CHAPTER 6

# DISCIPLINE, DISCHARGE, EXTERNAL LAW AND PROCEDURE—ROUNDTABLE DISCUSSION

RICHARD I. BLOCH, MODERATOR*
HARRY T. EDWARDS
BERNARD J. CASEY
BRUCE H. SIMON
CLIFF PALEFSKY
MEI LIANG BICKNER

**Richard Bloch:** Good morning, ladies and gentlemen. We have a distinguished panel on an interesting topic. At the far left, just take that as you will, is Judge Harry T. Edwards, appointed to the U.S. Court of Appeals, District of Columbia Circuit by President Carter in 1980, a former arbitrator, a former member and officer of the Academy, and we're delighted to have him with us. Next to Harry is Cliff Palefsky. Cliff is a partner in the law firm of McGuinn, Hillsman & Palefsky in San Francisco and is deeply involved in employment issues outside the sector of the organized labor-management relationship that we normally see at these meetings. Mei Liang Bickner is a member of the Academy, an arbitrator/mediator since 1980, and a professor at California State University, Fullerton. To her right is Bruce Simon, a partner with Cohen Weiss & Simon in New York, a firm engaged exclusively in the representation of labor unions. And to Bruce's right, considerably so, is Bernard Casey, a partner in the Washington, D.C., office of Reed Smith Shaw & McClay. Bernie represents management. I assure

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you that their CVs are far more extensive than I've just indicated.

What we have done for today's session is to put together a hypothetical case and, in the nature of roundtable discussion, we will discuss how this hypothetical will play out, both in the arbitration context and in the courts. We hope that the nature of the hypothetical will be instructive in raising as many issues as we can pack into the amount of time we have available.

The case before us involves the discharge of a bus operator. The bus company is a private municipal transit company. The bus routes, as is usually the case, create a cross-section of the city. Many of them, however, go to and through the school district and pick up many children who are returning from school. Based on records secured from a local court, the transit company has determined that the bus operator has pleaded guilty to a disdemeanor involving incest with his daughter. Based on that guilty plea, the company has discharged the employee, and cites as its bases for discharge, the following reasons: (1) adverse publicity to the company, (2) other bus operators will refuse to drive or work with this employee, and (3) he constitutes a danger to the unaccompanied minors who may be on the buses from time to time. As further information, you should know that the union, represented here by Mr. Simon, is less than enthusiastic about representing the driver. He, the driver, has retained outside counsel, Mr. Palefsky, who is poised to challenge the company represented by Mr. Casey and the union as well, if necessary, and to take whatever actions he feels appropriate against the arbitrator, just so you don't sit too comfortably, Ms. Bickner. So we have the actual arbitration case.

We are now at arbitration. The parties are gathered around the table, with the exception of Judge Edwards who remains in the sanctity of his chambers. He will later play the parts of both a district court and a court of appeals judge. This is then the case before you.

I turn first to you, Mr. Casey. You have brought the charges against the employee, and you have taken the actions. Let me ask you to begin our first area of inquiry. Clearly, this is a matter of off-duty conduct. As offensive as you may characterize it, it this really something that the bus company itself, as an operator and as a company, should be concerned with?

**Bernard Casey:** The question of off-duty conduct would be relevant, but only insofar as there is a nexus between what he did and what his job is. There can be no question but that a bus company must be extremely concerned about the behavior and predilections of its employees. A bus company is, in a sense, a

custodian of the public, at least the public that uses the bus system. In this particular case, the districts in which this driver is working transects school districts where children would be passengers. There is clearly a demonstrable connection between that kind of conduct and the proper performance of his job.

**Richard Bloch:** Does the company take action against other operators who perhaps failed to pay their taxes?

**Bernard Casey:** Well, as you know, Mr. Arbitrator, these things are all facts-specific, and not paying taxes is a far cry from molesting children, particularly your own children, insofar as it has anything to say at all about potential recidivism, potential impact upon the customer base, and consequently, potential impact upon the reputation of the company.

**Richard Bloch:** Mr. Simon, we've heard the company's case that this is something that's close enough to be considered within the nexus. What is your position on this?

**Bruce Simon:** Well, as in most cases, I think Bernie put his finger on it when he said these cases tend to be facts-specific. It's really necessary to lay out more of the facts to decide whether or not, in this circumstance, the individual should be returned to work. It is easy enough to speak in general terms about the impropriety of the alleged activity until we recall the daily headlines. We have fathers who have been arrested because they belonged to an amateur photography club and took pictures of their 3-year-old in the bathtub. They were turned in by the processing lab and arrested. Given what's going on in many parts of this country today, there is, some would say, an overwrought reaction to some of these issues. Broadly stated, you cannot come up with a conclusion. Perhaps as you spin out the facts and see what this individual has done to address the charges against him, you may see the factual distinctions that will lead to an expression of industrial justice that we've come to expect. We're a far cry, to be sure, from the notion that a man's house is his castle, and the right of an employer, or anyone else, to examine what goes on in one's private life is a matter of some separateness. But I don't think we've come to the point where every employee and every circumstance of his private life is open to scrutiny and mutilization by his employer.

**Richard Bloch:** You both have indicated that it's a facts-specific case. There is one fact that is already in evidence and that is this employee has pleaded guilty to the offense. Are you suggesting that we ought to revisit that whole thing?

**Bruce Simon:** The one thing that we know today about guilty pleas in our society is that they are often generated by a concern

about the implications of the trial, the cost, expense, and angst of the trial. Balanced on the other side must be a consideration of what penalty is to be imposed, and perhaps as you go through it again on the facts-specific basis, you will see that the plea is only the beginning, and not the end, of the inquiry.

