disabilities Act (ADA) is implemented. The problems in these cases may be even more difficult than those in abuse cases because at least New York State, and no doubt others, have developed procedures particularly suited to arbitrating abuse cases involving witnesses who have mental disabilities or deficiencies.

My concern goes to the mechanics of the crediting process for "problem" witnesses and particularly for mentally disabled witnesses in other than abuse cases. How should the arbitrator rule on questions relating to physician-patient privilege? What procedures would be helpful in ruling on those questions? Should the arbitrator permit examination of the witness at the request of either party to provide expert information in assessing the witness's credibility? Does the witness have a right of privacy and, if so, would that right of privacy be breached if such an examination were permitted? Would an examination violate the ADA, and, if so, what significance should that have to the arbitrator?

The Physician-Patient Privilege

Application

Sinicropi and Hill in *Evidence in Arbitration*[2] note that the Code of Professional Responsibility is silent on the application of testimonial privileges in the arbitral forum, but that the New York Tripartite Committee has discussed privileges likely to be encountered in arbitration, including the physician-patient privilege.[3] That committee's first comment regarding the physician-patient privi-

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[2]Sinicropi & Hill, Evidence in Arbitration, 2d ed. (BNA Books, 1987), at 160–61.

[3]Regarding the physician-patient privilege, that Committee states as follows:

a. Physician-Patient
   (1) Basically, a patient may claim as privileged his communications with his physician in any situation where such claim could be made in a court of law.
   (2) An employee asserting a claim or defense based on a physical condition may assert the privilege. However, the consequences of nondisclosure are for the arbitrator to determine.
   (3) The disclosure of the fact of a communication with a physician is not privileged, even though the content of a communication may be privileged.
   (4) If an employee's employment or continued employment is, by contract, controlling practice, or company rule, conditioned on his physical condition, he may not claim the privilege.

lege is that a patient may claim communications with a physician as privileged where that claim can be made in a court of law.

If this comment is to be followed, it is important to obtain a basic understanding of what may be claimed as privileged communications in a court of law. McCormick on *Evidence*[4] discusses the physician-patient privilege at some length. According to McCormick, under the Revised Uniform Federal Rules of Evidence,[5] this privilege applies to confidential communications to physicians and psychotherapists, and several states have extended it to clinical psychologists as well as psychiatrists.

McCormick emphasizes that:

> [T]he rule which excludes disclosures to physicians is not a rule of incompetency of the evidence serving the end of protecting the adverse party against unreliable or prejudicial evidence. It is a rule of privilege protecting the extrinsic interest of the patient and designed to promote health, not truth.[6]

The privilege can be claimed by only the patient who has consulted the physician for treatment. The adverse party has no standing either to claim or to waive the privilege.[7] Finally, patients placing their physical or mental condition in issue in a judicial proceeding waive the privilege with respect to information relevant to that condition.[8]

At the Academy's 1992 Annual Meeting union attorney Joel D'Alba acknowledged that "placing a mental condition in issue as a claim or defense waives the privilege."[9] However, the New York Tripartite Committee guidelines provide that an employee with a claim or defense based on a physical condition may assert the privilege in arbitration cases, but the consequences of nondisclosure are for the arbitrator to determine. Those guidelines also provide that, if the person's employment is by contract or practice based on the employee's condition, the employee may not claim the privilege; if it is not, the privilege lies.

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(5) If an employee's employment or continued employment is not explicitly or implicitly, by contract, controlling practice, or a company rule, conditioned on his physical condition, he may claim the privilege.

Note: In the event that an employee desires, for some special reason, to avoid the general disclosure of communication with the physician, the arbitrator may limit disclosure to selected representatives of the parties.

[4]McCormick on Evidence, 4th ed. (1992), at 368–392.

[5]Revised Uniform Federal Rules of Evidence (1974).

[6]McCormick, *supra* note 4, at 384.

[7]*Id.*

[8]*Id.*

[9]D'Alba, *Arbitration of Medical and Health Issues: Labor Perspective*, in Arbitration 1992: Improving Arbitral and Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books, 1993), 52.

