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.*

even frivolous claims.[4] Many participants in labor arbitration sense that the process may have therapeutic effects. The literature on labor arbitration and later Supreme Court decisions repeat Justice Douglas's dictum. There is a consensus that the therapeutic effect is a valuable, although not primary, goal of the arbitration process.

It is thus surprising that no one has ever examined the bases of Douglas's claim. Is labor arbitration really therapeutic? If so, for what types of problems? What elements of the arbitration process make it therapeutic? How does the therapy work? Psychologists examine therapeutic relationships. The psychology literature discusses the elements of therapeutic relationships that foster positive benefits for clients. The legal literature, in contrast, pays little attention to the therapeutic aspects of the formal legal process. In one of the few explorations of the subject, David Wexler remarked that "the law's ignorance of the mental health disciplines should no longer be excused."[5] In this paper we apply insights from psychology to understand better the possible therapeutic value of the labor arbitration process.

Is Arbitration Therapeutic?

Justice Douglas stated that "[t]he processing of even frivolous claims may have therapeutic values. . . ."[6] Before examining the possible bases for this claim, we must first identify what "therapeutic" means. Psychologists define the term in various ways. Therapy is a process "through which one person helps another to find relief from emotional pain."[7] A therapeutic process is "curative."[8] Individuals who believe a helper or counselor has curative powers often experience relief from their problems or emotional disorders.[9] Therapy is a verbal interaction that lessens anxiety, leading to tension reduction.[10] Simply telling one's story may prove helpful.[11]

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[4]Cox, *Current Problems in the Law of Grievance Arbitration*, 30 Rocky Mtn. L. Rev. 247, 261 (1958).

[5]Therapeutic Jurisprudence (1990), at 3.

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

[7]Balsam & Balsam, Becoming a Psychotherapist (1985), at 5.

[8]Egan, The Skilled Helper (1986), at 16; Webster's *Third New International Dictionary* (1986), at 2372.

[9]Egan, *supra* note 8, at 16.

[10]Balsam & Balsam, *supra* note 7, at 5.

[11]Masson, Final Analysis (1990), at 112. *See also* Slovenko, Psychiatry and Law (1973): "Psychotherapy is a planned technique of altering maladaptive behavior of an individual (or group) toward more effective adaptation. The essential ingredient of psychotherapy is the utilization of the therapist's personality interacting with the patient's personality." *Id.* at 459 (quoting Handler, *Psychotherapy and Medical Responsibility*, Archives Gen. Psychiatry (1959), at 464).

The therapeutic experience requires the development of a relationship between a client and therapist with the intent of ameliorating emotional symptoms.[12] Although there are many therapeutic orientations, they share common characteristics, including "comfort, support, guidance, reassurance, guilt-reduction through confession, and hope."[13] As the therapeutic relationship develops, a client experiences an atmosphere free of criticism and judgment.[14] Different psychotherapies use specific techniques to relieve clients' problems. Some focus solely on the relationship that develops between a client and therapist. An individual can change and experience relief by developing a supportive relationship with another person.[15] To understand the therapeutic aspects of labor arbitration, we will use insights developed in group, family, couples, and brief psychotherapy—techniques similar to arbitration. Although professionals who follow these models share similar techniques and a common conceptual framework, even they cannot agree just why a therapeutic effect occurs.[16] The essence of the therapeutic experience in a group setting lies in "increasing people's knowledge of themselves and others, assisting people to clarify the changes they most want to make in their life, and giving people some of the tools necessary to make these desired changes."[17] Psychological studies suggest that the therapeutic process is useful to many professions and to all human relationships.[18]

Justice Douglas cites Cox's article referring to labor arbitration as "cathartic." Catharsis is free expression,[19] a simple release of feelings, sometimes accompanied by an emotional expression such as tears, anger, or shouting.[20] Following catharsis a person is calmer.[21] Labor relations professionals will easily recognize the accuracy of Cox's description.

The Problems for Which Arbitration Might Be Therapeutic

Douglas's brief reference to therapeutic and cathartic values does not explain how arbitration produces these results or even

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[12]Wolman, ed., Dictionary of Behavioral Science (1973), at 304.
[13]Goldenson, ed., Longman's Dictionary of Psychology and Psychiatry (1984), at 605.
[14]Wolman, *supra* note 12, at 305.
[15]*Id.*
[16]Yalom, The Theory and Practice of Group Psychotherapy (1985), at 4.
[17]Corey & Corey, Groups: Process and Practice (1987), at 9.
[18]Kirschenbaum & Henderson, eds., The Carl Rogers Reader (1989), at 62.
[19]*Id.* at 69; Yalom, *supra* note 16, at 78.
[20]Nye, Three Psychologies (1986), at 11; Scheff and Bushnell, *A Theory of Catharsis*, 18 J. Res. Personality 238 (1984).
[21]Scheff & Bushnell, *supra* note 20, at 239.

what problems the process might redress. Before we explore the possible therapeutic effects of arbitration, we must identify its possible beneficiaries and the possible problems it might solve. Arbitration might address both individual and organizational problems.