**Richard Bloch:** Arbitrator Bickner, let me turn it over to you for a moment. You've heard both positions in general, and taking further this issue, the factual nature of the case, I want to ask you a question. Assume that the employer comes to you and asks you as arbitrator to take notice of certain facts, among them the heinousness of the crime. The employer says that it's beyond any argument that this is something that should not be tolerated and asks you to take notice of that fact. The company asks you further, rather than bringing forth all of the workers who may object to this individual, to take notice of the fact that many, many people are going to be repulsed by his actions. And finally, it asks you to take notice of the fact that the community itself is in an uproar, that from many quarters, the company has learned that the community will not patronize the bus company; certainly, it will not send its children on the buses, if this individual is retained. And the company asks you to take notice of that, and I should indicate it has a stack of affidavits to that effect.

**Mei Liang Bickner:** Generally, arbitrators take arbitral notice of certain facts that involve propositions or laws that are so obvious that they don't require formal proof. For example, arbitrators take notice of the fact that the day in question, perhaps it was last July 4, fell on a Monday, and this is easily verifiable. There is no reasonable dispute about those facts. I don't believe that in this particular case, the fact that the off-duty misconduct is a repulsive act or heinous crime that co-workers would refuse to work with the grievant, would fall in that category.

**Richard Bloch:** You're not willing to assume that as a matter of good faith?

**Mei Liang Bickner:** Right. Now if we're talking about a school bus driver and we're talking about parents' outrage, the employer may have a stronger case for arguing arbitral notice, but in this case, arbitral notice would not be appropriate. The affidavits suffer from the similar defect as other affidavits which are not subject to cross-examination, and there is also the possibility, in the case of a metro bus driver, unlike a school bus driver, of changing his route to one where he would not come in contact with schoolchildren.

**Harry Edwards:** Is there conceded wrongdoing here?

**Richard Bloch:** Yes, I wanted to point that out. For the moment, please recall not only is there a plea to the offense, but there is no dispute. The employee has conceded the offense. We're going to change that in a little while. But for now, please understand there is no dispute on that point.

**Bernard Casey:** Let me ask you this. Why would any lawyer raise the issue of arbitral notice under these circumstances? Why don't you have a representative sample testify, perhaps one employee on record, to allow you sufficient basis to argue. Certain things speak for themselves, it seems to me. You either buy into or don't buy into the fact that this kind of an act will be of such a nature as to create this kind of turmoil. Why raise the issue? If I'm an arbitrator and somebody says you must decide arbitral notice, I would start thinking about the standards. In terms of strategy, why not just start with one piece of evidence and then argue it?

**Bruce Simon:** One reason might be that for every one you bring in, Bernie, I'll bring in six of his co-workers who will attest to the fact that over the 15 years, he has actually been one of the great co-workers of all time. This is really just truly an aberrant act, and as the facts unfold, the treatment, and other elements come into play, you will find yourself in a contest of numbers. For every patron you bring in, I assure you I'll bring in six, because if I don't, the guy two seats away will threaten me with a claim for the breach of the duty of fair representation. If I don't turn myself inside out to produce the witnesses, he is going to demand that I produce them. In fact, he may well go out and find the witnesses for me and produce them in my reception room and so pressure me to do that in any case.

**Bernard Casey:** Except, we're going to get into that back and forth anyway, whether I approach the issue in terms of judicial notice or arbitral notice or put on a witness. You and I will not avoid that kind of confrontation in any case on that question.

**Bruce Simon:** That depends on how much else I will have to deal with. If I have a sympathetic case of someone who has been successfully treated, complete with testimony from doctors, the psychiatrist, his family, all attesting to the fact that he has overcome this single aberrant act, I may well strategically decide not to contest at all either the underlying facts, my plea, what led to my plea, or whether or not there are people unhappy that I'll be back driving the bus. Those arguments will probably trigger an unsympathetic reaction, even from an arbitrator with a great deal of intellectual integrity.

**Harry Edwards:** Why does your plea matter? The underlying basis for your plea is irrelevant if you've conceded the wrongdoing.

**Bruce Simon:** I agree. What I'm saying is that I would, given the circumstances I described, acknowledge the guilt that was part of the plea instead of trying to either excuse it away or excuse away the fact that there are going to be co-workers, members of the community who will be up in arms over the possibility of my return. Anticipating that I will not persuade anyone, I may simply accept the negative end of the case without contesting it. Again, this is all subject to however much pressure that shark Palefsky puts on.

**Richard Bloch:** Before we turn to that ominous storm cloud near the end of the table, I want you to notice how smoothly counsel has injected facts not yet in evidence, which goes a long way to explain Mr. Simon's success. He has talked about this successful rehabilitation.

**Bruce Simon:** I've held some things in reserve.

**Richard Bloch:** And I would like to approach that issue for just a moment and come back to you, Arbitrator Bickner. Is that at all relevant? Let's assure Bruce comes forward with doctors and other unimpeachable sources showing that, in fact, the grievant underwent successful rehabilitation and can authoritatively be deemed cured. Is that relevant for your consideration?

**Mei Liang Bickner:** Well, that depends on what the employer is arguing.

**Richard Bloch:** Let me guess. But short of that, Mr. Casey, how would you feel about that?

**Bernard Casey:** Obviously, it's going to be introduced. The quality of the psychiatric testimony will depend on how strong a case can be made that pathologies of this particular kind can confidently be diagnosed as being cured. First, under the facts of this case. I would be highly dubious about any such testimony. Second, the employee's rehabilitation is irrelevant to the central theme of the employer's position in the case, and that is the damage has already been done—the event has spilled over into the public. It has compromised the reputation of the company irretrievably, that is, if there is reinstatement in this case, because of all the doubts—valid or invalid, scientifically based or otherwise—in the mind of the public, that a driver with these propensities remains behind the wheel, driving our children to school every day.

**Mei Liang Bickner:** Well, if the employer is making the argument that he would not be a good candidate for reinstatement because

of those various reasons that Mr. Casey has just outlined, I think the union should be allowed to put on evidence to rebut that. The testimony of the psychiatrist would be that kind of evidence that would allow the union to at least counter the employer's arguments or evidence in that case. The employer might put on some evidence that this kind of grievant would not be suitable for reinstatement. To be fair to the union, it should be given an opportunity to present the testimony of the psychiatrist.

