Chapter 1

PRESIDENTIAL ADDRESS: MAINTAINING IMPARTIALITY IN THE EVOLVING WORLD OF WORK

I. Introduction: George R. Fleischli

Daniel J. Nielsen*

My remarks will be brief. Those are famous last words for any speaker, but George sent me a bunch of bio statements to help me prepare and I quickly realized there just wasn't much there. I considered making up some stuff, but instead decided to tough it out and talk a bit with George to see if I couldn't flesh this out and find *something* to work with.

When I asked George for some background for this, he told me that he grew up on the "wrong side of the tracks" in Springfield, Illinois—thereby suggesting that there is a *right* side of the tracks in Springfield. He described his childhood to me as a rough and tumble environment filled with shady characters, dark motives, and seamy transactions. Until that point, I never knew George had such an early interest in Illinois politics.

George worked hard to raise himself up by his bootstraps, selling newspapers door to door—creating a habit of hard work that has stuck with him to this day—and in time he found his way to the University of Illinois. He earned a business degree and a law degree. He spent a couple of years in the JAG Corps, but found out it wasn't really like it's portrayed on television, so George returned to Champaign, and earned his Masters Degree in Labor Relations while working as a research assistant for two great men, Martin Wagner and Bill MacPherson.

Martin took a fatherly interest in young George, and essentially advised him to get out of Illinois. Martin said that he should leave the heartache and hard times behind him, and make his way north to the Promised Land. So packing Ann and all of his worldly possessions in the family flivver, George set off on the per-

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ilous journey to the land of milk and honey—it was sort of like the Grapes of Wrath, without the grapes, and with Madison, Wisconsin, taking the place of California.

I was thinking of carrying that metaphor further, and calling George a "Poor Man's Tom Joad"—then it occurred to me that that made no sense at all—what would a rich man's Tom Joad be? For those of you who didn't get that last joke, just find someone over 50 to explain it to you. Come on—this is a meeting of the National Academy of Arbitrators—it's not like you're going to have a hard time finding someone over 50. We have more shades of gray in this room than you'll find in a Navy paint shop.

But I digress. In 1970, George finally made it to Madison and was hired by the Wisconsin Employment Relations Commission (WERC) as a mediator and arbitrator and hearing examiner, working for Morrie Slavney, another of the truly great figures in this field. In 1976, George became the agency's first General Counsel.

It was in 1981 that I first met George at what turned out to be a very significant point in both our careers. My mentors were June Weisberger and Bill Petrie, and they had given me the same advice that Martin had given George—that the WERC was the place to be if you really wanted to learn labor relations. June arranged an internship there for me. So one late August day I went up to the Commission's offices and was interviewed by George. It went fine—or at least I thought it went fine—until I went back a week later and to my surprise there was a different General Counsel. I was told George had quit to become a full-time arbitrator. It wasn't until years later that I found out that he had no real intention of leaving until he got a good look at the future of the agency. So, in any event, I found myself at the place that has been my professional home over the years, and George embarked on the road that leads us to this event today.

In preparing for this introduction, I asked George to describe for me a couple of the high points from his career. He immediately pointed to *Machinists v. WERC*,[1] a case in which the U.S. Supreme Court made important changes in the law of preemption. They accomplished this by resoundingly overruling a decision authored by George.

So I said "Well that's very nice; you got anything else for me to work with?" And George said, "Oh yeah," and told me that he

[1]427 U.S. 132, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976).

was the arbitrator whose awards were at the base of the horrifying Hormel strike in Austin, Minnesota.

Having determined that being overwhelmingly reversed by the U.S. Supreme Court and issuing an award that helped trigger a notorious strike were high points for George, I was understandably a little afraid to ask if there were any things he might consider low points.

With that by way of background, and putting aside the kidding for a moment, it is my distinct honor to introduce to you one of the finest lawyers, ablest arbitrators, and certainly one of the most decent men I have ever known—our Academy President, George Fleischli.

