CHAPTER VI

PROBLEMS OF PROOF IN THE ARBITRATION PROCESS:

REPORT OF THE WEST COAST TRIPARTITE COMMITTEE*

> Different and more or less conflicting systems of law, different and more or less competing systems of jurisdiction, in one and the same region, are compatible with a high state of civilization, with a strong government, and with an administration of justice well enough liked and sufficiently understood by those who are concerned.
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> POLLOCK AND MAITLAND,
> *HISTORY OF ENGLISH LAW* xxv (1911)

The legal premise from which any study of the problems of proof in labor arbitration proceeds is that "rules of evidence and

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This Report is the product of the meetings of the National Academy of Arbitrator's West Coast Panel on Problems of Proof, but the Chairman is solely responsible for its intemperancies, under the thoughtful and protective ground rules of the Program Committee for the Nineteenth Annual Meeting of the Academy in San Juan, Puerto Rico, in January of 1966. Where the Panel uncovered a consensus, it will be explicitly noted; otherwise the views stated here can only be attributed to the Chairman. This Report was prepared prior to the San Juan meeting after the Panel had met privately in a number of sessions and, then, publicly on December 6, 1965, before a group of several hundred attendants at a panel meeting in Los Angeles, arranged by the Academy's West Coast regional chairman, Thomas T. Roberts, at which the Panel discussed the topic of this Report. Whether due to the organizational talents of Tom Roberts, the presence of the stellar members of the Panel, or the inherent appeal of the topic, the December meeting was the largest turnout ever experienced at an Academy function in Los Angeles. It was quite apparent that there existed considerable interest among the audience, largely comprised of employer and union staff people, in the techniques of preparing and presenting evidence in arbitrations and in the criteria whereby its admission would be governed or its weight assessed by the arbitrator.

rules of judicial procedure need not be observed" [1] in arbitration unless the parties have mutually agreed to the contrary.[2] Of course, although they are not bound to abide by either of those sets of rules, they can resort to them selectively as resources for shaping more effective arbitral hearings.[3] Of particular interest in this respect, inevitably, are the rules of evidence. Finely spun abstracts interlaced with antique strains, however, tend to evoke a sterile jargon and a conceptualistic reasoning as the trial discourse of all too many lawyers demonstrates.

Even though, legally, rules of evidence may not govern arbitration hearings, it seems to be otherwise psychologically. Like the "practical men" of John Maynard Keynes "who believe themselves to be quite exempt from any intellectual influences" but are nonetheless "usually the slaves of some defunct economist," [4] arbitrators, whether or not they be legally educated, are unwitting, albeit sometimes very assured, heirs to a modest number of earlier expressions of adjudicative common sense more or less smothered by a vast array of judicial precedents extending over centuries which can only with great charity be regarded as systematic applications of dogmatic rules of evidence. McCormick observed wryly that "The doctrines of evidence and the decisions on evidence questions are as the sands of the sea." [5]

The rules of evidence have issued from the evolution of the Anglo-American common law. But arbitrators are of a different genetic line,[6] one which over the centuries runs variously through

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[1] *Cal. Code Civ. Proc.* 1282.2 (d). The California statute is an example of this generally accepted proposition.

[2] This assumes that the claim by a witness of a privilege not to testify does not involve a "rule of evidence." See the discussion later in this report of the significance of the constitutional and statutory privileges of witnesses not to testify.

[3] For a discussion of the need for evolving a profile of prudence in shaping more effective arbitration see Jones, *Power and Prudence in the Arbitration of Labor Disputes: A Venture in Some Hypotheses,* 11 *U.C.L.A.L. Rev.* 675 (1964) (hereafter simply cited as *Power and Prudence*). Compare, however, the discussion later here of the privileges of witnesses not to testify.

[4] Keynes, *The General Theory of Employment, Interest and Money* 383 (1936).

[5] McCormick, *Evidence* xii (1954). Professor Arthur Goodhart, viewing the American and English law of evidence in 1965, has observed that the "flood of precedents . . . has made the case law almost unworkable." He concluded that "The only solution seems to be to sweep the whole mass away and begin again by stating a few basic principles which a judge should follow unless in his discretion an exception ought to be made." Goodhart, "A Changing Approach to the Law of Evidence," 51 *Va. L. Rev.* 759, 779-80 (1965).