Where does this authority leave us as arbitrators with respect to rulings on the physician-patient privilege? Arbitrators thankfully have a great deal of discretion in making these decisions and are not bound by the exclusionary rules of evidence. Nonetheless, we want to make these decisions fairly and competently. The parties do, and have a right to, expect that. We should be aware of the thinking evolved in the courts, legislatures, federal rules of evidence, and the writings about arbitration. If we choose to follow McCormick, as a general rule the physician-patient privilege would apply to confidential communications to treating mental health experts. In my view, the privilege would apply to treatments from employee assistance programs, whether run in-house by an employer doctor or by outside treatment facilities. The privilege would not apply to the grievant witness who places mental health in issue to support a claim or a defense. The privilege would, however, apply to a grievant witness who does not, by the nature of the grievance, place mental health in issue. The employer would not be permitted to present privileged information into evidence over the objection of the grievant unless the grievant has placed the mental health question in issue. Moreover, the privilege would apply regarding any nongrievant witnesses.

Waiver of the Privilege

The next question for the arbitrator to address is whether the privilege has been waived. The privilege can be waived in numerous ways. Looking to McCormick for guidance, the patient may waive this privilege or, if the patient is unable to do so, the patient's guardian or personal representative may do so. The adverse party has no standing either to claim or to waive the privilege.[10] The privilege is waived by disclosure of the information in advance of the hearing or by the patient's testifying to it at the hearing. Patients placing their physical or mental condition in issue in a judicial proceeding waive the privilege with respect to information relative to that condition.[11] Courts are split as to whether patients testifying merely to their condition and not to any matter respecting their consultation with their physician waive the privilege.[12] Finally, under local law the privilege does not apply in certain kinds of proceedings, including child abuse.[13]

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[10]McCormick, *supra* note 4, at 379–382.
[11]*Id.* at 384.
[12]*Id.* at 386.
[13]*Id.* at 389.

If arbitrators follow McCormick, witnesses waive the privilege by testifying to significant portions of their treatment or by providing documents relating to their treatment to the party seeking the waiver.

Competency and Credibility

Waiver questions, especially at the hearing, raise concerns for the arbitrator. The mentally ill or retarded witness may not be competent to waive the privilege. The witness is not represented by separate counsel, and the counsel for the union and the employer probably have no interest in preserving the witness's privilege.

The courts can provide insight into possible procedures for arbitrators in assessing a "problem" witness's competency to waive the privilege or the witness's credibility. Judges ask questions of witnesses whose competence is challenged to make their preliminary determination as to competence to testify. According to McCormick, "The questions at a competency hearing usually are limited to matters that are unrelated to the basic issues at trial. Children often are asked their names, where they go to school, how old they are, whether they know who the judge is, whether they know what a lie is, and whether they know what happens when one tells a lie."[14] The "preliminary hearing is sometimes held in chambers only with the judge, the witness and a court reporter present. On other occasions the attorneys for both sides are also present while the parties are excluded."[15]

Adoption of a similar procedure in an arbitration hearing would be a clear departure from typical practice, which I am not at all convinced would be desirable. Nevertheless, if the witness agrees to waive the physician-patient privilege or does not raise it as a consideration, the arbitrator must make a preliminary determination of the witness's competency to waive the privilege. In addition, the arbitrator must ultimately assess the weight to be given to the testimony or the credibility of the witness. Witnesses with mental disabilities or children are particularly difficult to evaluate and may require additional effort from the arbitrator. The arbitrator does not know how much or what type of preparation the witness has received from the attorney who calls the witness to testify. These "problem" witnesses may be far more susceptible to suggestion, even by well-meaning counsel. In addition, they may be far

[14] *Id.* at 223.
[15] *Id.* at 224 n.5.

more susceptible to manipulation by supportive counsel asking leading questions. At the very least, the arbitrator must be attentive to these possibilities and caution against leading on direct examination. Typically, leading questions are permitted on cross-examination, but badgering is not. The arbitrator must determine the line between permissible leading and impermissible badgering. This line may be adjusted based upon the arbitrator's perception of the "problem" witness's capability to respond reasonably to the questioning.

