Chapter 17

GETTING IT RIGHT AND GETTING IT DONE: EVIDENCE AND PROCEDURE RULINGS

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Panelists: **Louisa M. Davie,** National Academy of Arbitrators, Mississauga, ON

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Andree Y. McKissick, National Academy of Arbitrators, Chevy Chase, MD

Luella E. Nelson, National Academy of Arbitrators, Portland, OR

Mei Bickner: I'm an arbitrator from Newport Beach, California, where the weather is always sunny. This interactive session will cover evidentiary and procedural issues. We have a wonderful panel of arbitrators from both sides of the border—two from Canada, Louisa Davie and Tom Jolliffe—and two from south of the border, Andree McKissick and Luella Nelson. All of you have been selected as the arbitrator to hear this case. Here is my first question regarding the start of the hearing.

When, if ever, do you meet with counsel to inquire if the parties wish you to mediate the dispute?

Louisa Davie: Those of you who are from Ontario will know me by reputation. I mediate between 80 and 90 percent of the cases which I am asked to arbitrate. I have been told that people select me as an arbitrator because I do that. Generally, counsel approach me in advance of the hearing and tell me that they want me to mediate. I generally mediate after having received opening statements. The only time I don't ask for opening statements when I know I'm going to mediate is in harassment and discrimination cases, because I find that they are impossible to mediate once the

parties have become entrenched in their positions through opening statements.

Thomas Jolliffe: It may be that people come to me because they want to actually arbitrate. I find that I mediate less than 10 percent of the matters that I hear. When it rarely happens, and it seems that it never occurs in a dishonesty case, very seldom in an accommodation case, and if it's going to happen at all, it's probably in something involving a workplace occupation of some kind, an insubordination aspect, or somebody who's got five days and they should have two days. Sometimes after opening statements, I give a bit of an indication that I'm not following it. They will say, "Well, what do you think? Can we maybe talk to you about it?" But, that happens to me very rarely.

Andree McKissick: Yes, I would agree, Tom. I think that when they choose you as an arbitrator, that's what they want. That's the service they prefer. However, if I see the parties going out and having caucuses outside, or it looks as if there may be a settlement, I ask them whether or not they are contemplating mediation, and if they do need to have my services as a mediator. At that juncture, I think it's very clear, especially if it's a complicated case, to explain to them that although I might participate as a mediator for some of the issues that I would not be available to function as an arbitrator for the others, unless we bifurcate specific issues. In that case, I'd have to recuse myself from the other issues that might come up. That works quite well. I've done that in several cases and the parties are quite pleased.

Luella Nelson: Depending on the parties, I sometimes will inquire at the beginning of the hearing whether they've had an opportunity to discuss settlement and whether they want more time to do that, with or without my help. I've also sometimes asked after opening statements, after noticing that there's little difference between their statements, if they'd like some time to talk with or without my help. If it is with my help, then I tell them that I'm a very active mediator, and that it is entirely possible that, even with that process, somebody's bell may get rung, and it might be mine. But, anybody can say at any point, "That's nice. If we reach settlement, that's a good thing. But, if not, you'll be using another arbitrator." So, I let them know that they can proceed with me as the mediator if they want, but they are taking a risk that, at some point, if they don't reach agreement, they're buying another arbitrator.

Mei Bickner: You're answering my next question, which is this:

If you mediate, do you ask the parties whether they wish you to proceed? If they don't achieve settlement, would they want you to proceed as an arbitrator?

Luella Nelson: That's something that they can decide, depending on how things go.

Louisa Davie: It must be because of my reputation, because everyone knows I'm an interventionist arbitrator. I am asked to mediate, and I am told that if we're not successful in mediating, then I will be the arbitrator. That's just done as a matter of course and a matter of practice. When I meet with the parties and do the mediation, I do give them the rules of mediation. I tell them that what happens in mediation stays in mediation, that if we don't achieve a settlement to a mediated process, then I will be the arbitrator. I can only make my decision based on the evidence I hear and the submissions from counsel—not based on what someone tells me during the mediation process. It is accepted practice in Ontario, at least with the people who choose me as their arbitrator.

Mei Bickner: We already see some differences between Canada and the United States, and also between the arbitrators. I hope for the next couple of scenarios that there will be a lot of disagreement among my panelists.

Thomas Jolliffe: Mei, let me just speak for Western Canada. I don't think any of us were ever asked to recuse ourselves because we've involved ourselves in a mediation at the beginning of the hearing. It's never happened to me.

Mei Bickner: Canadians appear to be more comfortable with the arbitrator continuing on as mediator.

Louisa Davie: I would say it's never happened. But, I let them know that they have that option if they become uncomfortable. That seems to make them more comfortable.