**Bernard Casey:** I don't disagree with that.

**Richard Bloch:** Well, now we turn to the ticking bomb that's sitting at the other end of the table that has been very patient up until now. Mr. Palefsky, you are an outside counsel. You are representing the grievant. My question is, "Why are you here?"

**Cliff Palefsky:** Well, I'm here for a few reasons. First, I am concerned, not only about the enthusiasm that Mr. Simon may have for the cause, but more about his expertise. I think privacy matters implicate lots of law and policy that are normally external to the contract. In my experience, many people who represent unions are very expert in traditional labor-management matters. But the field of privacy and the overlapping constitutional and statutory protection is not something they're as familiar with. I think we can bring to the table a lot of prior thinking about how to argue these cases, what nexus really means, what it means to regulate off-the-job conduct, what it means to have a company suggest that the doubts—real or unreal, valid or invalid—or the subjective moral determinations by other employees can ever amount to just cause. I have many considerations that led me to be here. My primary one, though, is to make sure that the very best case that can be put forth is put forth in this forum because I have grave concerns about where I go next.

**Richard Bloch:** All right, well, I'm persuaded by your expertise. In fact, some of you in this room may know Cliff was the author of one of the California laws dealing with off-duty misconduct. So your credentials are unimpeachable, but I'm still a little concerned about whether you should be in the room at all. Let me ask you, Mr. Casey, how do you feel about having Mr. Palefsky monitoring the integrity of the proceedings?

**Bernard Casey:** He is an interloper, in a word. We have a contract here. This is a contractual dispute—just cause is a matter of contract. The contract is between two principals. The principles are adequately represented. Mr. Palefsky will only confuse you. Exclude him please.

**Richard Bloch:** I assume you have made a motion to that effect. Well, one reason he is here is to "ride herd" on the union's caring and presentation of this. Mr. Simon, what is your response to his presence?

**Bruce Simon:** Well, to take a leaf from the book of those in the room, let him in for what he's worth. The overwhelming likelihood is that the union would not object to his presence. I don't know that I would demonstrate any great enthusiasm about his presence, but I think I would probably sit back and simply say when asked. "The union has no objections to his presence." Then, I would turn to the arbitrator and let her struggle with it.

**Cliff Palefsky:** In reality, I would not appear unannounced on the day of the hearing. If my client came to me with the concerns about the union's enthusiasm and expertise, I would spend a lot of time, well before the hearing, meeting with Mr. Simon, finding out exactly what his state of mind is, what his level of expertise is, and we would try to work this out if we could.

**Bruce Simon:** I'm sure my client would love to be billed for all the time that Mr. Palefsky wants to spend with me determining my qualities and expertise, but we'll put that to one side.

**Richard Bloch:** But there, at least we have the proposition that outside counsel has come to negotiate with the union about their appearance. This is, then, one of those novelty cases, and it has turned to you, Ms. Bickner. You have an objection by the employer, and apparently Mr. Simon has no objections.

**Mei Liang Bickner:** The law is pretty clear on this issue: If an employer objects to an employee being represented by outside counsel (an attorney of his or her own choice) in addition to the union counsel, such employee cannot be so represented because parties to the arbitration are the union and the employer. The law is pretty clear on that. Mr. Palefsky, as well-informed and expert as he is, does not really have standing in an arbitration hearing. In practice, most arbitrators probably will try to work out an accommodation. So I would probably try to have a conference with counsels out in my office, in the hallway, and see if I could persuade Mr. Casey to change his mind about the presence of Mr. Palefsky with the understanding that Mr. Simon will be presenting the case on behalf of the union.

**Richard Bloch:** Let me just say as a veteran of many such discussions in the hallways with both of these gentlemen, you aren't going to move Casey at all. It's one of those, often wrong, but never in doubt.

**Bernard Casey:** I think you're showing your hand here, Richard.

**Bruce Simon:** I couldn't have said it better.

**Richard Bloch:** So, let's assume that Mr. Casey has declined your good offices.

**Bruce Simon:** Well, at this point, you find the magnanimousness of the union, its concern for both the perception and reality of fair representation, would assert itself, and I would tender to Mr. Palefsky the opportunity to be admitted as co-counsel to the union on this case along with, however, an explicit and openly announced set of guidelines for the nature and extent of his participation. These guidelines would reflect the fact that this is the union's grievance and not the individual's grievance, that the union has issues involved in this matter that may well go beyond the precise reemployment interest of this particular individual, that while I will be pleased to hear from him throughout the case, he can indeed sit at my elbow, pass me notes, and whisper in my ear; I will be the exclusive counsel for the union in this matter and will so inform the parties, and not so coincidentally, he will not receive any payment for his services from the union but would look only to his individual client for compensation.

**Richard Bloch:** How do you react to that Mr. Palefsky? Is that satisfactory?

**Cliff Palefsky:** I would start off by asking Mr. Simon to identify what those separate union interests might be, and I would take very careful notes.

**Bruce Simon:** Let's talk about it not only in the context of this case of sexual abuse but other issues that have produced the series of decisions by persons sitting in this room. There are public transportation cases in which employees have, for example, epilepsy or have suffered from alcoholism, and where one of the questions was the validity of a broad company rule against the employment of such persons in those particular job categories. I can see us flipping on this from case to case, that each individual case ought to be taken on its own merits. The union might perceive, or even Mr. Palefsky might perceive, that the interest of our own respective clients would be best served by taking one or the other of those hooks. So, too, with the case you've presented to us. It's conceivable to me that we would have a significant difference of opinion, each of us representing our respective clients perfectly. That is to say, by taking the individual client-based interest into account, each of us might yet make very different tactical decisions in the presentation of the case. Because it is the union that is the representative of all

of the employees, and it's the union sitting in that capacity that is processing this case as an aspect of that overall representation that I want to make clear that the voice of the union is the policy voice that I would articulate and that it will not be complicated or compromised by the perfectly legitimate efforts of Mr. Palefsky who may wish to pursue different tactical considerations for his individual client.