The individual grievant may have demonstrable economic and psychological problems as a result of the employer's alleged contract breach. Deprived of contract benefits or even of a job, the aggrieved individual feels constrained by an internal labor relations system. A purely internal dispute-resolution system may inhibit expression and may not afford a remedy. The lack of a satisfactory procedure may depress grievants, leaving them suffering from low self-esteem, resentment toward the employer, and stress. Although management might admit its error within the grievance procedure, in some cases relief—both economic and psychological—requires invoking the arbitration process.

The union representing the grievant might have concerns of its own. These are most likely to be economic or political, but might also be psychological. The union as an institution may have no remedy other than to demand relief from management. During the term of the collective bargaining agreement, the union may not lawfully use its economic power. Although a union may win some grievances through logical persuasion, at times management will not yield to the merits of the case. For example, the employer might deny a facially meritorious grievance to show support for its supervisors or for other political or tactical reasons. As a result the union as an institution may feel enervated and powerless. (Without an effective dispute-resolution mechanism, it may actually become so.)

Management officials may experience psychological problems for which arbitration might be therapeutic. Although able to resist union claims through the grievance procedure, individual officials can feel that the employees do not respect their positions. Power does not necessarily mean comfort. In a few cases management officials can even experience guilt for actions affecting the grievant.

How Arbitration Might Resolve These Problems

We can posit several ways in which arbitration can lessen or eliminate the psychological problems of the participants. For the individual grievant arbitration provides the opportunity to explain to a neutral party the basis for the complaint. The arbitrator listens to the grievant and has the authority to grant relief. The arbitrator-

grievant relationship may relieve the grievant's depression while enhancing self-esteem.

Arbitration might not relieve the grievant's resentment toward management. In an adversarial proceeding, both management and union can appeal less to reason than to partisanship. Similarly, arbitration is not a stress-free activity. Successful establishment of the arbitrator-grievant relationship can reduce the grievant's stress but might not eliminate it. Nevertheless, the employee might gain some comfort. Arbitrator Benjamin Aaron has suggested that the grievant's presence at the hearing, watching management's witnesses subjected to "searching and often embarrassing cross-examination," can result in "a kind of catharsis that helps to make even eventual defeat acceptable" to the grievant.[22]

Arbitration can also reduce the union's psychological concerns. By participating in arbitration, the union shows its power and ability to represent its members' interests. It also proves its power to force management to justify its actions before a third party. The union may or may not win the particular grievance. Win or lose, however, the opportunity to challenge management's decision before an outside authority improves the union's image and self-image. Moreover, by depriving the employer of unilateral authority, the union strengthens its hand in future negotiations. Finally, arbitration serves as an acceptable source of difficult decisions the union may not be able, politically, to make on its own. An arbitrator can call an influential grievant wrong much more easily than can an elected union leader.

Similarly, management officials have the opportunity to confirm positions by explaining them to the neutral arbitrator. Like union officials, managers may value an outsider's ability to decide politically difficult issues. A labor relations manager may be in no position to tell the chief executive that a change in policy violates the contract. The arbitrator is.

The Limits of the Therapeutic Value of Arbitration

While a successful arbitration may be therapeutic and cathartic, that is obviously not its primary goal. Labor and management agree to arbitration because it is a comparatively efficient and inexpensive method of resolving disputes with finality. An

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[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. Stern & Dennis (BNA Books, 1983), 30, 32.

arbitration that does not resolve a dispute fails to achieve its primary goal, even if it helps the participants to feel better about themselves. The arbitrator is not a "labor relations physician."[23] Arbitrators rule on the merits based on the terms of the parties' collective bargaining agreement and the existing body of arbitral common law, not on how the losing party will feel about the outcome. Thus, arbitration's therapeutic effects are collateral by-products of the decisionmaking process.

Arbitration's Therapeutic Elements

What aspects of arbitration make it therapeutic? We can identify a few of the characteristics of the arbitration model that enhance its therapeutic value.

The Site of the Arbitration Hearing

Parties normally hold arbitration hearings in hotel meeting rooms or conference rooms at the workplace. A neutral, nonthreatening location can enhance the therapeutic values of the process to the participants. If the hearing were held in a courtroom, for example, the formal surroundings could inhibit witnesses and thus dampen the potential therapeutic effect. A hearing held in the employer's office could be a chilling experience for employees. An unfriendly environment is likely to inhibit the testimony of the grievant and coworkers, perhaps keeping them from frankly stating their recollections and expressing their views and emotions. Certain places promote candor; others do not.[24] The arbitrator is independent of the parties, although employed by both. A neutral site reflects this independence.

The setting for a client-therapist relationship is similarly important. The therapist must provide an environment suitable for exploring problems. The decor and arrangement of furniture in a therapist's office is an aspect of proxemics, the study of environmental or personal space.[25] The setting varies depending on the therapist's orientation. The therapist chooses a setting to enhance

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[23]We have criticized this concept elsewhere. Nolan & Abrams, *The Labor Arbitrator's Several Roles*, 44 Md. L. Rev. 873, 887–90 (1985). The term is from Lon Fuller's seminal article, *Collective Bargaining and the Arbitrator*, 1963 Wis. L. Rev. 3, 4.