[6] See *Power and Prudence* 683-692, comparing the roles and functions of trial judges and labor arbitrators.

civil law and common law, exclusively beholden to neither and apparently even antedating both.[7] Disputes were being arbitrated throughout Europe, and even in England, according to the common sense of the community, without benefit of barbarity, at a time when the rules of evidence were still reliant on such aids to the assessing of credibility as the dipping of witnesses in boiling water,[8] their total submersion under cold water for five or ten minutes,[9] their being compelled to walk into flames or across hot coals or irons,[10] and all of this to determine if they were telling the truth. If they expired, one could safely conclude that the truth lay not in their mouths, since it had not freed them.[11] In addition to trial by ordeal, as it was quaintly known, there was also trial by battle in which hired lances competed for the truth.[12] Aside from giving the decision maker an assurance, unparalleled even in our modern era, in the rightness of his decision, it must be conceded that these ancient common law approaches to credibility did eliminate perjury as a trial problem, since even the withheld stab, the leprously desensitized foot, or the unusually long-winded emersant could be completely relied upon to witness the truth, irrespective of their wicked intent. Result rather than technique was the crux; the final judgment was survival.

It is one of the abiding strengths of arbitration that its tendencies all run toward the pragmatic and away from the conceptual, and care should always be taken to reinforce rather than reverse those directions. So it is that the cautionary note must be sounded loud and clear and often that the rules of evidence had their origin in the felt necessity of courts to prevent undisciplined

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7 See *id.* at 701-709 for a summary of the historical evolution of arbitration.
8 See Lea, *Superstition and Force* 278 (1892).
9 *Id.* at 318.
10 *Id.* at 286.
11 "The trial by ordeal rests upon the belief that God will intervene by a sign or a miracle to determine a question at issue between two contending parties. . . . Without taking account of less important forms of the ordeal, we find that the person who can carry red-hot iron, who can plunge his hand or his arm into boiling water, who will sink when thrown into the water, is deemed to have right on his side." I Holdsworth, *History of English Law* 142 (1903). Holdsworth relates that when the Lateran Council of 1215 condemned trial by ordeal, Henry III issued a decree in 1219 prohibiting its use. "We shall see that the gap thus left was one of the causes which helped on the growth of trial by jury." *Id.* at 143.
12 This technique of proof was available at English common law as a possible alternative in real actions to the Grand Assize and as a means of disproving an appeal of felony until 1819 when it was abolished. Although it was not resorted to very often after the 13th century, it did crop up later from time to time. *Id.* at 142. See *Ashford* v. *Thornton*, 1 *B. & Ald.* 457 (1818).

layman juries from being gulled in their deliberations by prejudicial or unreliable testimony or exhibits.

Sir Henry Maine, the great English legal historian, commenting on the exportation of the English rules of evidence to India, observed of the English law of evidence that it "was in its origin a pure system of exclusion, and the great bulk of its present rules was gradually developed as exceptions to rules of the widest application, which prevented large classes of testimony from being submitted to the jury." Maine concluded that someone (like an arbitrator) not bound by the rules of evidence "may employ the English rules of Evidence, particularly when stated affirmatively, to steady and sober his judgment. But he cannot give general directions to his own mind without running much risk of entangling or enfeebling it, and under the existing conditions of thought he cannot really prevent from influencing his decision any evidence which has been actually submitted to him, provided that he believes it." [13]

James Henry Wigmore, the author of the basic American treatise on evidence, adopting those observations of Maine as "sagacious," observed that they "may serve to warn us that any attempt to apply strictly the jury-trial rules of Evidence to an administrative tribunal acting without a jury is an historical anomaly, predestined to probable futility and failure." [14]

Wigmore also pointed to what may be our own particular hazard in the assessment of the possible utilities of rules of evidence to labor arbitration proceedings. He saw two basic and contrasting approaches concerning the transferability of the rules of evidence to other than jury-trial proceedings. The one argues against the transplanting of "obstructive and irrational technicalities." [15] The other, the "technical" view, argues that "the jury-trial system of rules is the only safe method of investigation where liberty and property may be at stake; that the sound wisdom of caution which is the basis of that system is as valid for one kind of tribunal as for another." This view, Wigmore warned, "preaches or lurks in almost every judicial opinion; and it echoes instantly in the breast of the orthodox legal practitioner." [16]

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[13] Quoted in I Wigmore, *Evidence*, § 4b at pp. 30-31 (1940).
[14] *Id.* at 31.
[15] *Id.* at 32.
[16] *Id.* at 33.

He rejected it, as did the other two great American authorities on the rules of evidence, James Bradley Thayer and Charles T. McCormick. Thayer, in his thorough research in the origins of the rules, found that they arose from jury-trial problems and concluded that they are inapplicable where no jury was utilized.[17] James Barr Ames in his memorial essay on Thayer succinctly observed that "our artificial rules of evidence were the natural outgrowth of trial by jury, and could only be explained by tracing carefully the development of that institution in England." [18]

Charles McCormick stated flatly that, "It might have been more expedient if these rules had been, at least in the main, discarded in trials before judges." [19]

Furthermore, of course, the arbitrator, or the trial judge sitting without a jury, who has once heard unreliable or potentially prejudicial evidence, may be expected to be sensitive to the psychological reality that he cannot unhear it, that, in marshalling the facts, he must exercise care in order to identify the misleading potential of the impugned evidence so as to put it in proper perspective. If arbitrators, familiar with the rules of evidence or not, were to nurture that small nub of humility, the evidentiary objections of lawyer advocates would then appear as helpful, not as demands for exclusion, but as reminders of possible unreliability.