**Cliff Palefsky:** I don't really think our interests are very much in conflict. I'm not suggesting that someone who is epileptic should be driving buses. I think my client's case is much closer to someone who's been convicted for adultery, sodomy, tax fraud, or illegal campaign contributions. I think that it serves the union's interest to have a very bright line for all purposes as to what the nexus is and to what extent criminal convictions will spill over. I think what I need to do is to take Mr. Simon into the hall and convince him that we are not hostile. I recognize we're not going to have a hearing where two different lawyers will be speaking at the same time, but if I can convince him to allow me to do some cross-examination, that would be great. With certain witnesses we may be able to work very well, hand in hand. It is not going to be my role, at this hearing anyway, to create an adversarial relationship with the union.

**Richard Bloch:** Thank you, you have been very responsive on these points. I want to make two points. First, at the end we will have time for questions, so feel free to "load up" and "tee off" at any of our participants after this. Second, I want to change the hypothetical situation slightly. Until now, we had been proceeding on the assumption that the misconduct is conceded. Now I want to change it quite dramatically: The misconduct is not conceded. There is a finding of guilt by a jury, not a plea, and indeed at the arbitration, the grievant steadfastly denies any misconduct of this nature. Given that, I would ask Bernie, you've come to the hearing and in your hand is a document authenticated by the court indicating that he has been found guilty of this, what's your position?

**Bernard Casey:** The initial position is that you should go no further than the finding of the court. I recognize that is not generally in the nature of arbitration or arbitrators generally to be so constrained. But there are limits, in my view. There are very serious limits on what you should do under those circumstances. If I were the arbitrator in that situation, I would undertake to make a preliminary inquiry concerning the nature of the legal proceedings, get a proffer concerning the quality of the evidence, and determine whether there are any appellant issues that seriously call

into question the integrity of the verdict. I don't think the arbitrator should be looking to retry the underlying case, unless under some extraordinary circumstance where the underlying proceeding was flawed in a very fundamental way that affects the quality or integrity of the guilty verdict. Then you work out the procedures to do that.

**Richard Bloch:** Therefore, I take it, your position is that the guilty finding is of some value to this forum and should be admitted as evidence.

**Bernard Casey:** Yes, because I don't think you have the expertise really to retry the case. The arbitration forum is not designed to retry cases of guilt or innocence on the merits: the evidentiary standards are different, the due process standards are different, and the underlying principle of arbitration is that of finality, pragmatism. If you want to take a whole de novo proceeding on the underlying criminal charge, you don't do justice to that principle.

**Richard Bloch:** I assume, therefore, that if the grievant had been found innocent, you would feel precisely the same way.

**Bernard Casey:** I think I would probably articulate it in the same fashion, but I would be sure that the proffer was very effective.

**Cliff Palefsky:** I don't think that I would ever contest the guilty finding, nor would I want there to be any testimony at all regarding the underlying claim, nor would I want my client's credibility tested on any of those issues. I want this hearing focused exclusively on the impact on his ability to perform his job.

**Richard Bloch:** Aren't you at that point conceding his guilt, conceding the fact issue of guilt?

**Cliff Palefsky:** For purposes of this hearing, I am definitely conceding it so that we don't have to get into the evidence. I'm afraid of the emotional overflow clouding the issue. This is a very simple issue. This is a bus driver. How in the world does a conviction of a crime that the company didn't even know about affect his ability to drive a bus?

**Richard Bloch:** As a practitioner, are you saying that if the grievant came to you and said, "You know, I didn't do it, and I've got to convince these people," your reaction would be swallow it, and we'll argue the remedy.

**Cliff Palefsky:** After he has not been able to convince a jury with full due process, that's what I would say. I would say it's a losing battle, and you have to choose your battles.

**Harry Edwards:** Bruce, are you going to buy into that if he says in the hall, "Hey, don't try the facts. Let's concede them"?

**Bruce Simon:** In most instances, I would.

**Harry Edwards:** And then he'll come back and hit you with a breach of the duty of fair representation.

**Bruce Simon:** I was going to say that this is one of the instances in which I would see a significant tactical difference arising between us. I think the more difficult circumstance is where the individual absolutely insists upon ascertaining his innocence. Those are the ones that are tough. I agree that from the point of view of the tactics of litigation, especially if you have a strong rehabilitation case and a strong no-nexus case, the last thing you want to do is retry the ugly circumstances of the act for which he was found guilty by a jury of his peers. The problem is going to be where the individual simply refuses, for a variety of reasons, to acknowledge his guilt, psychological or otherwise. Those are the tough cases. And there, it's virtually impossible to disregard the demands of the grievant to do that.

**Richard Bloch:** Ms. Bickner, did you want to chime in on this?

**Mei Liang Bickner:** Well, if there was a guilty finding, for purposes of the question of incest, I would accept that finding.

**Richard Bloch:** As depositive of it?

**Mei Liang Bickner:** Right. It is separate from the decision of whether he should be reinstated to his job. So that's a separate question, but in terms of a guilty finding that would be my position. And I know others—and I know you, Richard, are one of them—would disagree with that.

**Richard Bloch:** Well, one of the beauties of being a moderator is that I don't have to commit, but you're right.

**Mei Liang Bickner:** On the other hand, if it was an innocent finding, then that's a different situation.

**Bruce Simon:** I think I would be prepared to enter into a deal with the management bar at any minute to agree not to contest a finding of guilt if they would agree not to try and prove guilt where there has been a finding of not guilty. That's the deal. I'll lose a few in the process, but I'll pick up a lot more. It's an outstanding offer.