[24]Employees are trained from grade school to sit and be quiet in certain places. The boss's office and the courtroom are the functional equivalent of the principal's office and the classroom.

[25]Cormier & Cormier, Interviewing Strategies for Helpers (1985), at 77.

the therapeutic effect, however. Most psychologists believe that an informal setting relaxes the client and encourages exchange of necessary information.[26] Others suggest that the setting should be nondescript, allowing the client to focus attention inward.[27]

Arbitration requires a greater degree of formality. Sitting around on soft chairs and couches discussing the workplace problem would not encourage the orderly collection of the data needed to adjudicate the dispute. A little formality silently conveys the importance of the proceeding. That, in turn, encourages truthfulness and mutual respect. The setting of the hearing also affects the legitimacy of the process. The arbitrator's decision will affect the employees' work lives. A completely informal environment might suggest that the arbitrator will not give the decision the proper attention.

The arrangement of tables in the arbitration hearing room is important. The arbitrator sits on the same level as the parties, but at the head of a separate table. This signifies a suitable detachment without the distancing effect of a judge's raised bench. Witnesses sit directly before or beside the arbitrator, allowing eye contact and an evaluation of demeanor. Some arbitrators insist on a U-shaped series of connected tables. Space between the arbitrator and the parties increases formality without hindering fact gathering.

The setting of arbitration and counseling is important to the therapeutic mix. Both are informal, although arrangement of the arbitration hearing room emphasizes efficient data collection over good feelings. Grievants and clients must feel comfortable in their respective settings. Neither procedure should tolerate artificial barriers to communication.

An Informal Hearing Not Bound by the Rules of Evidence

Arbitration hearings are orderly but informal. The atmosphere of informality at the hearing enhances the therapeutic value of the proceeding by encouraging those concerned to speak freely. The arbitrator wears business clothes, not a robe. Informal discussion can precede the hearing. The parties and the arbitrator relate to one another. Arbitrators normally introduce themselves to the parties and meet the grievant before the hearing. On the other hand, the arbitration process demands some formality to demonstrate its importance, its seriousness, its distinctiveness, and its

[26]Napier, The Family Crucible (1978), at 2.
[27]Masson, *supra* note 11, at 199.

legitimacy. Thus, the arbitrator does not wear casual clothes, follows a ritualized procedure, sits apart, and addresses (and is addressed by) the advocates and witnesses by honorific titles ("Arbitrator Jones," "Ms. Smith"). A similar situation occurs in counseling, particularly in family therapy, which usually begins with a social stage of mutual introductions. The therapist tries to make the family feel comfortable in the office, while maintaining a professional distance.[28]

During the arbitration hearing the arbitrator gets the information needed to resolve the dispute. Through testimony and documents the parties inform the arbitrator about their work relationship and the facts of the grievance. Parties can cross-examine witnesses to evaluate their testimony and elicit additional information for the arbitrator. The arbitrator normally seeks to reduce conflict between the parties at the hearing because conflict may interfere with data collection. A particularly important facet of arbitration is the opportunity for participants to explain events directly to an outside authority. The rules of the arbitration hearing foster the collection of these unfiltered data. Representatives of the parties may try to interfere with this process by lodging evidentiary objections. The experienced arbitrator does not permit objections to thwart introduction of this pertinent evidence.

Often one party uses a lawyer, while the other does not. If evidentiary rules applied, the party lacking the lawyer would be at a great disadvantage in presenting its story to the arbitrator. Some traditional court rules of evidence designed to keep prejudicial information from the jury have no place in arbitration. An arbitrator is not an untutored juror. The skilled arbitrator, like a judge, can give evidence the weight it deserves. It may be therapeutic for the grievant to tell the story through testimony. For best results, the grievant must perceive the hearing as more than a continuation of the employer-controlled grievance procedure. Evidentiary rules foreign to the participating workers should not inhibit the grievants' ability to tell the "truth" as they see it. Similarly, a therapist encourages the client to share information that will help the therapist better understand the client, from the client's frame of reference. No procedural "rules" inhibit this information transmittal, although some can help it. For example, therapy usually

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[28]Haley, Problem-Solving Therapy (1976), at 16. At this stage in family therapy, the therapist attempts to involve all family members in defining the problem they seek to address. In arbitration, by comparison, management and the union have designated representatives. *See also* Napier, *supra* note 26, at 2.

occurs at a set time and place. Confidentiality is an underlying principle of psychotherapy which encourages full and frank communication.[29]

A therapeutic advantage of the arbitration hearing is that the grievant expects a prompt resolution of the problem. The hearing itself normally lasts only a few hours. Either by contract or appointing agency rule, the arbitrator's award is normally due in 30 or 60 days. Arbitration is thus more like time-limited or brief psychotherapy than Freudian psychoanalysis, which often takes years.[30] A client facing a few therapeutic sessions expects improvement.[31] Brief psychotherapy focuses on specific symptoms or identified issues,[32] much as arbitration focuses on particular alleged contract breaches rather than the whole bargaining relationship.[33]

An essential step in developing a brief psychotherapeutic relationship is fostering the client's emotional safety.[34] Clients need to know that the therapist will respect rather than ridicule them. Similarly, in arbitration grievants must feel that their concerns are important to the arbitrator. In contrast to their status at work, grievants in arbitration have special recognition. They deserve the attention of all the people gathered in the arbitration hearing room, especially that of the arbitrator. In brief therapy the client often feels that the simple act of talking about the problem can be helpful, even if the discussion is only superficial.[35] Much the same occurs in arbitration.