It is healthy in this respect for us all to recall and relate the arbitrator to Judge Jerome Frank's reminder of the human situation in regard to decision making and "facts": "In sum, [the judge's] notion of the facts comes from his subjective, fallible reaction to the subjective, fallible reactions of the witness to the actual, objective facts . . . . A large component of a trial judge's reaction is 'emotion.' That is why we hear often of the judge's 'intuition.' " [20]

There is a substantial need among us for a let's-don't-kid-ourselves attitude of self-appraisal as we, as arbitrators and other

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17 Thayer, *A Preliminary Treatise on Evidence at the Common Law* 47, 266, 509 (1898).
18 Ames, *Lectures on Legal History* 464 (1913).
19 McCormick, *Evidence*, § 60, p. 137 (1954).
20 Frank, "Say It With Music," 61 *Harv. L. Rev.* 921, 923-24, 932 (1948). See, generally, Frank, *Law and the Modern Mind* (1930), and *Courts on Trial* (1949); Note, "Improper Evidence in Nonjury Trials: Basis for Reversal?" 79 *Harv. L. Rev.* 407 (1965).

arbitral participants, weigh problems of proof and assess the relevance of rules of evidence. When we turn to the rules of evidence, we are by no means examining sharp-edged criteria which can function impersonally for us so as to eliminate the nagging doubt or the certain frustration about reliability of data or relativity of weight which so often accompanies and, indeed, continues after the making of the decision.

Assuming that we can strip them of all content due only to historical accident (an ambitious assumption indeed for anyone, as Sir Henry Maine observed), the rules of evidence can still only be made to serve us as an agenda for caution, and little else. To the extent, however, that this would enable us to approach problems of proof with a certain humility and with something of a like mind, whether we be arbitrators or advocates, thereby establishing a measure of predictability enabling more effective preparation of cases, there is value in the effort.

I. Some Foundational Facts of Arbitral Life

A. The Arbitral Environment

Initially, we must identify the present differences of environment which characterize the arbitral processes from those of the courts. Notably differentiating labor arbitration from adjudication are: (1) the pragmatic cast of the arbitrator's judgment; (2) the more flexible conception of the materials that arbitrators deem relevant to their decisions; (3) the absence of an externally imposed concern for legal or arbitral precedents; (4) the practical and theoretical insulation afforded arbitrators against review for alleged errors of fact or law; (5) the flexibility of the methods utilized by the disputants to select and discard their arbitrators; (6) the growing utility of arbitration as a system of decision-making close to the plant in time, knowledgeability and direction, being situated in an increasingly centralized, remotely directed and burgeoning industrial society; and (7) the historical continuity of the parallel relationship of arbitration to adjudication in the administration of justice.[21]

Perhaps the most significant characteristic of the arbitrator, relative to his considerations of problems of proof, is the typically

[21] Discussed in *Power and Prudence* at 683-913.

pragmatic cast of his judgment. As I have listened to him in meetings like these, he tends to be something of a bemused skeptic when in the presence of those whose reliance is more on the conceptual than on the functional. He is a generalist who is commissioned by the disputants to be fair and final, but he is nonetheless a generalist with an occupational allergy to generalizing. He is also very much of an individual, and indeed the whole process of his selection and assessment, including the absence of judicial or other effective review of his decisions except by the parties themselves and other informed participants in the labor arbitral process, conduces to that individualism. One does not, on a panel such as this, for instance, tell him how he must act. One wheedles, cajoles, exhorts, and, finally, as just one pragmatic generalist among many, simply imbibes. Judges are appointed on the basis of all kinds of compelling constructs of ennobled merit—intellectual, political, economic, legal, and psychological—and then they live out their lives in the service of The Law. Arbitrators? Well, arbitrators are acceptable.[22]

For those who work with the arbitral tradition, and for those whose work is in the judicial tradition, it is important to realize that for centuries these two traditions have existed in parallel. The research of Professor John Dawson, for example, has revealed the existence of thousands of referrals to arbitration by the Tudor Privy Council in the sixteenth century.[23] The same phenomenon occurred in the court of equity, the "Chancery," where referrals to arbitration were undertaken in response to an increasingly overburdened calendar. Both the Privy Council and the Chancery, however, resorted to arbitration, in the words of the English legal historian, Maitland, "not merely to save the time . . . for more important tasks but through what seems to have been a conscious preference for solutions through arbitration." [24]