**Richard Bloch:** What are all of you going to do if that case is on appeal in the courts?

**Mei Liang Bickner:** Probably adjourn.

**Richard Bloch:** Okay, perfect.

**Bernard Casey:** Doesn't it depend on the issue, whether to adjourn or not? That is, if it's a technical issue, constitutional issue, or something having nothing to do with the underlying guilt or

innocence but to the process by which guilt or innocence was found. That might make a difference, wouldn't it?

**Mei Liang Bickner:** You'd have to show me that that was the reason for the appeal.

**Bernard Casey:** The logic would be if the underlying guilt or innocence is really at issue in both the criminal proceeding and the proceeding before you, then it seems to me that the appeal of that issue would be something that would trouble you before you were to render a decision. If, on the other hand, there was a search and seizure issue or some other kind of issue that affected the process and not the truth of the findings, that might be less of a concern?

**Mei Liang Bickner:** I would like to hear from Mr. Simon.

**Bruce Simon:** It seems to me that to brush aside something like search and seizure, if the evidence that led to the conviction of the individual was obtained by an unconstitutional search and seizure, I don't treat that as some mere technicality, not affecting what you would say is a regularity and finality of the conviction. It seems to me that you have to look at the whole package. And if the conviction is tainted or subject to reversal, whatever value it may have for the arbitrator has been erased.

**Richard Bloch:** Well, thank you. I've heard your arguments, to use an old phrase which really means, "Let's move on." We now progress to the point where the case has been submitted to the arbitrator for decision, and the arbitrator concludes as follows. We'll assume that Ms. Bickner has ruled adverse to the company with respect to all of the factual issues brought before her. That is to say, she finds no adverse publicity to the company. She finds that there is no evidence that other workers will refuse to work with the operator or that the operator is a danger to unaccompanied minors. She concludes, however, that since common sense and good judgment is so inherently a part of this individual's job, and since the conviction represents such an abdication of those qualities, the grievance will be denied and the discharge will stand.

**Mei Liang Bickner:** Please remember this is a hypothetical.

**Bernard Casey:** Sounds sensible to me, Ms. Arbitrator.

**Richard Bloch:** The union, perhaps spurred by co-counsel, is outraged and takes the case to district court. With due apologies, Judge Edwards, I will now demote you to the district court. You have just received this case where the claim is that the arbitrator has gone way off base and made a decision on an issue that had not

been argued by the company. Obviously, the union is wishing to overturn this decision.

**Harry Edwards:** The first question I have to look at is to see whether the arbitrator wrote anything because the arbitrator may have just said, if she was smart, "Grievance denied."

**Mei Liang Bickner:** It might have been smart, but it would affect my acceptability.

**Richard Bloch:** You would agree that if the arbitrator, after a five-day hearing, simply issued an opinion with the words "Grievance denied," they would probably have to find work as a judge or something else.

**Harry Edwards:** It's good work, if you can get it. It does highlight the very limited scope of review of the arbitrator.

**Richard Bloch:** I want to stop you for just a minute. Let's assume that the decision was rendered with just two words, "Grievance denied." What are you going to do?

**Harry Edwards:** I think Mr. Simon probably would not have brought the case to district court, right, Mr. Simon?

**Bruce Simon:** I think that's correct. As absurd as I think the result would be, I accept the law the way it is, and I think the likelihood of overturning that award is between slim and none. I would probably counsel the union not to take it.

**Harry Edwards:** I suspect that's probably true even if the arbitrator had said at lunch or in passing essentially what you're saying was in an award. The union has no case, is not likely to have a good case, and it really highlights the very limited nature of review.

**Bruce Simon:** I only hope that Mr. Palefsky was not at that lunch, but you're right.

**Richard Bloch:** Why are you content as a judge to allow that sort of an almost nothing award to stand?

**Harry Edwards:** It's not a matter of what I'm prepared to allow. This is the party's arrangement. This is the party's judge. They've selected the arbitrator. The party's "contract reader," as Professor St. Antoine says, it's their arrangement. If there is nothing on the face of it to suggest there is a taint that we worry with, it's over. He's not going to bring that case.

**Richard Bloch:** All right. Now let's return to the claim from the union that there was a gross procedural irregularity because the arbitrator made a decision on a point that simply wasn't argued.

**Harry Edwards:** Well, it really is going to depend a lot, I think, on what's in the contract and how the parties view the submission. If there is a broad arbitration clause, a very usual just cause provision,

and the arbitrator is writing the magical words that suggest that she is drawing the essence of her award from the agreement, and if there is nothing in the submission or the party's contract that suggests that the submission is jurisdictional in the sense that the arbitrator is so confined, most of the case law is going to have the union tossed out quickly because arbitrators tend to wander around in reaching results in discipline cases; we all understand that, and that's the end of the ballgame.

The more difficult case is going to be if there is something in the contract or in the submission that suggests that the submission is jurisdictional in that the arbitrator has nothing more or less than what the submission says. If that's the case and I were to find that that is a limit on authority, then the union will win and the judgment will be vacated. Alternatively, the other way you could look at it is to look at this as a procedural infirmity, that is, I would expect Mr. Simon to argue that even if I can't prove anything on the submission, we never got a hearing because the arbitrator decided something that we weren't aware of. For example, let's use a ludicrous case. Let's assume that the arbitrator said, "Forget all these things that were before me. This guy needs a haircut. He's not well-groomed, and therefore he's fired." A grievant, I think, even in court, can say, "I didn't know that was the case." We have not yet been in arbitration. I think if that type of case were presented to a court, a court could very easily say, "I'm sending it back to arbitration because there has not yet been arbitration."

**Richard Bloch:** All right. Just so I can crystallize it and make sure we understand your point, let's assume that there is nothing in either the submission itself or the collective bargaining agreement that says anything about this particular issue or the handling of such issues. The only thing that has happened is that the company came in and said its points 1, 2, and 3, and the arbitrator said, "You lose on all those, but I like point number 4." And you're saying that's really not enough because arbitrators have kind of a rough justice approach, anyway.