Within the limits of an orderly proceeding, informality is an essential therapeutic aspect of labor arbitration. Beyond the necessary order, formality is likely to decrease the proceeding's therapeutic value. This "ordered informality" fosters the arbitrator's information gathering because witnesses find it easy to convey their evidence and opinions. That, in turn, helps the arbitrator to complete the assigned task of resolving the dispute on the merits.

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[29]Corey, Corey, & Callanan, Issues and Ethics in the Helping Professions (1988), at 183. Although the arbitration process is normally private, it does not usually require the same degree of confidentiality.

[30]Leonard Small reports that five or six sessions are adequate brief therapy in most instances. Small, The Briefer Psychotherapies (1979), at 122. The total time approximates the average arbitration hearing. *See also* Nye, *supra* note 20, at 38; Wolman, *supra* note 12, at 304.

[31]Small, *supra* note 30, at 44.

[32]Budman & Gurman, Theory and Practice of Brief Therapy (1988), at 27.

[33]Arbitration resembles crisis intervention, a form of brief therapy that addresses a critical period in a person's life. Small, *supra* note 30, at 27.

[34]Goulding, *Getting the Important Work Done Fast: Contract Plus Redecision*, in Zeig & Gilligan, eds., Brief Therapy: Myths, Methods and Metaphors (1990), 303.

[35]Balsam & Balsam, Becoming a Psychotherapist (1985), at 165.

Similarly, informality engenders trust and openness within the client-therapist relationship. It helps the client to speak freely and allows the therapist to understand the nature of the client's problem. Only then, with the therapist's help, can the client begin to resolve the problem.

The Grievant-Arbitrator Relationship

Of the many possible therapeutic aspects of arbitration, the most important to the individual grievant is the potential relationship with the arbitrator. The grievant's initial and final perceptions of the arbitrator critically affect therapeutic values. The therapeutic key is the creation of a relationship between the grievant and the arbitrator within which the grievant trusts the arbitrator. The arbitrator's personal characteristics—expertise, openness, and the ability to control the proceeding, among others—foster this trust.

During the grievance procedure, the grievant could not help but notice that management controlled the process. After all, management could, and did, deny the grievant's claim. At the arbitration hearing, in contrast, the grievant finds a new power, the arbitrator. The grievant sees how the arbitrator controls the proceeding. The arbitrator's control places the union and the employer on the same plane, thus raising the grievant's relative position. (For the same reason arbitration enhances the union's position in the eyes of its members and in the eyes of the employer.) Although grievants have not seen the arbitrator before, they are likely to appreciate the neutral's ability to treat the grievants and union as management's equals.

So too in therapy. Studies show that a therapeutic relationship between a client and a counselor evolves as the client comes to perceive the counselor as expert, attractive, and trustworthy. When these three characteristics, known as "relationship enhancers," are present, counselors more readily influence clients.[36] A counselor's physical appearance, reputation, and professional status contribute to the client's perception and, thus, to the client's willingness to develop a productive relationship. Clients determine their counselor's competence by examining credentials and accomplishments. They consider factors such as specialized training, experience, status, attire, reputation, and

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[36]Cormier & Cormier, *supra* note 25, at 44. Michael Kahn has written that "the relationship *is* the therapy." Kahn, Between Therapist and Client (1991), at 1.

physical attractiveness to determine their counselor's ability to help them.[37]

Arbitrators may exhibit these "relationship enhancers." Grievants perceive arbitrators as expert. The grievant expects to trust the arbitrator because the union, the grievant's representative, participated in the selection process. Appearance and demeanor can confirm (or defeat) that expectation. A self-assured arbitrator impresses a grievant. The arbitrator's role in the proceeding, directing both labor and management, supports the grievant's predisposition. The arbitrator's behavior should enhance the grievant's trust by showing sincerity, openness, and competence.

The grievant-arbitrator relationship parallels the client-therapist relationship. The client depends on visual cues, descriptive and behavioral, to form an opinion about the therapist. The client watches and listens, noting how the therapist makes eye contact, speaks, moves, and responds. These initial impressions strengthen the therapeutic relationship.[38] The client judges the counselor's openness, honesty, and candid description of the process. The relationship deepens when the client perceives the counselor as friendly and likeable. The therapist must maintain some distance, however. The client and therapist are not friends.[39] When the therapist projects professional characteristics, the client becomes trusting. Once secure, the client can reveal sensitive information.[40]

At its core, the therapist-client relationship depends upon trust.[41] Rogerian therapy, a humanistic, person-centered approach, focuses on factors that foster a trusting relationship. Thus, Carl Rogers explains that a therapist's personal characteristics and attitudes are essential to the development of the therapeutic relationship.[42] The therapist must show:

1. "*Congruence*," Rogers's term for genuineness;[43]