II. ADDRESS

GEORGE R. FLEISCHLI*

With your indulgence, I would like to begin on a personal note by explaining why I believe that I am a very fortunate person. Doing so will give me an opportunity to publicly thank some of those persons who have been influential in my life and helped me achieve that good fortune. Be assured that I will eventually connect that discussion with the substantive part of my comments today: "Maintaining Impartiality in the Evolving World of Work."

In our complex economy, it is the ultimate in good fortune when a person can make a living doing that which he or she enjoys. I have had that privilege. I love the work we do as arbitrators of labor disputes. There are a lot of reasons why this is so, but one stands out in my mind. In the course of our work we have an opportunity to learn about the work performed by others in nearly every modern human endeavor. I have had the privilege of handling cases involving the work of accountants, bartenders, brewery workers, coal miners, cooks and chefs, college professors, court clerks, crane operators, dairy workers, dentists, doctors, electricians, factory assemblers of airplanes cars trucks and hundreds of smaller products, fire-fighters and paramedics, foundry workers, laborers, laboratory assistants, machinists and machine operators,

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meat-cutters and packinghouse workers, mechanics, medical examiners, nurses and nurses aides, papermakers and fabricators, postal workers, printers, office employees of nearly every kind, operating engineers, pilots and flight attendants, police and prison guards, real estate appraisers, school teachers, ship-builders, steel and aluminum workers and fabricators, stock brokers, social workers, tire builders, truck drivers, and zoo keepers. I have had the opportunity to listen to the expert testimony of actuaries, auditors, chiropractors, document examiners, economists, epidemiologists, general medical practitioners and specialists, metallurgists, psychiatrists and psychologists, securities analysts, and veterinarians. I once heard the testimony of an expert on the meaning of Chinese ideograms. Most of all, I have had the opportunity to listen and learn from these workers and experts while attempting to resolve the most basic, important, and interesting of human conflicts—those that arise in the workplace.

How did I happen to stumble into this profession? My grandparents came from working class backgrounds in Switzerland and Germany. But they were farmers and saloonkeepers, not members of a guild or union. They were more bourgeois entrepreneurs—albeit unsuccessful—than they were members of the proletariat.

In college I found that I was interested in labor history and labor economics. I developed great admiration for those workers and labor leaders who fought for economic justice. I learned to appreciate the impact their struggle had on the promotion of human dignity and improving the standard of living for all of society. It was only later that I came to appreciate the work of those peacemakers who took it upon themselves to intervene in that struggle to help work out settlements that could be accepted by both labor and management.

Before that happened, I had concluded that the most logical course of action would be to seek to join the ranks of the "enlightened management" that was then running most large industrial enterprises—management that recognized the value of working with unions to achieve labor peace and promote good labor relations. After earning a degree in business management, I planned to pursue a master's degree in labor relations and join their ranks.

Prior to executing that plan I was afforded an opportunity to attend law school at no cost, and I took it. I had no real intent to practice law, but felt the training would be invaluable in my management career. It was in law school at the University of Il-

linois, and later at the Institute of Labor and Industrial Relations, that I came to appreciate the work of such well-known and respected neutrals as Robben Fleming, Bill McPherson, and Martin Wagner. While at the Labor Institute, I had the good fortune to work as a research assistant for both Bill McPherson and Martin Wagner. In 1970, I took Martin's advice—for which I will always be grateful—and applied for a job with the Wisconsin Employment Relations Commission (WERC). After taking a written exam and barely managing to pass an oral exam conducted by a panel headed by Bob Mueller, I got the job. At the WERC, I came under the indirect influence of Arvid Anderson and Nate Feinsinger, and the direct influence of Morris Slavney, Zel Rice, and a stable of colleagues. Like Arvid, Morrie, and Zel, 16 of those colleagues became members of the Academy.

Every day in the office included the functional equivalent of a seminar on every aspect of labor relations in the public and private sectors. Through the Association of Labor Relations Agencies, I got to know and work with Bob Helsby, Bob Howlett, and the staff of numerous other state and federal agencies.