**Harry Edwards:** That's exactly right. As a general matter, I can't find it in the case law. If you've got the usual language, and I don't mean to suggest that everyone writes exactly the same way, but if it's the usual broad arbitration clause, just cause provision and nothing that's tying down the arbitrator to a very limited submission (as is done sometimes under the Railway Labor Act, for example), if you don't have that, I think most courts, certainly if it got to the court of appeals, are going to throw it out.

**Richard Bloch:** Let me then reverse the assumption in terms of how it got to court. We will assume now that the arbitrator has in fact reinstated the employee, finding that nothing was so bad about the activity (or for whatever reason). Now the case comes to the court on a far different claim, and that is the reinstatement of this employee was simply dead wrong in a society that values children, and so forth. It's a breach of any public policy you can think of. What about that? Now I will put you back on the circuit court, but with apologies, that's about as far as we can go today, but good luck.

**Harry Edwards:** Does Mr. Casey have any argument to make on this?

**Bernard Casey:** I do have an argument. I have to say I recognize what an uphill struggle it would be to make the argument, but I'll do it anyway. And it strikes me that in conduct of this kind by an employee holding the job he holds is something that goes to the real vitals of public interest. This is a company, privately owned, but it's performing a public service. It's working with the public. It is being conducted by an employee with proclivities that my psychiatrists are saying are difficult to cure if not impossible. In my judgment, he is not a candidate for rehabilitation. I think, if anything has a direct, obvious impact on public safety and health, it's conduct of this kind, and I think the court ought to pay attention to that.

**Harry Edwards:** Suppose the parties had a clause in their contract, Mr. Casey, that said employees convicted of a crime like incest cannot be fired if they successfully complete rehabilitation. Is that unlawful?

**Bernard Casey:** Is it unlawful? I haven't really given that much thought. I suspect it's not unlawful.

**Harry Edwards:** You know it's not unlawful.

**Bernard Casey:** And I suspect that makes my case a lot easier to get by the public policy exemption. There it's not public policy; there it's a matter of contract.

**Harry Edwards:** Right. And if the employer hired a bus driver who had been guilty of this, with or without rehabilitation, someone who either pled guilty or was convicted (and may or may not have served time), would that be unlawful? Could anyone come in and say that person has to be fired against public policy? It's a threat to society, all the things you've just said.

**Bernard Casey:** I think that's a matter for the employer to determine.

**Harry Edwards:** Right. Certainly. You're absolutely right, and the employer is a party to the collective bargaining agreement, and this is the employer's arrangement and the arbitrator is the reader of the contract for the parties. What I'm suggesting is the answers to these two questions prove the point on what my circuit has done, what the Ninth Circuit and a couple others have done. I think there are circuits that have gone the other way, but the point is, there isn't any doubt how my circuit would rule on this. This was forecast many years ago in the *Otis Elevator*[1] case that Justice Marshall, Judge Friendly, and Judge Kaufman decided: When someone is fired for illegal gambling, they said that the question is, "Is there a public policy against reinstating a person for gambling." And of course, there is not, and that's been, I think, the enlightened line of authority in these cases. There isn't any public policy against hiring or reinstating a person guilty of incest. The other problem, it seems to me, is that there is a real mischief in these cases in that when the court steps in and second-guesses the arbitrator, the reader of the parties' agreement, serious damage is done to the duty to bargain that itself is part of public policy. I have been astonished that the cases that have gone the other way have missed the point about safety, as if safety were excluded from the duty to bargain. It's not. It's something that the parties have control over.

**Bernard Casey:** I am very familiar with your views on that, the views of the court, and the majority views of the courts throughout the country. On the other hand, in this forum, I think I'm free to say (and I would be free to say if I were arguing the case) that personally I would revisit some of those assumptions. I would revisit the notion of the reader of the contract as being a notion that is, frankly, unrealistic and unduly circumscribing. I would go back to the *Trilogy*.[2] You're talking about the premises that arbitrators should not dispense their own brand of justice and that there is a law of the shop, whatever that is, which is the governing principle here. I think when an issue transcends the law of the shop, when it goes out and has an immediate, definable impact on matters of

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[1] *Electrical Workers (IUE) Local 453 v. Otis Elevator Co.*, 314 F.2d 25 (2d Cir.), *cert. denied*, 373 U.S. 949 (1963), cited in *W.R. Grace v. Rubber Workers Local 759*, 461 U.S. 757, at 766.

[2] *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).

public safety and health, then a different approach should be taken.

**Harry Edwards:** Let me try to understand you. You're saying the law of the shop has an immediate impact but you say if I, the employer, do it on my own, that's my authority, you have no control over me. That's not a matter of public policy, that's a matter of employer prerogative. How is that changed? I'm really missing the point. How is it a matter of such grave concern if it's in this context where it's done pursuant to arbitration and not so grave if the employer hires the same employee. And you say no one could challenge you if the employer went out and hired someone guilty of incest—no one could dare come in and challenge that hiring?

**Bernard Casey:** Well, they couldn't challenge it in an arbitration proceeding, but they could challenge it in *other pragmatic ways.*

**Harry Edwards:** As they could here?

**Bernard Casey:** That's exactly right.

**Harry Edwards:** Pragmatically?

**Bernard Casey:** That's correct.

**Harry Edwards:** And that's it.

**Bernard Casey:** But I'm saying there should be room for pragmatism with respect to the analysis of whether or not the underlying arbitration decision is congruent with matters of vital public policy.

**Harry Edwards:** My question is what's the public policy? That's what I'm missing. I've got to write this. I'm being dead serious now. And we always say this to counsel, "Fine, we hear you, and you're impassioned in your expression, but what are you talking about?" I must go write this now. My law clerks and I have to struggle through this. I don't know how to write it.

**Bernard Casey:** I think it's a matter of public policy when the confidence and judgment of, in this case, bus drivers, pedestrian as it might sound, is called into question. I think the public has a vital interest in assuring that they have people with sound judgment behind the wheels.