Mei Bickner: If they ask me at the beginning of the hearing to mediate, I ask them if they would want to continue to hear the case if they do not settle. Most of the time, they say they do want to continue as the arbitrator after a mediation session.

Audience Member: If one party says yes, continue, and one says no?

Mei Bickner: Then you don't continue.

Thomas Jolliffe: There's no mediation then.

Joe Randazzo: Do you use a written mediation agreement?

Louisa Davie: It's probably because of the size of the bar in terms of the lawyers who appear on the union and the employer

side that appear before you regularly. I've never used a mediation agreement during a labor arbitration. I only use a mediation agreement when I'm asked to specifically mediate a wrongful dismissal suit in a non-union environment. That's because in the unionized environment there are statutory protections for mediation.

Nancy Hutt: One of the things that I do is, after I hear the opening statements and can tell that the facts are very similar, I will ask the parties if they have stipulated to any facts. Usually, I find that the representatives go out of the room and sometimes reach a settlement. So I find this approach successful at times.

Marty Allen Burke: If you're assigned, and you're hearing a case as an arbitrator, but you're now in the mediation stage, will you meet individually with the parties or only jointly?

Louisa Davie: Individually, if you are mediating. You go out and caucus with the union, then go out and caucus with management.

Marty Allen Burke: But, you're mediating as an arbitrator. Will you still follow the same procedure where you meet individually with them?

Louisa Davie: Well, you kind of go with the flow. You have to see how the mediation is working. Sometimes I meet only with counsel in the absence of their clients. Sometimes I meet with one side in the absence of the other. There are occasions when I might bring everyone together in a room during the course of the mediation. That doesn't happen often, but you just go with the flow.

Mei Bickner: We will now move to arbitrability issues.

The employer had objected on timeliness of issues throughout the grievance procedure and insists at the hearing that the proceeding be bifurcated, limiting the arbitrator's jurisdiction strictly to the timeliness issue. The union objects, citing costs and the presence of all witnesses to testify at the hearing, and asks the arbitrator to hear both the arbitrability issue and the merits of the case. What do you do?

Luella Nelson: If they're not able to agree on it, then I bifurcate. I will say this is something advocates need to find out about the arbitrator. My mentor, when I was starting out as an arbitrator, would not decide both arbitrability and the merits. So, if you brought him and asked an arbitrability question, that was as far as he was going to go. If you knew that, you selected him, and then this argument never arose.

Andree McKissick: In federal sector cases, many times a collective bargaining agreement (CBA) requires us to simply respond

to the arbitrability issue only. Therefore, we are prohibited from going to the merits. Thus, that answers that question for us. Certainly many of the CBAs that are utilized in federal sector cases are quite clear on this point.

Louisa Davie: Whether I bifurcate or not is extremely fact-specific. I will admit that I'm an arbitrator who doesn't like to bifurcate. I don't like to cut up the salami. If I know it's going to be a one-day case, then I don't bifurcate. If the issues on the timeliness or the evidence on the timeliness are intertwined with the evidence on the merits, I don't bifurcate. On the other hand, if it's going to be a 15-day case and the timeliness issue could do away with 15 days, then I'd probably bifurcate. But it's really very fact-specific. I don't think that there's a one-size-fits-all answer.

Mei Bickner: I agree with Louisa. But I think in a majority of my cases, I will not bifurcate. When bifurcation makes sense, I still have the parties present their full cases. When I write the decision and find a procedural error, I rule on that and do not proceed to the merits of the case.

Thomas Jolliffe: I have to say that I cajole and I urge, but I don't ever force one of the parties to complete the whole hearing if there's an arbitrability, a jurisdictional issue, or insisting on having an award on the jurisdictional issue that really, obviously, affects the rest of the hearing. I do that. I invariably do that. I also find that, generally, the parties are more or less in agreement. As Louisa said, it comes down to being fact-specific. I had one recently where it was a short hearing, and they agreed there was a timeliness issue. They said we want you to do the whole hearing. More than that, even if you find that it's untimely, we want you to write an award where you give your answer *in obiter* fashion, because that would be helpful to the parties. I find that is not a bad way to proceed in that kind of a situation. That would come up rarely, I think, but I would discuss the merits when the parties expect me to do so.

Allen Ponak: This is for Tom. Do you consider whether the parties have discussed the issue in advance of the hearing?

Thomas Jolliffe: Yes.

Allen Ponak: It would matter to me if one party came to the hearing expecting that the merits were going to be presented, and the other party walks in and says we've got a preliminary objection on timeliness. And the first party says, you never told us that.

Mei Bickner: That's very relevant.