The words of a 1596 decree give the flavor of the rationale of preference that has characterized resort to arbitration from the days of Athens to those since *Lincoln Mills:* "It was moved and thought meet by the court that some indifferent gentlemen who

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[22] For more extensive analysis of these thoughts see *Power and Prudence* 741-46, 762-65.
[23] Dawson, "The Privy Council and Private Law in the Tudor and Stuart Periods," 48 *Mich. L. Rev.* 393, 423-24 (1950).
[24] Maitland, *Selected Historical Essays* 133 (1957).

are of understanding and dwell in the country where the controversy groweth and may thereby knowe the partyes and credytt of the wytnesses" should be appointed to arbitrate so that a "friendly and quyett end" might be achieved.[25]

B. Current Expectations of Labor Arbitration

As we seek understanding of problems of proof and of how arbitrators ought to (and are likely to) react to variations on the legal rules of evidence, it is important that we identify the marked and complex variations in the expectations of how arbitrators should function.

First, the traditional viewpoint pictures his mind, if he is successful in his function, as no more than a litmus of the intent of the collective bargainers. His responsibility, in this view, is strictly to limit himself by forbearance so as to give effect to that intent in any event, so long as he can ascertain it, and, failing its ascertainment, to deny the grievance before him. In this view, he has no other points of reference for his decision-making than those expressly or by necessary implication given him by the bargainers.

Irrespective of how accurately descriptive that concept may be said to be of the kinds of decisions which have been made by arbitrators for the past twenty years, it is of dubious accuracy as descriptive of what has been happening in American labor arbitration for almost a decade now, and it is certainly inaccurate when applied to the developments of the past five years.

Today the pattern of expectations of what is proper to labor arbitration is quite complex and, to some extent, conflicting. Irrespective of views of the soundness of the expectation, it may be identified substantially as follows:

1. Among many collective bargainers (sometimes varying with the necessities of advocacy) and among an undetermined number of arbitrators the traditional viewpoint pretty largely still obtains, and the thousands of arbitral decisions issued annually still remain almost entirely unlitigated thereafter before the courts or the Labor Board;

2. An undetermined number of arbitrators, however, feel new

[25] Dawson, *A History of Lay Judges* 168 (1960).

or increased pressures upon their discretion to be cognizant of more than just the intent of the bargainers, generated in part by the realization of the practical finality of decision but, more particularly, by the federalization of labor arbitration by the Supreme Court, accompanied by its successive mandates to judges both to innovate arbitral federal law out of "the policy of our national labor laws" and, then, to refrain from deciding issues of procedural or substantive arbitral merits, which the Court has committed to the discretion of arbitrators;

3. The Supreme Court appears to be implementing an interactive sequence of decision in order to achieve an informed "judicial inventiveness" ("judicial" meaning "by judges") in the course of which the arbitrator shall be the first one to articulate what is an appropriate decision on the issues before him, backstopped thereafter as necessary by a court (state or federal) or the Labor Board in the name of federal law, enforcing the arbitral decision except in certain limited circumstances; [26]

4. An undetermined number of arbitrators are concerned about whether they should seek either to avoid or to ignore the prospect of having their decisions either postponed or set aside in those "certain limited circumstances" in response to existent federal policy as formulated by courts or the Labor Board from federal statutes or the Constitution; [27]

5. It is unsettled whether or to what degree arbitrators shall be expected by the courts or the Labor Board to demonstrate that they are reaching decisions in accordance with policies of the national legislation [28] designed, for instance,

a. to protect individual employees against discrimination due to their views or other characteristics by either an employer or a union or both;

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[26] The sequence is analyzed in *Power and Prudence* 766 *et seq.* See also the discussion in Jones, "On Nudging and Shoving the National Steel Arbitration into a Dubious Procedure," 79 *Harv. L. Rev.* 327 (1965) (hereafter referred to as Jones, *Nudging and Shoving*).

[27] For reasoning in support of the thesis that "arbitrators of labor disputes should exercise a creative prudence in order to accommodate arbitration to the emergent needs of the parties, but should neither be subjected nor accede to inducements to discover, or conform to, or to rely upon 'law' in the course of their decision-making, rather leaving to the appropriate courts and the Board any conforming superintendence that may be necessary," see *Power and Prudence* 693-701.