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[37]Egan, The Skilled Helper (1986), at 19–21.
[38]Cormier & Cormier, *supra* note 25, at 37.
[39]Kahn, *supra* note 36, at 2–3.
[40]Cormier & Cormier, *supra* note 25, at 21.
[41]Small, *supra* note 30, at 44; Wolman, ed., Dictionary of Behavioral Science (1973), at 304.
[42]Kirschenbaum & Henderson, eds., The Carl Rogers Reader (1989), at 62, 135.
[43]*Id.* at 135. Congruence helps the counselor develop trust and rapport. Cormier & Cormier, *supra* note 25, at 22. The client perceives genuineness when the counselor behaves in a nonstylistic manner. *Id.* at 27. The counselor conveys genuineness with nonverbal behaviors, such as eye contact, smiling, and leaning forward toward the client. *Id.*

2. *Unconditional positive regard*, which is "prizing," acceptance, and trust;[44] and
3. *Empathy*, an understanding from the client's viewpoint.[45]

These aspects of a client-therapist relationship contribute to the therapeutic effect.[46]

A labor arbitrator who exhibits the same characteristics will promote therapeutic values. This does not require partisanship favoring the grievant. A therapist's focus in individual therapy is the client's well-being, but the arbitrator's primary concern is the relationship between the employer and the union. At times the arbitrator must sacrifice the full therapeutic effect for the grievant to maintain the stability of the collective relationship. The arbitrator can listen and empathize without showing bias toward the grievant. The therapeutic effect does not depend upon partiality. It is enough for the arbitrator to treat grievants with respect and listen to their story.[47]

The therapist-client and arbitrator-grievant relationships aid the curative effects of the processes. The therapist's and arbitrator's personal characteristics and professional habits help to develop these relationships. Over time the client and grievant come to believe that the therapist and the arbitrator will help resolve their problems.

The Opportunity to Address the Arbitrator

At the close of the hearing, many arbitrators offer grievants a chance to speak freely on the record. This penultimate stage of the hearing fulfills the grievant's expectation about the relationship with the arbitrator. By offering the grievant a chance to speak, the arbitrator shows concern, empathy, and understanding of the

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[44]Kirschenbaum & Henderson, *supra* note 42, at 136. The therapist makes an effort to understand the client. By respecting the individual, the counselor demonstrates a commitment to the relationship, behaving in a nonjudgmental manner with warmth. Cormier & Cormier, *supra* note 25, at 22. These behaviors show the client a commitment to work toward resolution by accepting the client as a person. *Id.* at 22, 31.

[45]Kirschenbaum & Henderson, *supra* note 42, at 136. A therapist demonstrates empathy by showing a desire to comprehend the client's feelings, by discussing what is important to the client and reflecting the client's feelings and statements. Using these skills, the counselor builds rapport and elicits information from the client, allowing self-exploration. Cormier & Cormier, *supra* note 25, at 22. Empathy, like genuineness, is conveyed through nonverbal behaviors, such as direct eye contact, an open arm stance, and leaning forward. *Id.* at 23.

[46]Yalom, The Theory and Practice of Group Psychotherapy (1985), at 48.

[47]Similarly in couples therapy, the therapist, although empathetic, must remain impartial. The therapist must treat both parties fairly and comprehend their differences. Kirschenbaum & Henderson, *supra* note 42, at 347.

grievant's turmoil and discomfort.[48] This may be the most therapeutic moment of the arbitration hearing. Unencumbered by management or the union, the employee can speak freely. Sometimes the statements are very revealing. They may convince the arbitrator that a grievant cannot return to the workplace.[49] Some employees show contrition and rehabilitation.[50] Even if grievants say nothing, they are likely to appreciate the offer.

Carl Rogers stresses the importance of the client's expression of feelings. The therapist elicits these expressions by showing an understanding of the individual's problem and a willingness to listen.[51] Other therapeutic models insist that simply releasing unexpressed feelings is not enough to produce a therapeutic effect. There must be a cognitive element present, a knowing appreciation, and an understanding of the problem.[52]

A grievant who accepts the arbitrator's offer of a chance to speak freely may accomplish both exposition and understanding. On the other hand, the grievant may only feel a cathartic release.[53] In either case the experience is psychologically helpful. Psychologists have focused on the need to communicate feelings to others. Exposition in an empty room is neither cathartic nor therapeutic.[54] In the arbitration hearing, the grievant has an audience consisting of coworkers, union leaders, managers, and—most important—the arbitrator. The entire therapist-client session is a direct conversation between the two persons. In contrast, only a small part of the arbitration hearing involves a direct interchange between arbitrators and grievant. In this brief period, however, the arbitrator can learn a lot about the grievant, and the interchange can reinforce the grievant's perception of the process as fair, open, and curative.

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[48]*Id.* at 112, 136; Cormier & Cormier, Interviewing Strategies for Helpers (1985), at 23.

[49]Arbitrator Eva Robins recalled one case in which she asked a grievant whether he wanted his job back. He replied: "Hell no, I don't want the job back or any back pay. I just want satisfaction." Fallon, *The Presidential Address: The Role of Humor in Arbitration*, in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books, 1987), 1, 5.