Allen Ponak: I'd go ahead with the full hearing. Another factor is whether the timeliness issue is intermingled with the merits. Sometimes, three witnesses testify on the timeliness issue, and they are the same three witnesses on the merits. That would affect my decision.

Audience Member: One comment to Allen on that: I agree if the facts were intertwined, I just don't bifurcate. But the one thing that I think you can do as an arbitrator—even where you bifurcate until you've heard like five witnesses on the bifurcated issue—you have to get the parties to agree up front that the evidence you heard on that issue can be used on the merits if it turns out…, because you shouldn't have to hear it twice.

Beber Helburn: Sometimes I think it may be a budget consideration. Sometimes it's contract language where the feds do these things smarter than some of the other folks do. Sometimes, admittedly, we don't have the information before we walk into the hearing. But, I have had a fairly recent IRS case with the National Treasury Employees Union (NTEU) where the advocates asked that we have a telephone conversation on the arbitrability issue. It was very clear and very short. That was the end of that. I've had a customs and border protection—again, NTEU—arbitrability issue where the advocates agreed to brief it, and then to go with a real hearing if it turned out that the matter was arbitrable.

Howell Lankford: I think this an area where it's really important that you make sure exactly what the parties' disagreement is if they're disagreeing about bifurcating. I have had several cases in which they were getting all fussy about the question of bifurcation. By and by, it became clear that all the employer really wanted was to make sure that I was going to address the issue of arbitrability first and really didn't have any expectations of separating out the procedure for addressing that from hearing the case on the merits. So, it really pays for the arbitrator to make sure what exactly is being asked of him or her. The other is that this is one of those peculiar areas where the parties have a remarkable probability that they haven't read their own contract. I can think of at least three instances when I was sitting there, idly reading through the contract as they talked to me about whether or not we were going to bifurcate, and discovered that issue had been very specifically addressed and in great detail in the contract. As soon as I pointed that out, they just sort of folded up their tents. We did whatever the contract said we were supposed to do.

Mei Bickner: Here is the next question:

Does it make any difference to you whether the party makes an opening statement at the start of the hearing or not? Secondarily, does it make any difference to you if a party reserves its opening statement until later in the hearing? Thirdly, does it make any difference if a party reserves its opening statement and then decides to make no opening statement?

Andree McKissick: It's my preference that the Parties make opening statements. I think it's a mistake to defer it. I like to know the mindset of the person, to understand what I should be looking for in terms of viable evidence in their case. Although deferring is frequently done, I would encourage both parties to let me know up front by giving me at least a summary opening statement. Generally, it's the union who defers because they don't know what management has set forth, or plans to discuss, or brings forth in terms of evidence. However, that is not helpful for the arbitrator, because we are pretty much left there wondering what the case is about. What will the union come up with at the end? Thus, I encourage both parties to make opening statements.

Luella Nelson: I prefer it, but I don't insist on it, and I prefer that it be succinct. The late Adolph Koven used to say he wanted a whiff of the perfume, not the whole bottle. I prefer that both of them do it in advance. I did have one hearing in a contract interpretation case where, after the employer waived its opening statement, it became apparent that their theory was quite different from what their grievance response had said. Ultimately, that case settled, only because we finally got to the issue after two hours of testimony.

Thomas Jolliffe: Long ago, when I was a litigator in my youth, I was doing a jury trial on a personal injury matter. The claimant's lawyer had an opening statement that was about three hours long about what he was going to prove. It became very apparent within about two days or three days of the trial that he wasn't going to even come close. The jury was looking very, very confused, as were the judge and myself. Eventually, he just walked over to my table and said, "Is that offer still on the table?" I said, "Yes." He said, "Well, I'll be taking that."

That comes with the perfume and not the bottle. I think counsel are wise to make their opening statements, although setting the table—as it were—to be pretty succinct and to the point. Otherwise, they might run into a bit of a problem. I find that it's a little distressing from my point of view that the unions that I've been dealing with more and more defer their opening statements

to their side of the case. I think it's probably wiser simply to get everything on the table from outset.

Louisa Davie: Our topic is getting it right and getting it done. One of the ways of getting it done is to insist on an opening statement from counsel and not to let them get away with deferring it. Because, quite frankly, as far as I'm concerned, you need that opening statement to provide context for the remainder of the hearing. You're going to need to know what the case is about from both sides in order to make the evidentiary rulings that arise during the course of the hearing. You know, if it turns out that they make an opening statement and they can't prove it all, that'll be something that they will have to live with at the end of the day. I never let counsel get away with saying to me "I want to defer my opening statement." I make them do it.

Mei Bickner: Louisa is very tough. I have advice, though, for the advocates in the audience. It is really not wise to delay an opening statement, because if one side makes an opening statement and lays out the road map of their case, that lets the arbitrator know what to listen for in the evidence being presented by the other side. The opening statements give the arbitrator context for the evidence being heard.