At that time, most labor arbitration work was being performed by academics on a part-time basis. In Wisconsin, you could count on one hand the number of arbitrators in private practice, and most of them had other sources of income. It never occurred to me that I might become a full-time labor arbitrator. Beginning in the mid-1970s, things changed. What was once a calling performed by numerous academics and a few others, suddenly become an occupation. Never mind that things have moved in the opposite direction since that time. (I don't intend to focus on that issue today.) Labor arbitration suddenly became an occupation that I and many others in this room could aspire to join. By the late 1970s, I had to make a choice: either ignore the opportunity, or strike out on my own. That was the true beginning of my good fortune.

In thanking people for my good fortune, I need to extend the greatest thanks to my wife Ann and my two daughters, Mary and Margaret. They had to tolerate all those days and nights for the 11 plus years when I was on the road holding hearings and mediating disputes while working for the WERC. Then they had to try to hide the panic that I could see in their eyes when I told them I had quit my real job and would begin working out of the basement.

I became much more active in the Academy, helping to eliminate my sudden isolation and greatly enhancing the benefits of

self-employment. Through my activities in the Academy, I have had the good fortune to work closely with and learn from so many highly respected fellow arbitrators that I dare not mention some without appearing to slight others. Therefore, I will mention only the name of our honored and distinguished Alex Elson who is with us here today. Thank you, Alex. I have benefited greatly from your wise counsel over the years.

In the course of my journey from the role of student and research assistant; to the role of a government mediator, arbitrator, hearing examiner, and general counsel: to the role of a full-time arbitrator, I discovered some things about myself. I derive much greater satisfaction working as a neutral than as an advocate. It suited my personal preferences and it suited my personality. I had had the opportunity to serve as an advocate during a three-year stint as a Judge Advocate in the Air Force. Although I believe that I did a respectable job, I eventually concluded it was not for me.

Although I am sure that this suitability factor played a major role in my personal success as an arbitrator, I do not believe that it is among the four generally essential qualifications for success in our profession. Such essential qualifications can be found in Part 1-A-1 of the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.[1] They are honesty, integrity, impartiality, and general competence.

In the place of "impartiality," I could just as easily refer to "neutrality." I use the term "impartiality" rather than "neutrality" for a reason. As noted in the ongoing "Neutrality Project" sponsored by the Association of Labor Relations Agencies, it is possible to confuse the concept of neutrality with indifference. It would be foolhardy to suggest that arbitrators do not, or should not, care about the outcome of the cases they decide. Sometimes, our dislike of the outcome constitutes the most difficult aspect of the decisionmaking process.

Nor should the term "impartiality" be confused with a total lack of bias or prejudice. Arbitrators are human. They not only care about the outcome of the cases they hear, but they also have personal life experiences that cause them to view the world through a filter created by that experience. It is important that arbitrators recognize those feelings and opinions and make a conscious effort to keep them in check when they decide a case.

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[1] *Available at* http://www.naarb.org/code.html.

Once one begins to develop the habit of looking at disputes with a concern for one's possible biases, there may be unintended consequences. My wife, Ann, would be happy to attest to the number of times we have had a conversation about something that has turned into a disagreement because of this habit that I have sought to cultivate for 35 years. For example, something may be reported in the media and Ann is understandably ready to make a judgment based on the reported facts. I will then begin with a phrase to the effect, "Yes, but isn't it possible that . . . ." Of course, it always turns out that she is right. However, I am willing to wager that there isn't an arbitrator in this room who has not had the experience of hearing one side put in its case and thinking, "Why am I here? The answer is so clear," only to learn that, yes, indeed there is another side to the story.

I am using the term "impartiality" in the same sense that is reflected in the admonition found in Part 1-A-2 of the Code of Professional Responsibility:[2]

> An arbitrator must be as ready to rule for one party as for the other on each issue, either in a single case or in a group of cases. Compromise by an arbitrator for the sake of attempting to achieve personal acceptability is unprofessional.

As Morris Slavney so often said, a decisionmaker must function like a good umpire. You have to "call them the way you see them." To that I would add, "If you worry too much about how your decisions are received in the short run, there will be no long run."