[50]A. Howard Myers explained that the "arbitration hearing has been called the psychiatrist's couch of industrial relations," because the arbitrator can determine "motives" at the hearing. Myers, *Concepts of Industrial Democracy*, in Management Rights and the Arbitration Process, Proceedings of the 9th Annual Meeting, National Academy of Arbitrators, ed. McKelvey (BNA Books, 1956), 59, 74. For example, the grievant might reveal those motives when asked by the arbitrator to supplement the record.

[51]Corey & Corey, Groups: Process and Practice (1987), at 5. *See also* Yalom, *supra* note 46, at 50.

[52]Corey & Corey, *supra* note 51, at 5. *See also* Yalom, *supra* note 46, at 84, 226.

[53]One can test this hypothesis by observing grievants' behavior on the workfloor after the hearing. A positive behavioral change might indicate the employee both expressed feeling and understood the import of the proceeding.

[54]Yalom, *supra* note 46, at 85.

Therapeutic Values and Arbitral Legitimacy

With little explanation Justice Douglas applauded arbitration's therapeutic values. We have tried to suggest how and when arbitration can be therapeutic. Therapy, however, is only one of several arbitral values, which deserve at least as much protection. The arbitrator should therefore try to accomplish the therapeutic goals of arbitration without losing sight of the other goals. A purely therapeutic approach is not desirable, nor does it fulfill the parties' needs and expectations. On the contrary, it can destroy the very legitimacy essential to arbitration's success. The arbitration process must be legitimate, final, and binding. Some characteristics that enhance therapy—for example, the joint selection of the arbitrator by the parties—foster these other important values.[55] Other characteristics can produce therapy at the expense of the other values. Here are a few examples:

1. An unstructured, completely informal proceeding might be the best way to solve an individual's psychological problems. Nevertheless, that might destroy the parties' respect for arbitration as a quasi-judicial process.[56] Arbitration requires more than a helpful chat with a counselor about a workplace problem. Arbitrators who are too informal and too familiar with the parties can raise significant doubts about the legitimacy of their awards. We conduct trials with substantial formality at least partly to enhance their legitimacy and power.[57] Arbitrators do not sentence people to death or even to jail, but they do address important employee job rights. Participants often refer (hyperbolically) to discharge as "industrial capital punishment." Because the results are important to the participants, arbitration should have sufficient formality to provide the dignity and respect appropriate to the issue.

2. The ultimate result of the arbitration process must be a binding resolution of the dispute. A purely therapeutic model might leave some substantive issues for the parties to resolve after the arbitrator's intervention is complete. A psychologist, for example, will try to encourage the client to develop remedial strategies to deal with difficult situations. Therapy teaches clients to exercise self-control. Although arbitrators commonly leave the

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[55]Edwards, *Advantages of Arbitration Over Litigation: Reflections of a Judge,* in Arbitration 1982: Conduct of the Hearing, Proceedings of the 35th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books, 1983), 16, 25.

[56]*See generally* Tyler, Why People Obey the Law (1990).

[57]*See generally* Galanter, *Adjudication, Litigation and Related Phenomena,* in Lipson & Wheeler, Law and the Social Sciences (1986), 151.

back pay calculation to the parties for final resolution, they must address the merits with finality. Parties can learn about problem solving, which can be useful in the future. This can be a collateral benefit of the process but is not its central focus. The most important task for the arbitrator is to resolve the dispute with finality.

3. A therapist might avoid telling clients bluntly that they are wrong. An arbitrator may have to do so in an opinion. Failing to exercise judgment is neither honest nor "legitimate." Judgment is what the parties wanted when they agreed to arbitration and selected a neutral to judge the dispute.

4. Therapists might try to assure clients that they are on the clients' side. The arbitrator, on the other hand, must maintain strict impartiality. The arbitrator's relationship with the grievant must not be misread as favoring the union's case. It is a difficult line for the arbitrator to walk between openness and taking sides.

5. A therapist might decide to extend and expand treatment to help the client resolve many outstanding issues. By comparison, an arbitrator should seek a speedy resolution only of the submitted dispute. A therapist offers advice; an arbitrator must *decide* the issue. A therapist often operates on subjective feelings; an arbitrator should strive to decide a case on the record. Thus, while there are parallels between arbitration and therapy, there are important differences in purpose and process.

The key is balance. Informality in an arbitration proceeding can promote therapy without jeopardizing legitimacy if the arbitrator protects the basic integrity of the process.[58] The parties must see the arbitrator doing the primary job, collecting the information necessary to resolve the dispute. The arbitrator who allows employees to tell their story gains this information. With a balanced approach, the arbitrator can relieve employee apprehension while maintaining the proper distance needed to protect arbitration's legitimacy. In the end, the correct balance allows arbitration to serve its essential goals.

Comment

JOHN W. MCKENDREE*

The paper contains several interesting statements and conclusions but is not firmly rooted in common sense or even its

[58] *See* Abrams, *The Integrity of the Arbitral Process*, 76 Mich. L. Rev. 231 (1977).