Ed Pereles: I usually ask for a stipulated issue before opening statements. In one case, where the parties arbitrated almost every day, I forgot to ask. One party gave an opening statement on one case and the other party gave it on a different discipline matter with the same grievant. Then, they argued what case had been scheduled to be heard. Both cases were captioned the same. I informed the Parties that they must work this situation through. They did. Neither, however, wanted to proceed. Each wanted a postponement even though a number of witnesses had been subpoenaed. Bottom line: by getting a stipulation on the issues at the beginning of the hearing, the parties might recognize the problem before embarrassing themselves.

Audience Member: Louisa, because you're tough on the parties, would you set out what the grievance was in advance of the hearing? Or, would you ask the parties for a brief when you accept the appointment?

Louisa Davie: No. My letter accepting appointments basically says, thanks a lot for asking me. I'm accepting your invitation.

We're having the hearing on such and such a date. My fee schedule has been filed. See you then. That's my letter of appointment.

Mei Bickner: Our next issue:

After the union presented its case without calling the grievant, the employer, who had counted on cross-examining the grievant, calls the grievant as a witness. The union objects. How do you respond?

Andree McKissick: I actually had a case like this. Of course, I would allow the grievant to be called on cross, provided he had already been sworn in on direct. On the other hand, I think it would be unfair and an added advantage to the employer in this case if the grievant were called under these circumstances. Thus, I would uphold the objection of the union. I would suggest, of course, if the grievant failed to testify, I would not hold that against him. Nonetheless, as arbitrators, we have the right to make adverse inferences.

Thomas Jolliffe: In a situation where the union has the onus, I have, and I will probably continue, to allow the employer to call the grievor if that is something that they should be doing as part of their case. But where it's a difficult issue is where the employer has the onus in a discipline case and goes through its evidence and the grievor is not called when the union gets set to commence his case. In those situations, the union jumps up and says, "I'm sorry they closed their case." I have to say that I've upheld the union's ability to do that. Once the employer has closed its case, I don't think there's any ability of the employer to call the grievor as a witness and reopen its case. They can't do that as far as I'm concerned.

I can tell you the way it's usually resolved is there's an inkling that the union is not going to be calling the aggrieved employee, and the employer picks up on that; before it finishes its case, it puts it right on the table. "Are you're going to be calling the grievor?" The union might say, "We haven't made up our minds." So, they put the union on notice and say, "We're not closing our case at this point until we get an answer." In most cases, I have ruled that the union should be revealing whether, when they start their case, they're going to be calling the griever. If they don't do that, I allow the employer to call the grievor as part of its case to explain just how that money got in their pocket.

I think that goes a long way to resolving the issue—the guilt or innocence issue.

Luella Nelson: I'm at the end of the spectrum that says you can call anyone you want as a witness anytime.

So, that if it's a discipline or discharge case and they call the grievant as their first witness, I say, "Would you raise your hand," and swear him in.

Louisa Davie: I'm with Luella on that. I think that the only thing that you have do if an employer wants to call the grievor as their first witness is tell employer-counsel, now he's your witness. You can examine him in chief, but you can't cross-examine, because he's your witness. For what it's worth for those of you who are from Ontario, there's actually a Court of Appeals decision. Michel Picher is not going to like this, because he wouldn't permit the Employer to call the grievor as its witness, and it was taken up on judicial review. The court said there is nothing wrong with the employer calling the grievor as a witness.

Thomas Jolliffe: There is case law for suggesting that. It might be a different situation if the person is facing criminal charges.

There are at least one or two cases that suggest you might be in a different situation. Where that's happened to me, I've allowed the person to testify under the protection of the Canada Evidence Act. In one case, the person was mostly all the way through the criminal proceedings, and they wanted to argue the guilt or innocence. I would not do that until the criminal case was finally resolved, because I did not want to put myself in a situation where a provincial court judge with a higher standard of proof found the person not guilty or I found the person with a lower standard of proof was. I did not want to put myself in a situation where I was in conflict with the court on that. I would not hear final argument until the criminal matter was resolved.

Luella Nelson: At least in my part of the United States, we do it a little differently. If there is a pending criminal case, we tend to just hold the arbitration in abeyance and complete the criminal trial first, and then see if there is still an arbitration case to be heard.

Thomas Jolliffe: I probably would have, but I wasn't actually told about the criminal matter until the hearing. The evidence was all in, in that particular case. They said, "You know, his trial's coming up next." I said, "What trial?"

Louisa Davie: In Ontario, we argue about whether the arbitration should be held in abeyance pending the criminal proceedings or not. There is like a whole slew of arbitration awards to deal with that.