A reputation for impartiality takes a long time to develop. And, one learns along the way that the appearance of impartiality is just as important as the reality. The appearance of impartiality is an ephemeral thing. It can be damaged or lost through a thoughtless action or remark, or through unavoidable actions, such as the making of tough judgment calls. When I was starting out as a mediator, I would often see the same teacher representatives again and again, at various locations throughout the state. On one such occasion, I greeted one of those representatives with a flip comment to the effect that our spouses might begin to wonder why we were meeting so often at night. At that very moment, I lost any ability to function as an impartial mediator in that relationship. The members of the school board were dairy farmers, who had never before had any dealings with a mediator. Immediately, they

[2] *Id.*

became convinced that I was in league with the teacher's union and not to be trusted.

On another occasion a few years later, during the course of an arbitration hearing, an attorney representing one of the parties concluded that I was biased and said so. It does not matter whether his opinion was the result of a series of erroneous rulings or his unreasonable response to a series of fair but tough judgment calls. (I, of course, insist that it was the latter.) Either way, every ruling I made thereafter was considered suspect by that attorney. That remained true even when the ruling was favorable to his client.

In recent years, a public perception of arbitration has developed that has at times called into question the fairness of the arbitration process generally and the impartiality of arbitrators in particular. That perception is the result of the misuse and abuse of the arbitration process in circumstances where one of the two parties was in a position to set up the rules of engagement and did so in a way that was patently one-sided. Initially, some of the worst examples arose out of unilaterally imposed systems of employment arbitration. Many of those problems have been corrected. Recently, the worst examples have arisen under the terms of adhesion contracts in consumer cases. All of these cases have generated a number of negative press accounts.

It used to be the case that when I told someone what I did for a living, I either got a blank stare or a follow-up question that indicated that the person had no idea what a labor arbitrator did. Those few who did understand would express their admiration that I could continue to be selected after cutting the baby in half all the time. No more. Now, those who seem to know what an arbitrator does are growing in number and they often indicate that they have doubts about the fairness of the arbitration process.

A number of positive steps have been taken to deal with these misuses and abuses, but a lot more remains to be done. The Academy has taken an active role in promoting some of those positive steps by filing amicus briefs in the courts,[3] adopting the *Guidelines on Arbitration of Statutory Claims under Employer-Promulgated Systems*,[4]

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[3] *See, e.g., Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 159 LRRM 2769 (1998), where the Court adopted the Academy's position and refused to infer that the parties to a collective bargaining agreement intended to waive an individual employee's right to pursue a statutory claim of discrimination.

[4] *Available at* http://www.ilr.cornell.edu/alliance/resources/Guide/statement_guidelines_of_NAA.html.

and supporting the development and implementation of the *Due Process Protocol*.[5]

Many members of the Academy feel that we should be doing more. They also feel that we cannot do so with credibility unless we expand the Academy's membership to include other neutrals who serve as decisionmakers in employment disputes and, in particular, employment arbitrators. If we do so, it will be necessary to overcome many obstacles. Included among those obstacles is this problem of perception.

All agree that any new standards of admission to membership in the Academy will need to continue the requirement that the applicant not also serve as advocate or consultant, or be affiliated with a firm that does. It is also reasonable to assume that the Membership Committee will do its best to screen out applicants whose work as an employment arbitrator has not been conducted in accordance with the Guidelines and the requirements of the Due Process Protocol.

Regardless of whether or not the Academy decides to expand its membership to include employment arbitrators, there will continue to be a problem of perception for those labor arbitrators who perform this work, at least for the foreseeable future. Many will harbor suspicions, based on the fact that the employer normally is expected to pay the arbitrator's fees and expenses. Others will harbor doubts about how much mutuality actually underlies the establishment and administration of such systems. And, there will continue to be a perception on the part of many in the labor movement that such work is inconsistent with work as a neutral in labor-management disputes.