[28] See Smith and Jones, "The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law," 63 *Mich. L. Rev.* 751, 806 (1965).

b. to assure inclusion within a bargaining unit of employees based upon their having exercised their Section 9 right to the secret ballot to express their will to be or not to be represented;

c. to preserve for persons testifying in an arbitration such constitutional rights as those involving self-incrimination, inadequate representation, or admission of illegally obtained prejudicial evidence;

d. to assure that the arbitral hearing is conducted so as not to deprive employees or other affected persons of due process, in terms, for instance, of the rejection of proffered evidence, or the disposition of notices of hearing, or possible abuses of the subpoena power or the oath for testimony, or exclusion from the hearing, or fair access by employees or other affected persons to the grievance procedure.

C. The Arbitral Response to Federal Power

Whether they like it or not, arbitrators today wield federal power in those disputes which affect interstate commerce, and the dimensions of demand upon their discretion in reaction to that reality are not yet clear. What is clear, however, is that it no longer is possible to describe arbitrators as responsive solely to the will of the bargainers. Creatures of collective bargainers, indeed they are, but, once existent by virtue of the act of will of the bargainers, they are also being charged increasingly with responsibilities of implementation both as to national policies and as to the basic precepts of due process. Doctrines are emerging in court decisions throughout the land, as well as from the Labor Board, which set the arbitrator in an intricate pattern of interactive decision-making among arbitrators, collective bargainers, federal and state judges, and Labor Board members, shaping a new federal law of collective bargaining insofar as its incidents are determinable through the administration of thousands of grievance procedures.

How shall arbitrators respond to this unwonted (and, I suspect, largely unwanted) complex of responsibility? It is too early to assess the quality of the responses of arbitrators. But I suggest

that the hazard lies not so much in over-reaction as in under-reaction, that our failures may be those of omission rather than commission. Occupationally conservative, we must nonetheless give serious thought to ways in which we may make constructive contributions to the growth of arbitration in this relatively new and judicially created and stimulated environment in which labor arbitration is now evolving. It is not enough now that we hearken nostalgically to the days described so felicitously by Harry Shulman.[29] We have now to set our minds to the prudent structuring of labor arbitration in this post-Shulman era of interactive tribunals. The reality is that labor arbitrators will either offer counsel of needed innovations or trial judges will simply take the initiative in response to their own felt necessities of decision. Either labor arbitrators will think through and assert what is prudent for arbitration, or the judges themselves will shape legalistically foundationed decrees structuring the incidents of arbitration. A reading of the several hundred court decisions of the past two years affecting labor arbitration does not suggest that judges, who mainly are expressly mindful of the continuing arbitral *caveats* of the Supreme Court, either want to preempt arbitrators or, when they do, that they do a particularly good job of it.[30] In the latter case, as a matter of fact, they tend to be quite conceptual. But somebody has to make the decision, and, in the press of litigation, who can blame a busy trial judge if he bulls ahead when he has no authoritative counsel to invoke or be cited to him?

No one can predict with any assurance at this juncture whether the federalization of labor arbitration by the Supreme Court will ultimately enhance or deteriorate the utility of arbitration to collective bargaining. This is so because of the difficulty of predicting how well the diverse participants in the process will carry their responsibilities under the Supreme Court's rationales. We may hope, at least, that the arbitrators to whom the Justices have looked with such complimentary expectations will be able to respond.

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29 See *Power and Prudence* 763-66.

30 See the annual reports of the Academy's Law and Legislation Committee in the appendices of the annual *Proceedings* for a close view of the rapidly developing federalization of labor arbitration in the courts. In 1965 there were in excess of 150 cases, as there were also in 1964.

II. Some General Considerations in Assessing Problems of Proof

A. The Experiential Background of the Participants

Perhaps the inescapable dilemma affecting intelligent discussion of problems of proof in labor arbitration may nowhere be better exemplified than in last month's discussion by this West Coast Panel in Los Angeles of the problems involved in the presentation and evaluation of evidence in arbitral hearings. Of the three hundred or so persons who attended a four-hour weeknight panel meeting in downtown Los Angeles, a regional Academy project, perhaps three-quarters were industrial relations and union business representative staff personnel who have had no exposure to formal training in law, other than to Perry Mason's course on spontaneous disclosure under cross examination, or to that now defunct network primer on points of law, "Day in Court." Yet they do, from time to time, some infrequently, some quite often, have the responsibility of presenting cases in arbitration. The economics of industrial relations are such that the pattern is not apt to change from substantial numbers of legally untrained (and often legally misinformed) persons functioning as advocates in a significant, perhaps the predominant, number of arbitrations. On the West Coast, at least, I am under the impression that the majority of arbitration hearings are not conducted between large companies and unions, each employing staff attorneys to administer their grievance procedures or retaining expert labor counsel from the large law firms in the area.