**Harry Edwards:** But it doesn't answer the question of preserving the right to hire that person as you see fit.

**Richard Bloch:** Well, on that note, gentlemen, if I may, I will exercise the prerogative of the chair. I think the panel has had ample opportunity to wring this hypothetical dry, and I think Judge Edwards has had ample opportunity to abuse counsel. I'm not saying that you can't do it anymore, but I wanted to make sure that before we adjourn that we do open the floor to questions.

**Dan Boone:** I know the culture must vary from one area to another if an attorney for the plaintiff comes into the arbitration room at a local motel. In the particular culture that exists in northern California, I think that individual grievants can be improperly prejudiced in the hearing of their case by the arbitrator when the plaintiff's attorney comes into the room. The assumption is, as is explicit and implicit in this conversation, that there is an antagonism. Frankly, I, as a union attorney, want the plaintiff's attorney there. I want it very clear that the plaintiff's attorney is not going to say anything as the advocate, but I want the person there taking and passing notes, taking part in the caucus. I assume that it may help in preparing and trying the case. I also know that it is impossible for the union to be sued when the plaintiff's lawyer is there because whatever decision that is going to be made is with the participation of that attorney. But whether it's very friendly or very antagonistic, the plaintiff's attorney is there in the interest of all the parties, not as the advocate, but as the observer. Everybody's interests are served there—the arbitrator's, the employer's, the individual grievant's—as long as the arbitrator is not prejudicing the case against the employee because of that presence. I would be interested in the comments of the participants.

**Richard Bloch:** Cliff, did you want to respond to any of that?

**Cliff Palefsky:** I sort of agree. I understand that it's a culture that is very different from the one I'm used to, having sat in one arbitration in my life. I would defer to an experienced counsel in that regard. And it's not my style to be disruptive or to take any action that would prejudice my client. I really want to understand the environment before I open my mouth at all. So I agree with him.

**Bruce Simon:** I think it's also fair to say, apart from geographic differences, that there is a difference in time. I think the culture has changed in that regard, certainly, in the 35 years I've been practicing. Three decades ago, I think, if a highly politicized local union allowed an individual to come into a case with his own attorney, there are many arbitrators (none in this group) who would form an instant conclusion very similar to that just reported. The individual would suffer the consequences. And I remember struggling with the question as to whether or not I should in good conscience tell that to the individual lawyer who would appear on occasion with an individual client or whether that would be seen as a count in the alleged breach of the duty of fair representation. That's not an easy call.

**Alan Symonette:** I would like to hear the panel's comments on the effect on the parties' arguments of the passage of community notification laws dealing with molestation. In the case of a bus driver who was convicted of molestation and local police was obligated to notify the community, how would the parties' arguments be affected?

**Bernard Casey:** Offhand, I suspect that it strengthens the employer's case in this situation. If there had been any doubt before that the community at large would be aware and would be likely to react adversely to the company, I suspect that those laws would dispel that infirmity in the case.

**Richard Bloch:** That's an interesting point because in many of these cases where you do have the claim of adverse publicity to the company, it's often very difficult for the company to point to anything that would support that.

**David Feller:** All of the issues discussed here were discussed in a different context during the days of the McCarthy hearings which enabled use of the Fifth Amendment, and a number of companies in the steel industry, probably at the urging of Senator McCarthy, fired people whom they wanted to get rid of. I remember very well Harry Platt deciding cases where the testimony before the arbitrator was that workers could refuse to work with a man claiming the protection of the Fifth Amendment. And Harry Platt said it's the business of the company to discipline the employees, to make them work, and to put them back to work. All the issues explored here were explored in the context of Communist Party membership and the public policy issues of that time. I think this is all old stuff.

**Bernard Casey:** Don't you think, sir, that there is considerable difference between being disciplined because of political beliefs or freedom of expression issues, on the one hand, as opposed to this circumstance where there is an act that would be almost unanimously viewed as morally repugnant?

**David Feller:** I think if you think back to what the atmosphere was back in those days, there is no difference. It's hard to explain today the reactions at that time. At that time, being a Communist Party member was regarded as horrendous as child molestation.

**Bruce Simon:** Isn't the issue really one of limitations? As significant as the employer-employee, union-management relationship and its private governance mechanism is, it is really not the playing field for working out all of society's various angst-ridden concerns. One of the wonders of the system we have devised is that it works extraordinarily well for that which it governs. That really brings you

back, I think, to the significance of the nexus argument and the realization that the issue is not whether you are returning a grievous sinner to work but rather whether that person has paid his debt to society, has either rehabilitated himself or has otherwise presented acceptable proof to an arbitrator that that conduct is not likely to reappear or to affect the quality of his work. There may be some greater societal concerns, but do they really belong in this narrowly circumscribed world in which we function?

**Cliff Palefsky:** That's the privacy issue that we started off with. The notion that employment decisions are going to be made on the basis of subjective impressions, perceptions, misperceptions, or even biases of other workers, is a very dangerous road to travel. There are many employees who don't want to work next to a minority. At what point do you start catering to the misperceptions or the biases of other workers?

**Bernard Casey:** Judges draw those lines all the time. That's what they get paid to do.

**Harry Edwards:** However, don't overstep the argument because, remember, the parties could well agree in the agreement that a person found guilty of a felony will be discharged and that an arbitrator will have no authority to reinstate at any terms on the assumption of adverse reputation of the company. That should be sustainable. So all of your civil libertarian views are of no moment.

**George Nicolau:** I really want to direct this question to Mr. Palefsky. The nexus argument is something that we deal with all the time, and you seemed to be saying earlier that it was really irrelevant. Now you're saying that at some point it should not count. I was wondering if you could provide more about where you think some point is in relation to the rights of the employer.