Finally, there are two particular threats to the perception of impartiality that I would like to address today. We heard about the first one this morning in the session on ethics.[6] In many forms of commercial arbitration, there is a legitimate concern about the "repeat player" phenomenon. Unlike labor arbitration, there is usually no continuing relationship between the parties. In many cases, one of the parties has probably never before been involved in arbitration and does not anticipate ever being involved in arbitration in the future. Further, in commercial arbitration it is a common practice to use arbitrators who come from the industry

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[5] *A Due Process Protocol for Resolving Employment Disputes Involving Statutory Rights*, 50 Disp. Resol. J. 37 (Oct.–Dec. 1995).

[6] Sharpe, William, "Arbitration in a Fishbowl: The Ethics of Disclosure," *reprinted in* Chapter 9.

involved in the dispute, who have a background representing clients in that industry, or who have practiced in the area of law involved in the dispute. That combination of circumstances has led to an expectation that commercial arbitrators will search their records and disclose all instances where they have ever had any previous dealings—even as a neutral—with one of the parties, their attorney or law firm, or one of the witnesses in the proceeding. The perceived need to do so is greatest in cases involving individual litigants.

I am concerned that this expectation will be extended to the labor arbitration process. When looking at the disclosure obligation there is a tendency on the part of the courts to say that no harm can flow from requiring too much disclosure. I do not agree. Don't get me wrong. There are instances where disclosure of work as a neutral may be required—the "special circumstances" referred to in Committee on Professional Responsibility and Grievances CPRG Advisory Opinion Number 22.[7] It is the extension of such an expectation to all work as a neutral to which I object. In my opinion, such a blanket requirement is unnecessary in the case of labor arbitrators. It will prove to be extremely burdensome for experienced arbitrators, and it will encourage game playing by those parties who would like to try their luck with a new panel. But the more serious objection that I have relates to the message that such a disclosure requirement sends to the parties about the impartiality of labor arbitrators and the encouragement it may provide for attacks on labor arbitration awards in the courts.

The second threat to the perception of impartiality on the part of labor arbitrators is far more serious. It has to do with recent changes in the Code provisions dealing with solicitation.

Several years ago, the Code was modified to eliminate all restrictions on advertising except for statements that are false or misleading. In my view it was the need to advertise in fields of arbitration other than labor that served as the impetus for this change. It remains to be seen what effect, if any, this change will have on the practice of labor arbitration. My belief is that most advertising will prove to be of little value to arbitrators or to the parties to labor-management disputes. It is costly and fails to provide the parties with information about arbitrators that is as useful as that which they can secure from more reliable sources.

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[7]Gruenberg, Majita, and Nolan, Fifty Years in the World of Work (BNA 1998), 410–14.

More recently, the Code provision prohibiting solicitation was modified to say the same thing. The change was made in response to the judicially sanctioned theory that written solicitations are just another form of advertising that cannot be curtailed except to the extent that they are false and misleading. I am concerned about the potential harm that this change may have on the reputation of labor arbitrators for impartiality. Fortunately, the modified language contains an important proviso. The relevant portion of the Code (Part l-C-3) now reads as follows:

> An arbitrator shall not engage in conduct that would compromise or appear to compromise the arbitrator's impartiality.
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> a. Arbitrators may disseminate or transmit truthful information about themselves through brochures or letters, among other means, provided that such material and information is disclosed, disseminated or transmitted in good faith to representatives of both management and labor.

In my view this is an issue in which everyone in this room has a stake. If we allow practices to develop that involve undisclosed, unilateral solicitations of work, it will not merely reflect badly on the appearance of impartiality for the arbitrators involved, it will seriously undermine everyone's confidence in the integrity of the labor arbitration process itself. If that happens, the usefulness of the process will be greatly diminished and we will all be harmed. All of us—labor, management, and fellow arbitrators—need to be vigilant in our efforts to see that this does not occur.

In closing, let me thank all of you for creating and nurturing the system from which I have drawn so much enjoyment. It has been a wonderful ride and I hope to continue to enjoy that ride for a few more years to come.