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ostensible pericope. Justice Douglas's comment regarding the therapeutic value of even a frivolous arbitration was not made in a time such as this, where psychotherapy is a massive and burgeoning industry, which has nearly co-opted the very term "therapy." In 1960 the common meaning of the word "therapeutic" was closer to its own roots, that is, concerned with the discovery and application of remedies to diseases. Based on the 1960 usage of the word, the authors might just as well suggest that arbitrators are related to physicians or pharmacists.

The authors have, unfortunately, read a contemporary meaning into Justice Douglas's words and run with the premise that arbitration is a process which naturally and inevitably contributes to the mental health and well-being of the participants. This premise verges on the realm of the incredible. Arbitration, like civil litigation, is a stressful and arduous process in which participants are subjected to an examination which, to them, may feel more like an interrogation.

Perhaps the authors have not recently read the entire *American Manufacturing* case.[1] Merely two paragraphs before Justice Douglas's comment regarding arbitration's "therapeutic value,"[2] one finds: "In the context of the plant or industry the grievance may assume proportions of which judges are ignorant."[3] Here the text finds its context, and common sense shows its old gray head. Seemingly minor incidents in the workplace, such as those which lead to so-called frivolous grievances, are like burrs under a saddle. Each one, taken individually, means nothing to an outsider. But to the person aggrieved, the perception is more akin to experiencing death by a thousand cuts.

Justice Douglas submits that every incident is arbitrable since the grievance procedure is a quid pro quo for the usual no-strike clause. Without arbitrability, the workers would be tied down by their agreement not to strike with nothing to show in return. Moreover, a restriction on arbitrability could conceivably be expanded to preclude any arbitration of grievances, even the most substantive. Justice Douglas concluded, "Arbitration is a stabilizing influence only as it serves as a vehicle for handling every and all disputes that arise under the agreement."[4]

It would follow that the "therapeutic" value of arbitration is its stabilizing influence in the workplace, that of providing what

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[1] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960).
[2] *Id.* at 568.
[3] *Id.* at 567.
[4] *Id.*

Archibald Cox called a "safety valve."[5] Arbitration is a method for addressing problems which arise in the workplace, with an eye to preventing a future occurrence of more serious problems. Arbitration is, in principle if not in practice, both remedial and preventative.

The problems addressed by arbitration are, generally, problems which arise between individuals or groups of individuals, rather than within one person. Psychology, generally, addresses problems which arise within the individual and are often manifested in difficulties between the subject and others. The arbitrator's table is more similar to the judge's bench than to the psychiatrist's couch.

While anecdotal evidence may well bear out the opinion that grievants feel better after an arbitration session, that feeling could well be likened to a litigant's relief after a day in court. It could also be the relief that follows a great tension, such as the arbitral process itself. The paper quotes Arbitrator Simkin as stating that parties like to get things off their chests in the arbitration session. Most blue collar workers also like to get things off their chest when they talk to a bartender.

Arbitration is likened to psychotherapy in comparisons between the processes. Several of these comparisons, however, lay aside logic altogether. The grievant's initiation of the process is compared with a patient's initiation of psychotherapy. The unasked question is, If the grievant did not initiate the process, who reasonably could? Initially, at least, only the grievants know that they are aggrieved. Arbitrator selection is compared with the selection of a psychotherapist. Usually one person affirmatively selects a psychotherapist from those in the geographic area. The alternate striking method of arbitrator selection could scarcely be more different.

Arbitration hearings are held in neutral sites which are selected for the convenience and relative comfort of the parties and, of course, economic factors. Arbitrators tend to steer clear of the most elegant hotels for arbitration hearings. The layout of the rooms is determined by practical and functional considerations. Psychologists select their offices with similar considerations in mind. Then again, so do accountants, attorneys, and any number of other professionals who provide services to members of the public. The informality of arbitration, as opposed to judicial proceedings, is again functional. An arbitration hearing's purpose

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[5]Cox, *Current Problems in the Law of Grievance Arbitration*, 30 Rocky Mtn. L. Rev. 247, 261 (1958).

is to speed the determination on the merits rather than to state the truth beyond a reasonable doubt with absolute precision. The formalities of judicial proceedings would, in many cases, delay the determination on the merits, frustrate the parties, and lead to confusion among the general public.

The authors compare the qualities of a good psychotherapist with those of a good arbitrator at some length. Overlooked is the simple fact that the qualities listed are those of a good communicator. I recall that Carl Rogers's[6] terms used in the paper originally referred in his works to listening skills for people in general, not just therapists. In any interpersonal endeavor, communication skills are essential. In this regard, arbitrators might be compared with journalists or detectives.

In the end, however, the authors rightfully back away from the initial bold suggestion that arbitration is a form of psychotherapy to endorse a more reasoned viewpoint. Arbitration is simply and only arbitration. It can be a useful means to the end of resolving workplace disputes. The resolution of workplace disputes can bring about many salutary side effects. A workplace which is harmonious, or at least free of major conflict, itself engenders many good things. As long as arbitration can do its own job, it need not worry about shrinking heads.

Comment

WILLIAM F. SCHOEBERLEIN*

The paper presented by Roger and Frances Abrams is an intriguing analysis. It presents many useful observations on the arbitration process and demonstrated methods to make the procedure more effective. Yet, its major thrust, that arbitration is analogous to psychotherapy, misses the mark. With all due respect to the authors, that equation in many regards is flawed and misdirected.