Mei Bickner: The next question:

During direct examination, the witness is very nervous, pauses frequently before answering a question, repeats virtually every question asked before answering, and nervously pulls at the pile of papers that have been hidden on his lap. Does the witness' demeanor affect his credibility with you?

Thomas Jolliffe: In a hearing, I find there's nothing wrong with nervous. I like nervous. I like real nervous sometimes, if it suits the situation the person is in. I do not judge a person's demeanor by the nervousness of the testimony. I know that's very common in the reality shows about trials and things. I find that there are times when people ought to be nervous and if they're not, I wonder why. I do have some problems with demeanor if the person is evasive; all the usual reasons. They are abusive in some part of their evidence or they take objection to being there at all—all the usual demeanor problems that come up. I do not relate that to nervousness, however. Although when people are shuffling papers and looking at documents, that, of course, raises cause for concern. You want to know what they're going through. We've all been in that situation. One of my learned colleagues here, I know this story because he told it to me—Mr. Hornung—had a situation where he asked the person about the papers he was looking at while he was testifying. It turned out that they were the questions and the answers that he was going to be given in his lawyer's handwriting. I believe, as Mr. Hornung tells the tale, the hearing went strictly downhill from that point on. Nothing like that has ever happened to me.

Louisa Davie: Together with the anecdotal notes: pause here, cry here.

Mei Bickner: That moves me right into my next question, which is the question of the witness versus the statement.

The witness in this case, who was the grievant's shift supervisor, admits that he does not really remember the particulars of a fight incident that took place more than 16 months ago. So he's now employed elsewhere in a different industry. He continually has to refer to his very detailed write-up of the complicated chronology of the incident in order to answer the questions posed to him. Opposing counsel objects to his reading the statement before answering any questions. Would you say that the witness has to testify from his memory, or do you allow him to refer to the document while testifying?

Andree McKissick: I would prefer him to testify from his memory. However, if he has supplementary notes or something that is pertinent to the case, then my suggestion is to refresh his recollection by reading it independently before testifying. If he's having difficulty while he's testifying—directly to the chronological event—I think that one should be allowed to glance at a relevant document to refresh his recollection of events. What I suggest is that you read it first, go through the generality of the statement that's before him, and then put it aside. Thereafter, answer the questions from whatever he memorizes or from his notes. However, if he's confused and still stumbles, then he can refer to whatever the date is in the chronological document.

Luella Nelson: I have seen the parties that come before me often introduce the statement, and then I just have them supplement the statement, rather than having them stumble around with more than a year-old memory. So, I think I've not had this kind of objection in a very long time. It's perfectly appropriate, once you've exhausted a witness' memory; then they get to refresh their recollection.

Louisa Davie: Yes. I agree with Luella. The only thing I do make them do is establish that the notes were made contemporaneously with the events. Then it makes the hearing go faster. You're getting good evidence. If there's a discrepancy between the written statement and what the person recollects, you'll have to deal with that when you write the award.

Thomas Jolliffe: I find that the supervisors with large public sector employers actually made those notes 18 months after the fact—sometimes two years—in order to get much evidence at all. In the hearings I do, usually there's pretty much wide reference to these statements. I will say, though, that in a discipline matter where the statement varies from the actual testimony from his current recollection, I tend to go with the lesser recollection in terms

of effecting the griever's situation. So, if he says in a statement that he punched the guy four times and his recollection was that maybe he only did it once, I go with the once. I give the aggrieved employee who's looking at that onus the benefit of the doubt in a situation like that. It just seems to work out fine that way.

Nancy Hutt: What if there was a vicious fight on the floor? The supervisor then does a discharge or whatever happens, and you think there is no way that he could forget, because it's so unusual. Do you make a credibility determination on that, because you think he should have remembered something like that since it's so unusual?

Louisa Davie: No. I would imagine he remembered the fight. What he may not remember is all the questions. Are these going to be asked in examination or the cross-examination? I wouldn't make an adverse finding about the fact that he didn't have all the details on his fingertips and needed to refer to his notes.

Thomas Jolliffe: The last time that came up in a hearing with me, the supervisor had notes and statements from four different witnesses, as well as his own compilation of what had been said. There was no way he could give any real testimony without being able to try to coordinate all of that. He had a lot of things going on in his mind in terms of what he actually saw himself versus what he may have been incorporating from other people's observations. So, I don't have any adverse inferences to draw. It's a very difficult thing. I think we all recognize the vagaries of memory in someone trying to describe the nitty gritty details a year or two down the road.