At the Los Angeles meeting, there were also several able and prominent arbitrators, themselves not legally educated, some of whom attended the meeting with a view of becoming better informed about the import of the legal rules of evidence, others of whom were simply curious to see whether a panel of lawyers, given the topic, could possibly have anything constructive to say which might make any utilitarian sense. The realities arising from considerations of the availability and the acceptability of arbitrators makes it certain that there will continue for the foreseeable future to be a substantial number of arbitrators who are not products of legal education. Claiming a certain right of privileged disclosure as a law professor (and also dissenting from the stridencies of a former law professor, more recently become

a federal judge, who has acquired jaundiced recollections of his former arbitral activities and colleagues [31]), I add that I am convinced that this is a healthy state of affairs.

While I also think that it has already become necessary to establish criteria of competence administered on an exclusive basis by an impartial central agency, so as to achieve at least a uniform minimal degree of expertise among arbitrators whose names appear on federal, state and AAA panels, it seems clear enough to me that it would be most unfortunate were labor arbitration to be committed to the superintendence of any one specific professional group, particularly were that group to be comprised entirely of lawyers. The present mix apparently is roughly about fifty percent lawyers, fifty percent not, and for the healthy future of arbitration I like that balance very well indeed. But even so, I am sure that, in their customary reflective humility, my arbitrator colleagues, the hems of whose academic gowns have gone untainted by the hand of the law, will not need very much empathy to feel some passing compassion for the lawyer advocates before them who either contemplate engaging in what they regard as necessary (but hope will not prove offensive) professional disputation on evidentiary objections, or, instead, hear their "final and binding," but not legally educated, arbitrator solemnly intoning an erroneously conceived ruling thought by him to issue from the solemn heart of the rules of evidence.

Whether or not you share with me that preference for a mix of lawyer and non-lawyer arbitrators and advocates, it is not likely that anyone here would be so naive as to think it will change significantly in the immediate years ahead. Let us not forget, therefore, in any of our thinking on problems of proof and the relevance to their solution of the rules of evidence, that substantial numbers of the participants in the labor arbitral process have, and I would insist, can have, no reliable information or insight into the rules of evidence.

For this happens to be one of those esoteric preserves which history over the centuries has marked out for knowing entrance only by the select few. There, repeatedly to be observed in un-

[31] See Hays, "The Future of Labor Arbitration," 74 *Yale L.J.* 1019 (1965). The Hays text was distributed among top management of at least one major corporation as evidence that collective bargaining (not just arbitration) ought no longer to be acceptable.

abashed public display before the initiate, ancient "technical trumperies" [32] are wed to present decisions to produce some of the weirdest progeny ever conceived by the minds of men bent upon "justice." Only a thorough formal education in legal genetics—which is the three-year law curriculum—can enable one to keep a balance of confidence in the viability of our judicial system depite the jolting experience of encountering, in case after case, the blindfolded lady's walking wounded, ceremoniously spawned in the Temple of the Law according to the rites of evidence. To move labor arbitration into that Temple, even as a rather unadorned anteroom, simply dismays me in the contemplation. This, I should add, is the unanimous viewpoint of our West Coast Panel of five lawyers. Having said that, however, I must add that one or two of us would not be too unhappy if we did set up camp next door to the Temple.

B. Some General Elements of Consensus

With differences inevitable among us concerning significance in particular problem situations, as panelists we share the conviction, which we also regard as a widespread one, that arbitration is needed; indeed, that it can, without hyperbole, be regarded as indispensable to the continuation of American collective bargaining, that its utilities can be summarized in terms of its capacity to afford an impartial, intelligent, speedy, and relatively inexpensive procedure for the resolution of disputes concerning wages, hours, and conditions of employment, by a decision-maker jointly acceptable to the disputants, a process which is promotive of industrial stability and is preservative of the individual dignity of worker and manager alike. The process must maintain a general acceptability, demonstrating its continued capacity to satisfy those enumerated utilities in the generality of the disputes brought to arbitration. A major aspect of that acceptance, of course, is that the process be understood, that trends of decision among arbitrators be understandable and be regarded

[32] I Wigmore, *Evidence*, § 9 at p. 293 (1940): "The primitive ordeals of fire and water were not more calculated to deify chance or chicanery as the arbiter of litigation than is this dominant contemporaneous practice of granting new trials for an immaterial slip in the rules of Evidence. The most trifling error 'works a reversal', in the same wizard-like manner that the mispronounced word in the superstitious formulas of the Germanic litigation lost for the party his cause. This modern doctrine is the more discreditable of the two. They knew no better; yet we preserve this technical trumpery."

as responsive, generally speaking, to the expectations of the disputants, irrespective of a particular "wrong" decision. At this point, of course, our unanimity dissolves, some of us giving considerably more weight to the elements of predictability and consistency of result than do others.