**Cliff Palefsky:** The statute that has been enacted in San Francisco, which I helped draft in 1985, says that an employer can only take action based on off-the-job activities or relationships if it has a direct and actual impact on the employees' ability to perform their job. I think that's a very specific standard. We're not going to sit here and worry about what *might* happen, what people *might* think, what people *might* do. The employer has the burden of showing that it does impact their ability to do the job. I think it's as definite a standard as I can get.

**Laura Cooper:** It seems to me that the power to insulate an arbitration award from attack on public policy grounds is entirely within the hands of the arbitrator. If the arbitrator writes the award in such a way as to make a finding of fact that the employee is

unlikely in the future to commit this act again, then I don't see any circuit, including those that disagree with the District of Columbia circuit, reaching a conclusion that the arbitrator's award violates public policy. I would be interested in hearing whether Mr. Casey would take such a case.

**Bernard Casey:** Probably not. I think you make a very good point.

**Bruce Simon:** However, in the real world, arbitrators are concerned about the future. This is why you rarely have arbitrators acting as warrantors or assurities for those they're returning to work. It is the rare arbitrator, I think (especially in the case of sex abuse, child abuse), who is going to say, "I find as a fact that this person will never do it again." And I harken back to some of the medical condition cases for the same kind of approach. What you get is a balance approach or a recognition that risk is inherent in our society, and the risks of aberrant behavior and a medical condition are there. These are risks we all bear—the risks we measure and live by.

**Harry Edwards:** You know, I'm not sure that the assumption is correct in these cases. One or two of the circuit cases that have gone the other way, read in the extreme, really would not allow the arbitrator to dictate the result. In the Iowa nuclear power case in the Eighth Circuit,[3] the court seems to be saying that the court will decide what makes sense; it wouldn't matter what the arbitrator wrote. They felt you don't allow someone who messed up a safety mechanism in the nuclear power plant to work, that's that. So I'm not sure. In the end, I think it shows the mischief of allowing the court to get into those kinds of matters because they so fouled up the duty to bargain, that they didn't have the slightest clue as to how much they had done so.

**Cliff Palefsky:** Coming from the private sector, I'm really struck by the loose definition of public policy that you seem to work with in this context. It's been beaten into my head that public policy has to emanate from the Constitution, from statutes. It should not be made by judges, and I, for the life of me, can't imagine what public policy you would point to that says someone who has been convicted of a crime, done their time, should never work again in this country. I'm not sure where this comes from.

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[3] *Iowa Electric Light & Power Co. v. Electrical Workers (IBEW) Local 204*, 834 F.2d 1424 (8th Cir., 1987).

**Alan Miles Ruben:** Suppose we change the facts just slightly. Suppose we had a situation where the guilty verdict is based upon repressed memory, revived under therapy. Will that change the tactics of counsel for the union and the grievant? And if so, will it affect the arbitrator's decision on the merits? Secondarily, suppose we have, after the verdict, a dispositional decision made by the judge that puts the grievant on probation on the grounds he poses no danger to anyone and he would not repeat the offense. Will that make a difference?

**Bruce Simon:** I think the notion of repressed memory is a useful reminder. This is what I was dealing with in my photographer case. I guess it would depend upon my view, as a litigator, of the ability to puncture holes in a repressed memory case. Again, I think you should proceed very cautiously before you reopen the merits of the underlying charge. There is a raging dispute in the Freudian analytic community today as to whether or not the latent life reports of early child abuse are the manifestation of fantasy or genuine repressed memory. The notion of trying that issue before an arbitrator, with the possibility of judicial review, goes one way if you're in skeptical New York City where everyone reads the *New York Review of Books*, or in a community where you've had a series of repressed memory convictions cheered by the local community.

**Bill Murphy:** I was struck by the fact that the panel seemed to have a consensus that it was bound by the jury finding on the guilt question. I think it's settled that when we arbitrate discharge based on misconduct, we are not bound by the finding of an unemployment compensation commission which found the employee was in effect discharged for misconduct. We hear it and make our own decision. Some arbitrators in fact, I'm told, would not even admit evidence of an unemployment compensation finding. The only thing that differentiates that case from this case is that this is a jury finding in a criminal case and the other is an administrative finding in what is almost always noncriminal conduct. So I would be interested in hearing the panel tell me why they so sanguinely accepted the jury finding as binding when apparently it's settled that the other finding is not binding.

**Bernard Casey:** I think there is a major distinction between the administrative proceeding and a court of law which is bound by proof beyond a reasonable doubt. The standards are much more rigorous, due process, evidentiary standards, and so on, which should reaffirm or reinforce the integrity of the verdict. This does not exist with unemployment compensation. Beyond that, my own

view is that, I'm not saying that the arbitrator is necessarily bound; things don't work that way, as you know better than I, in arbitration. But I think the arbitrator has to be very careful about getting into it de novo. I think some sort of preliminary inquiry concerning how the verdict was returned and the quality of the underlying finding is about as far as you should go.

**Bruce Simon:** I want to emphasize that I was not agreeing as a matter of substance that an arbitrator should be bound by the determination. I was making a litigator's judgment that, more often than not, I'm simply not going to want to retry that issue unless there are circumstances I could argue with success that the finding of guilty was not dispositive.

**Mei Liang Bickner:** Well, I think there are different standards that Mr. Casey referred to certainly that would influence my decision. I know arbitrators differ on this, but in a guilty verdict, I take into account that the standard is much more stringent than the standard I might apply in an arbitration hearing. But again, the fact that I accept the guilty verdict does not mean that I feel that he should not be reinstated to the job. I think that's a separate question. So arbitrators differ on this. On the other hand, if he were found innocent, I think the employer would be entitled to present a case. Even though he was found innocent of the incest in a jury trial, there remains this separate question of whether he should be reinstated to his job. I feel that is a separate question, a separate standard.

**Richard Bloch:** Before we adjourn, parting words to our panel: You have been as responsive as Harry and I have been rude, and we deeply appreciate your help. Thank you.