Where the witness waives the privilege or does not assert it, the competency of the witness to waive the privilege must be considered. If the parties do not ask questions sufficient for the arbitrator to conclude that the waiver was understood by the witness, the arbitrator has the option of asking questions similar to those asked by courts in competency proceedings to evaluate the competency of the witness to waive the privilege. Perhaps such questions could also be helpful to the arbitrator in resolving the ultimate question of the credibility of the witness. This is, however, a task fraught with perils. Should the arbitrator ask about counsel's preparation of the witness to testify? If the witness is the grievant, efforts in this regard could quickly conflict with the attorney-client privilege.

Psychiatric Examinations

Does either party have the right, over the objection of the witness, to have the witness examined in order to obtain an expert evaluation of the witness's competence or credibility? Does the witness have a right of privacy to reject such an examination?

The authority regarding this right of privacy is sparse. With respect to public-sector employers, the existence and application of a constitutional right of privacy is an issue. McCormick notes lower court conflict concerning the Supreme Court decision in *Whelan v. Roe*[16] which, he states, strongly suggests the existence of a constitutional right on the part of patients to preserve confidentiality about medical treatment. He notes that the lower courts are in conflict regarding the nature, scope, and even the existence of such a constitutional right.[17]

With respect to private-sector employers, the limited writings again are in some conflict. For example, in a 1980 article[18] Marino

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[16]429 U.S. 589 (1977).
[17]McCormick, *supra* note 4, at 372.
[18]Marino, *The Arbitration of Mental Illness Cases*, 31 Lab. L.J. 403–16 (1980).

addressed the question of whether management may require employees to undergo a psychiatric examination. He concluded that the weight of arbitral authority permits the employer to require the grievant witness to take a psychiatric examination "if there is a 'substantial' basis for concluding that he is incapable of performing his job or endangers his own health and safety, the health and safety of fellow employees or Company property." Marino noted a great variance in what arbitrators conclude constitutes such a "substantial basis." In contrast, Academy member Don Sears, at the 1969 Annual Meeting,[19] questioned whether management has the right to insist on psychiatric examination, or whether the only recourse is to discharge an employee and argue "just cause."

The ADA may modify existing law regarding psychiatric examinations to assess a witness's credibility. The ADA provides that a "covered entity" (which includes both employers and unions) "shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity."[20] In the next subparagraph, the Act states: "A covered entity may make inquiries into the ability of an employee to perform job-related functions."[21]

Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission (EEOC) *Technical Assistance Manual*[22] on the employment provisions of the ADA suggests that requirements for medical examinations and inquiries of employees are more stringent than those affecting applicants for employment. As an illustration of "job related and consistent with business necessity," the *Manual* provides that, for employees having difficulty performing their jobs effectively, an examination may be necessary to determine whether the employees can perform essential job functions with or without an accommodation.

However, even if an examination is permissible under the ADA, the *Manual* provides that all information from examinations must be maintained and used in accordance with ADA confidentiality

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[19]Sears, *The Use of Experts in Arbitration—III. Observations on Psychiatric Testimony in Arbitration*, in Arbitration and Social Change, Proceedings of the 22d Annual Meeting, National Academy of Arbitrators, ed. Somers & Dennis (BNA Books, 1970), 151.

[20]Americans With Disabilities Act §102(c)(4)(A).

[21]*Id.* §102(c)(4)(c).

[22]Equal Employment Opportunity Commission, Technical Assistance Manual, §6.6.

requirements,[23] namely, that all medical related information must be kept confidential, with listed exceptions pertaining to restrictions on work duties and necessary accommodations and potential emergency treatment. Other exceptions include ADA government investigations, state workers' compensation procedures, and insurance company health and benefit matters. Arbitration proceedings are not noted as an exception, although it seems reasonable that ultimately arbitration proceedings pertaining to the ability of grievants to safely perform their jobs will be included within this exception.

If I am right about the ultimate extension of the ADA confidentiality exception to arbitration proceedings, Marino's 1980 position is still valid. If there is a substantial basis for concluding that the grievant is unable to perform the job safely, the employer may require the employee to take a psychiatric examination and to enter the results into evidence in arbitration. The ADA, so construed, would not preclude it. It would, however, preclude mandatory examinations for employees whose ability to safely perform their jobs is not at issue.

Should arbitrators find a right of privacy for grievants where the company is contesting ability to perform their jobs safely? McCormick suggests that there may be a constitutional right of privacy. Arbitrators may want to transpose that right into the arbitration forum under construction of the "just cause" contract language. Sears questions whether the employer has a right to require a grievant to undergo psychiatric examination.