Luella Nelson: There's been some very interesting research on memory. One of the things that they have found is that sudden, exciting events tend to lead to really bad recollection. This is because you don't see it all, and your brain starts filling it in. I had a really good example of that in Portland a few years ago. There was a shooting on the streets of Portland at 11 in the morning—not a rainy day, so good visibility. Of course, the media all descended and started interviewing people. There were seven different descriptions of how it happened, five different descriptions of how the perpetrator got away, and numerous descriptions of what the perpetrator looked like and what he was wearing. I was sitting there, watching this play out, instead of working because it was so interesting. I was sitting there thinking, "I don't want to be the DA that has to try this case, because how am I going to prove

which of these statements actually was the guy and which of these other conflicting statements wasn't the guy?

Mei Bickner: Our next question is on procedural error in the face of serious criminal misconduct:

The grievant, in the presence of many witnesses, threatened to kill the supervisor and was promptly discharged. The collective bargaining agreement provides that "the steward shall be informed of and shall have the right to be present at all meetings where members may be subjected to discipline or discharge." The supervisor was understandably agitated and concerned and promptly called the union, which promised to send a representative over immediately. After waiting half an hour, the supervisor, pacing back and forth, finally went ahead and interviewed the grievant and decided upon discharge. Would you uphold the discharge under these circumstances?

Louisa Davie: I know we're going to have a disagreement on this; that's why I'll go first. I would probably uphold the discharge. The way I read the language of this collective agreement, it doesn't render the discipline *void ab initio*. The discharge decision substantially complied with the language that's in the collective agreement, which talks about the steward being informed and having the right to be present. So, it's not the right of the employee to have the union present; it's the right of the union to be present. The way I would interpret that collective agreement is that the discipline would not be *void ab initio*. When people threaten to kill their supervisor, I tend to uphold that discipline.

Thomas Jolliffe: I don't know if I have a different view necessarily on the wording. I would say that this is a pretty limp-wristed provision we've got here. Most of these provisions are all the same. It's basically you can't fire the guy without having a steward present at the time. Or, the person has the right to steward representation at any meeting that might involve discipline. Those clauses traditionally, in Canada, have been held to be substantive. For a long time, it was automatically a matter of vitiating the discipline, and people were reinstated. The problem that appeared over time was that a lot of these people just could not really realistically be returned to work. I think all the arbitrators from Canada have those situations happen in the cases they have decided over the years. For me, it was a situation where a fellow was collecting money for his employer, and he was stealing the money, spending it, and not returning any part of it. He did not have any steward present when

he was fired on the spot. I had to find that was a breach of the substantive provision, but I still didn't reinstate him. He indicated that he didn't think he should have his job back because he had a hard time having money in his pocket. So, I upheld. I did award a measure of damages for breach of the substantive right. I thought that was accessible as a breach of the substantive right. I believe I awarded the equivalent of about three-months severance because of that issue.

Andree McKissick: No, I would not uphold the discharge. I think it's clear that implicit in the language is that the union representative should be present. I would analyze this situation in terms of the *Weingarten*[1] rights for protected activities. The grievant has the right to be physically there and hear all events. I certainly wouldn't discharge him without the legal representation of his Union Steward. The whole purpose of the *Weingarten* case is that grievants are protected by their due process rights for these kinds of violations. That's the whole thrust of a NLRA, Section 7 protections and, when it's violated, an 8(a)(1) violation ensues.

Luella Nelson: If you had a strict Daugherty's Seven Tests arbitrator, then it probably would be not sustained. I am not a strict seven tests arbitrator. I'm inclined to go with my Canadian colleagues here.

Fred Ahrens: One thing that bothers me about this case is how much trouble would it have been for the supervisor to call security and get the guy off the grounds, as opposed to just firing him? Tell him to come back the next day when there's a union steward.

Thomas Jolliffe: Some people just can't help blurting out, "You're fired." It's in their soul.

Luella Nelson: You do want to do the interview while the event is fresh, before they've had a chance to come up with a great story.

Paul Roose: Wouldn't that depend a lot on whether the primary evidence against the employee had to do with what he said to the supervisor in this meeting without the shop steward, or whether there was substantial other evidence like eyewitnesses that heard the threat? That would make a big difference in my ruling as to whether there was a confession without a steward present.

Thomas Jolliffe: That's the reason why we have these substantive provisions to begin with—to protect the person against himself and to put his best foot forward while there's still an opportunity—

[1]NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

all of those reasons that are traditional, which is why these provisions were found to be substantive in Canada 30-odd years ago.

Mei Bickner: In this scenario, there were many witnesses to the statement that he made to his supervisor, and it was incontrovertible that he made the threat. So, it wasn't a confession on his part. There was no issue about that. Our next question:

An RN is discharged for not following the proper procedures in a medical protocol, for example, such as failure to use Heparin, a blood thinner. The employer provides the step-by-step instructions of the procedures obtained on line, and the link to the site as part of the exhibit. Would you accept this exhibit? And, do you accept exhibits which are downloaded online from WebMD and other websites?