The paper points out Justice William Douglas's reference in his 1960 decision in *American Manufacturing* to the "therapeutic values" of the arbitration process.[1] It then refers to Douglas's quote of Archibald Cox as to the "cathartic value" of arbitration but fails

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[6]Kirschenbaum & Henderson, eds., The Carl Rogers Reader (1989).

*Harding & Ogborn, Denver, Colorado.

[1]*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568, 46 LRRM 2414 (1960). The authors refer to "therapeutic *effects*" which may be different from "therapeutic *values*" referred to by Justice Douglas.

to consider the relationship between a "cathartic value" and a "therapeutic value." From here, the authors quickly jump to the conclusion that therapeutic value must mean the psychotherapeutic process. This jump in logic is made without any consideration of alternative interpretations, such as the curative effect or the beneficent effect of due process or justice and, indeed, not even the cathartic effect referred to by Cox.

A search of the relevant authorities gives no support to the idea that either Douglas or Cox were referring to psychotherapy. We found no authority for that conclusion. Indeed, the *Trilogy* decisions of 1960 focus quite differently. The Court's emphasis was on the use of arbitration to provide justice and dispute resolution in the workplace. In *Enterprise Wheel & Car*,[2] Douglas said:

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. . . . an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.[3]

The clear emphasis here is on the collective bargaining agreement and the administration of justice thereunder, rather than anything akin to psychotherapy. In fact, undue emphasis on psychotherapy might well be viewed as dispensing the arbitrator's own brand of industrial justice in Douglas's words.

Justice Douglas was pointed in his emphasis on arbitration as a dispute-resolution procedure. "In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife."[4] He also observed: "The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement."[5] Douglas made it plain that arbitrators were selected because of their knowledge of the common law of the shop and trust in their personal judgment. Nowhere was there an inference that the arbitrator's acumen in the field of psychotherapy would have any bearing upon or beneficial effect in the

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[2] *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 242 (1960).
[3] *Id.* at 507, 46 LRRM at 2425.
[4] *Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578, 46 LRRM 2416 (1960).
[5] *Id.* at 581.

arbitration process. In other decisions of the Supreme Court where the word "therapeutic" or "therapy" appears, there is no reference or even the vaguest implication that psychotherapy is being referred to.[6]

Thus, if there is an illness that the Supreme Court is addressing in its various decisions, the illness is the existence of disputes in the workplace, which are in need of resolution. There is no suggestion that the illness is an illness of the grievant's mind. The latter, of course, must be the fallacious assumption of the Abramses' paper. The therapy proposed by the Supreme Court is to provide a due process procedure for resolution of workplace problems, rather than industrial warfare. The focus is not upon the individual grievant, but rather upon the collective bargaining agreement and the parties thereto, which include both the employer and union as well as the employee.

There is no issue with Abrams's condemnation of undue formality in the arbitration process, making it more akin to court-like proceedings. It is very appropriate to eliminate procedural issues insofar as possible and to emphasize the comfort and ease of the proceedings to all parties involved. The Abramses are correct in their analysis of many facets of the process, which are designed to make it more useful and effective for the parties involved.

However, it is improper to put the primary focus on the satisfaction of the grievant's needs. That distorts and may even harm the process. Both the union and the employer are prime participants, as well, and the need to be resolved is an institutional need. The employer and the union both need to have problems resolved without resort to economic warfare. The grievant, individually, may be either right or wrong. The process may be found not at all satisfying to an individual grievant whose grievance is denied. Indeed, from a psychotherapeutic standpoint this determination may generate great pain for the grievant. Yet, the institutional problem is solved by providing a mechanism to attain resolution without resort to strike. The most that can be said for the individual is that the grievant at least had a procedure which accorded due process. The cathartic value is clear. The psychotherapeutic value is, at best, questionable.

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[6]*Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 55, 7 FEP Cases 81 (1974) ("the conciliatory and therapeutic processes of arbitration); *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 272, 55 LRRM 2042 (1964) ("[T]he therapy of arbitration is brought to bear in a complicated and troubled area").

The Abramses' paper mentions in passing that psychotherapy is "not its primary goal." Abrams also acknowledges that the arbitrator is not the "labor relations physician." Indeed, Abrams concludes: "Thus, arbitration's therapeutic effects are collateral by-products of the decisionmaking process." However, to emphasize the psychotherapeutic effect of arbitration may divert the arbitrator from the principal goal of resolving workplace disputes under the collective bargaining agreement. For example, the process may encourage frivolous or politically motivated grievances. To be sure, the procedure should deal with these cases, but encouragement is another matter. More and more effective arbitration demands efficiency and economy.

The goal of psychotherapy is to provide treatment for the individual, which in the Abramses' analysis focuses on the grievant. Undue emphasis on this may, in fact, destroy the effectiveness of the arbitration process. The mutual objectives of the parties must be the paramount focus of the arbitrator. It is the resolution of these mutual objectives under the collective bargaining agreement that in turn avoids industrial conflict and achieves the principal goal of arbitration, that is, industrial justice. The therapy is the application of justice and due process to the industrial system and the workplace.