In assessing whether this right of privacy exists, it is important to keep in mind the reasons for the physician-patient privilege in contrast to reasons underlying a witness's possible right to privacy. According to McCormick, the physician-patient privilege insures proper care for the patient's concerns that matters revealed to the doctor during treatment will be subject to disclosure in subsequent litigation. McCormick is somewhat hostile to this privilege because it eliminates probative evidence from the judicial procedure and because employees, due to concern for potential litigation, are likely to withhold from their doctors information which may be critical to their treatment. He and others therefore urge that the privilege be narrowly construed.

The right of privacy is not similarly expounded upon by McCormick, except to note its possible existence. My view is that

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[23] *Id.* §6.5.

a grievant's right of privacy may be particularly significant to arbitrators. Arbitrators consider not only the immediate question of who is to win the arbitration case but also long-term implications for the collective bargaining process and for the employee's continued employment. If encroaching on the employee's privacy becomes a common arbitration practice, those who learn of this practice may choose to refrain from appearing as witnesses in arbitration proceedings. Employees might refrain from filing legitimate grievances or from pursuing them to arbitration to avoid probes into their privacy. Grievants who have mental disabilities might suffer setbacks regarding both their mental condition and their ongoing acceptance by fellow employees if their private mental difficulties are exposed in an arbitration proceeding. Should these considerations cause arbitrators to find that employees have privacy rights?

Other questions remain. What constitutes a waiver of privacy rights or ADA rights? In representing the grievant's interests, the union can advise the witness and obtain a meaningful waiver. But should the arbitrator be concerned that the union is focused on winning the case as well as on the future welfare of the grievant? And may a nongrievant employee witness waive an ADA right to refuse such an examination? Should the arbitrator enforce the ADA right in the arbitration proceeding? Would the arbitrator's enforcement, or failure of enforcement, raise public policy questions, which could render the award unenforceable as contrary to public policy?

Even if a witness submits to a psychiatric examination, what weight should the arbitrator give to the testimony regarding the examination? Sears noted concerns expressed by a doctor about the results of psychiatric examinations without the wholehearted cooperation of the patient, as any compulsory examination at the urging of either party would surely be. The doctor stated:

> A subject who knows that his revelations may be used against him will certainly not be so expressive as one who expects help in the form of treatment from a physician.[24]

Conclusion

As you can see, I am really better with questions than with answers. I hope these comments suggest that Wittenberg's paper is a start. I found her paper very helpful in its assurance that

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[24]Sears, *supra* note 19, at 153 (quoting Watson, Mental Illness and the Law, Ch. XI).

arbitrators may appropriately consider the additional factors peculiar to "problem" witnesses and make reasonable determinations as to the weight to be given to all or portions of their testimony. My questions relate not to the ultimate factfinding function but to the mechanics presented by questions relating to privilege, the right of privacy, and the possible impact of the ADA. In the short time allotted, I have only raised these questions and have not provided many definitive answers. In our future annual meetings, as the law evolves and our experience grows, I hope that others will give more guidance than I was able to marshal today.

PART II. ARBITRAL THERAPY

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Thirty-three years ago the Supreme Court issued its famous *Steelworkers Trilogy*[1] decisions that set the ground rules for the relationship between the courts and the labor arbitration process. In *American Manufacturing Co.*,[2] the first of the *Trilogy*, Justice William Douglas posited therapeutic effects for the labor arbitration process. The Court held that a trial court should order arbitration even of claims the trial judge believes meritless. "The processing of even frivolous claims may have therapeutic values of which those who are not part of the plant environment may be quite unaware."[3] In footnote 6, Justice Douglas quoted at length from an article by Archibald Cox referring to the "cathartic value" of arbitration and explaining the value to the parties of arbitrating

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[1] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960). Briefly, the Court ruled that a court is to enforce a contract promise to arbitrate, applying a presumption of arbitrability. It should order arbitration without considering the merits of the grievances. After arbitration, the court should not substitute its views for that of the arbitrator and should enforce an arbitration award as long as it has "drawn its essence" from the terms of the agreement.

[2] *Steelworkers v. American Mfg. Co.*, *supra* note 1, at 568.

[3] *Id.*