We are agreed that the rules of evidence, *per se,* ought not to be incorporated into arbitral reasoning without a careful assessment of all of the elements of their utility or disutility. We have reached a consensus upon some general precepts, phrased in sufficient generality as not to offend anyone other than those who are compulsive about precision, but which may nonetheless be helpful to participants in the labor arbitral process in gauging the extent of desirable resort to rules of evidence in the context of a specific case:

1. Problems of proof in labor arbitrations must be analyzed relative to the status of certain variables of fact which characterize the environment of the hearing of the particular case, such as,

a. What is the experiential background of the arbitrator?

b. Are one or both of the parties represented by lawyers?

c. What has been the experience of the parties in past arbitrations in relation to the presentation, reception, and apparent evaluation of evidence?

d. Are the parties used to having their arbitrator play a passive or an active role in the conduct of the hearing?

e. Are evidentiary objections by the representative of one party or the other proffered in good faith to assure consideration of only reliable evidence, or, instead, to hamper or harass either the adversary or the arbitrator?

2. The standard of the admissibility of evidence should at least be more permissive of admission in those arbitrations concerned with legislating new provisions ("interests" or "legislative" arbitrations) in contrast to those interpreting existent, already negotiated provisions ("grievance" or "rights" arbitrations). Some would say "evidence" is an anachronistic concept in the former

context, that "data" is what is sought, and that *all data* must be assessed.[33]

3. So varied are the backgrounds of the participants, and so diverse the circumstances which summon objections and rulings on the admissibility of evidence, that only snares and delusions lie in ambush for the unwary arbitration participant who believes that "a definitive set of rules" is achievable which can possibly fix "with a reasonable degree of certainty the place of the present-day arbitration process on the broad spectrum between informality and formality."

4. Evidentiary rulings should affirmatively be aimed at securing the admission of *reliable* evidence which may be *useful* in helping the arbitrator reach a decision, rather than negatively be intent upon ferreting out for exclusion the useless or the unreliable.

5. All things being equal (and recognizing that they rarely are), *admission* of proffered evidence is preferable to *exclusion.*

6. All facts having rational probative value should be held to be admissible unless there is some specific and persuasive reason in the circumstances for their exclusion.

7. Predictability of the disposition and evaluation of types of proffered evidence is desirable in order to assure the more orderly preparation and presentation of cases in arbitration.

8. On occasion, evidence will be proffered which recognizedly has no probative value but which should nonetheless be admitted, because to exclude it would be too damaging to confidence in the efficacy of the grievance procedure among unsophisticated participants in the arbitration. Some call this therapy evidence, and we are willing to admit it so long as the therapy itself does not become traumatic.

9. A helpful formulation for an arbitrator, in establishing his focus on evidence of dubious utility may be to ask himself whether he would regard the evidence, if credited, to be essential and necessary to his decision. If not, it is surplusage in any event (a

[33] One of our Panel observed that some arbitrators do not have the capacity to distinguish between legislating and interpreting, and that some set rules are therefore needed. Another among us responded that the timid arbitrator would be quite apt to hide behind the "rules."

trial lawyer might then call it "immaterial") and, once he has set that focus, he need not be greatly concerned with its admissibility. But if it may be said to be essential, he should, depending on the hearing circumstances (see 1. and 2. above), either exclude it or carefully identify its weakness to the party proffering it so that the defect may, if possible, be cured by further evidence or, failing that, at least be recognized by the profferer for what it is.

10. It is necessary to be mindful in discussions of problems of proof in labor arbitration that we are not talking about litigation; these questions arise out of and settle back into and affect the processes of collective bargaining and industrial self-government.

11. If weaker and less satisfactory evidence is offered, when it was within the power of the proffering party to produce stronger and more satisfactory evidence, and if there is no rational explanation of the omission, the evidence offered should be viewed with distrust.

12. Although rules of evidence need not as a matter of law be observed in arbitrations, recognition by an arbitrator of a claim of privilege, which would entitle the claimant to decline to disclose evidence, may be required by law either expressly (as in California)[34] or impliedly (as under the federal or a state con-

[34] The new California Evidence Code was enacted in 1965 to become effective January 1, 1967. One of its major divisions is concerned with privileges of witnesses not to testify. *Cal. Evid. Code* §§ 900-1070. Although the California Code of Civil Procedure expressly exempts arbitration from servitude to the rules of evidence, *Cal. Code Civ. Proc.* § 1282.2(d), the new Evidence Code expressly displaces that exemption in respect of privileges. *Cal. Evid. Code* § 910. The California Law Revision Commission, under the auspices of which the new Code was drafted and enacted, commented that, "Most rules of evidence are designed for use in courts. Generally, their purpose is to keep unreliable or prejudicial evidence from being presented to the trier of fact. Privileges are granted, however, for reasons of policy unrelated to the reliability of the information involved. A privilege is granted because it is considered more important to keep certain information confidential than it is to require disclosure of all the information relevant to the issues in a pending proceeding. . . . If confidentiality is to be protected effectively by a privilege, the privilege must be recognized in proceedings other than judicial proceedings." They add that no California case "has squarely decided whether the privileges which are recognized in judicial proceedings are also applicable in nonjudicial proceedings." Enactment of § 910 "will remove the existing uncertainty concerning the right to claim a privilege in a nonjudicial proceeding." *Cal. Evid. Code, Pamphlet*, pp. 158-9 (West Pub. Co., 1965, as annotated with the Law Revision Commission cross-references and Commentary). See discussion of privileges in text *infra* at footnote 87 *et seq.*