Luella Nelson: I would say very little about this because I actually have a pending case in which some of the evidence included printouts from sites that are commonly used by actual medical professionals, like Lexicomp and MicroMedex—I think they're the second one. But, the more evidence I have that is something that's actually used by medical professionals, the more likely I am to place any weight on it. I hardly ever exclude things unless there is some major evidentiary problem with them. I will tell people that I am not likely to place much weight on it if it's not something that's commonly used by medical professionals.

Andree McKissick: I had a recent employment case that dealt with a non-compete covenant incorporated in the employment agreement. One of the central issues was whether or not a reasonable distance was within 15 miles of one's established business. So, the party that was presenting the evidence actually went to MapQuest and one could see the exact distance. Thus, I was able to determine whether or not it was a breach of the covenant. The non-compete covenant involving this particular town was restricted to 25 miles, and the location of the respondent's new job happened to be 26 or 27 miles away. Thus, this information became viable and, thus, actionable evidence. Of course, I admitted the evidence, even though it came from an external source, but it was presented in this case through the claimant's exhibit.

Louisa Davie: I find that usually when someone wants to introduce something from the Internet, my first question is, "Is there any objection to that?" and there never is. So, it generally goes in.

Thomas Jolliffe: I'm kind of the same way on that. Although, I must say, it happens pretty rarely. But, most of the time when I

get a case involving a professional who's somehow not measured up, everybody troops in with manuals in hand and starts talking verse and verbatim about what they were trying to do, what should have happened. That way, they're properly prepared for the cross-examination they're going to be under. It's pretty tough to cross examine Wikipedia. I just find that in a professional problem, which we deal with in the nursing industry and broader public sector problems, I just don't find that this is an issue. Anything coming off the Internet is something that is pretty open and shut, such as it's 123 kilometers to this distance.

Richard Hornung: I recently had a case where a psychologist testified. In cross examination, counsel attempted to introduce printouts of documents gleaned from the Internet, and then wanted to examine her on them. My position was that if the psychologist adopted an article—or the author—as being recognized or accurate, that it could be introduced into evidence and relied upon. However, if such wasn't the case, I wouldn't normally accept them unless properly introduced.

Mei Bickner: Can we move on to this new world of LinkedIn?

Are you on LinkedIn? If not, have you been invited to join LinkedIn by an advocate? If yes, have you accepted the invitation? Why or why not? And if yes, do you disclose such relationships to parties if it becomes relevant?

Andree McKissick: I am on LinkedIn. I have been invited by the parties to join, and I've accepted it. However, there are no conversations between me and the parties. If it was an ethical inquiry where I was asked, I would certainly disclose the fact that I am on LinkedIn. Yes, I've gotten cases from LinkedIn. On LinkedIn, a short biographical sketch of one's experiences and education are listed. It is not unlike one's biographical sketch sent by American Arbitration Association (AAA) or Federal Mediation and Conciliation Service (FMCS) to the parties when we are selected for cases. This is a professional site. I'm not on Facebook. I don't participate in Twitter. But yes, LinkedIn I think is a legitimate professional site, and it is quite well utilized by many professionals.

Luella Nelson: I've been invited to join LinkedIn, but I have not accepted because I don't have the time to research what the consequences and complications there might be. And life is short.

D.C. Toedt: What would you do if an advocate who has previously appeared before you—or is currently doing so—were to post

a recommendation for you on your LinkedIn page? Any one of your LinkedIn connections can post a recommendation, but you get to accept or reject the recommendation. Specific recommendations can be hidden from view.[2]

Andree McKissick: That happened to me, too. Someone did recommend me. This was an employment case, not a labor case. I simply said, thanks for your recommendation. That was the end of it.

Mei Bickner: I have had many invitations to join all kinds of advocates on LinkedIn, and I have simply deleted the message from my e-mail—every single one of them.

Dan Nielsen: Does anyone actually endorse advocates on LinkedIn?

Andree McKissick: No.

Dan Nielsen: How about neutrals?

Andree McKissick: I haven't endorsed anyone. I have thanked people for endorsing me.

Dan Nielsen: Because I always think when the big LinkedIn New Hampshire primary comes up, those endorsements will be very handy.

Paula Knopf: I have a question for us all to think about. I don't know a lot about LinkedIn, and I don't know really how it works, but I'm told that if you're on it, people can "endorse you." There's a section where people can endorse you. So, counsel could endorse you as being a terrific arbitrator. The applicable question becomes, if you have a hearing, and you have an endorsement from advocate A, do you need to disclose that to advocate B? So, that's where it becomes very problematic.

Paula Knopf: If you're on LinkedIn, you can read your own LinkedIn account, and it's going to show you that advocate A has endorsed you.

If you're already there, you can't say I didn't know. I don't know whether you can decline these things, but it puts you in an awkward situation if you are being endorsed by advocates or parties.

Mei Bickner: This is an evolving area.

David Stein: How is it any different that somebody recommends you on LinkedIn than if that somebody recommends you by word of mouth, which has happened to all of us. I had this arbitrator in a case; he did a good job. I'd recommend him any time. How

[2] *See* http://help.linkedin.com/app/answers/detail/a_id/165.

is that any different other than the fact that LinkedIn is read by more people?

Andree McKissick: Maybe our Committee on Professional Responsibility and Grievances chair can answer that.

Paula Knopf: I just think the difficult answer to that question is that it's one thing to have counsel recommend us to each other, but it's another thing to publicly advertise on LinkedIn that we have been recommended by those counsel. I, on my website, don't say I've gotten this many referrals by George or by Bill. On LinkedIn, essentially, that's what you're saying. I'm saying this situation is a red flag warning for us all.

John Moreau: Isn't the solution to all this to just stick to your own website? You've got control over it. Forget about LinkedIn and the other websites of the world.

Mei Bickner: We will close with this case. This is also disclosure, disclosure, and recusal.

The grievant was terminated for pulling a knife on a supervisor, and brandishing it at him. The supervisor and the grievant knew each other socially. The grievant claimed the existence of a romantic triangle, which had led to the friction between himself and the supervisor. The grievant denies pulling the knife, claiming that he had been framed. He denies ever having seen the knife, an exhibit at the hearing. After the parties had rested their cases and are in a corner discussing the filing of briefs, the grievant approaches you and asks if the record was closed. When you confirm that it is, the grievant asks if he can now have his knife back. Should you disclose the conversation to the parties or proceed to decide the case? Or, should you recuse yourself at the end of your conversation with the grievant with or without an explanation?

Louisa Davie: I would disclose to counsel that the grievor has made that statement to me. I would not recuse myself from hearing that case.

Thomas Jolliffe: I agree with that. I would disclose, but I wouldn't recuse myself over that. I think you should be very careful about recusing yourself. Grievors do dumb things all the time in hearings that might sway the parties one way or another, or sway your decision. I don't know where that would end. I think you do have to disclose it.

Andree McKissick: I believe there's an ethical duty to disclose. However, I would recuse myself.

Louisa Davie: Why? They're going to have to go in front of another arbitrator, spend all of that cost? You may run the risk that you would be subpoenaed. The Employer could call you as a witness and ask, "Did he say that was his knife?" Then, there's the whole issue of whether you are required to respond to the subpoena.

Andree McKissick: That may be true, but I think it's pretty clear that it was his knife that is at issue. Nonetheless, I think that it would be the ethical way to handle it.

Luella Nelson: I definitely agree that I would disclose that it had occurred, and I have been pondering whether the appropriate thing to do would be to go back on the record and put it on the record. Then things go where they go. The one concern that I have is what Louisa said. Unless the union says this guy is a nut case, and we're not taking this to another arbitrator, there is the serious likelihood that you're one of the witnesses in the redo as somebody who heard the admission by the grievant.

Mei Bickner: How many arbitrators in the audience would disclose? All of you. How many of you would recuse? Two people would recuse.

Robert Brookins: I would recuse because I would not want the risk of a cloud hanging over the opinion based upon some concern of whether I saw the knife. That's going to sway my opinion. So, I would just politely bow out and let them go forward with it.

Thomas Jolliffe: So you let the parties bear the complete, total re-expense of a 12-day hearing because of that kind of a remark?

Robert Brookins: I'm assuming a one-day hearing, and they would do that. I still think that I would lean toward just recusing myself because of the knowledge that I have. I don't know how the union would have handled that, and that's their particular client. So, I would bow out.

Andree McKissick: Is the CPRG opinion about whether when you observe things or overhear things or something that would be somewhat pertinent to this? It seems to me that there might be some helpful information on this issue incorporated in a prior opinion for our guidance.

Marty Ellenberg: I think you might suggest to the parties that you're not going to issue an award promptly and suggest that this might be a case they ought to settle themselves.

Mei Bickner: The last case was a real case. The arbitrator in the case did not disclose and issued the award, because he had already

decided that the grievant was guilty. He was going to uphold the discharge anyway. So, he did not disclose and wrote the award.

Panel, you were wonderful. Audience, thank you for your participation, which made our discussion lively. Our session illustrates again that there are varied practices and approaches to similar problems, and that there is really no one way of "getting it right."