stitution),[35] and failure to recognize the claim may, if material, result in vacation of the subsequent arbitral award. Although the law varies among jurisdictions, in some, including California, exercise of a statutory or constitutional privilege of nondisclosure, in the instant proceeding or on a prior occasion, lawfully may neither be the subject of comment by an arbitrator or advocates in an arbitration nor may any inference be drawn from it as to the credibility of the witness or as to any matter at issue in the proceeding.[36] Although the person claiming the privilege need not produce evidence as such, he has the burden of showing from the context of the proffer that the proffered evidence might tend to cause disclosure violative of his privilege; the proffered evidence is legally inadmissible in an arbitration unless it clearly appears to the arbitrator that it cannot possibly have a tendency to violate the privileges claimed.

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[35] In 1964, the Supreme Court, interpreting the Fourteenth Amendment, held that the Fifth Amendment privilege against compulsory self-incrimination cannot be abridged by the States. *Malloy* v. *Hogan*, 378 U.S. 1 (1964). In 1965, less than a year later, the Court held that adverse comment by a prosecutor or trial judge upon a defendant's failure to testify in a state criminal trial violates the federal privilege against compulsory self-incrimination, and this because such comment "cuts down on the privilege by making its assertion costly." *Griffin* v. *State of California*, 380 U.S. 609, 614 (1965). In 1966, in declining to give the *Griffin* rule a retrospective effect, the Court again emphasized that the privilege is the "essential mainstay" of the American system of criminal prosecution, that state and federal governments are "constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth." *Tehan* v. *United States*, 86 Sup. Ct. 459, 464 (1966), quoting *Griffin* v. *State of California*, 378 U.S. at 7-8 (1965). In *Tehan*, the Court observed that, "The basic purpose of a trial is the determination of truth. . . . By contrast, the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone. To recognize this is no more than to accord those values undiluted respect." *Ibid.*

[36] Although we do not yet know if the *Griffin* no-comment rule on exercise of the privilege against self-incrimination will be extended to arbitrations, the new California Evidence Code applies a no-comment ban broadly to all proceedings, including arbitration, and to all privileges provided in the Code: "If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding." *Cal. Evid. Code* § 913 (a). The seeds for future vacations of arbitral awards are plain enough there! Compare, for example, *United Parcel Service, Inc.*, 45 LA 1050 (Turkus, 1966).

See the thoughtful Note, "Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime," 78 *Harv. L. Rev.* 426, 443 et seq. (1964).

III. Some Specific Aspects of Problems of Proof.

A. The Setting of the Question of Admissibility

There are two alternative situations in which the arbitrator will have occasion to consider the various types of evidence proffered. The first is when the proffer is made without objection by the adversary party. The second is where the proffer is countered with an objection that the evidence is incompetent.

1. *A Proffer of Dubious Evidence Without Objection.* As to the first, there may be some types of evidence proffered without objection as to which the arbitrator will consider in the particular circumstances of the hearing whether he should perhaps register his sense of its lack of value or of its impropriety or even to decline to receive it in evidence.

Among our panel there was a contrariety of view whether the arbitrator helps or hinders the arbitral process by volunteering to exclude proffered evidence when there is no objection. If the adversary party is represented by counsel who makes no objection, there is no reason for an arbitrator to do other than receive the evidence, relying on counsel's judgment not to object for reasons unknowable to the arbitrator at the time. It may be due to interpersonal factors or hearing tactics. Tactical advantage has been gained on occasion from another party's evidence.

If unsophisticated participants are involved rather than lawyers, the arbitrator, depending on the circumstances of the case and the personalities of the advocates and others present, may wish to indicate that he gives little or no weight to certain types of evidence in order to expedite the procedure or in fairness to enable a more effective regrouping of evidence by the proffering party. For instance, the typical "I seed him do it, he was standing there" affidavit (with or without notary seal) proffered instead of the witness, is entitled to minimal weight. Perhaps in fairness the arbitrator should tell the unsophisticate that so that he may at least have the chance to produce the witness. My own view is that this is not subject to a generalized conclusion; that on occasion, variously, it is advisable to speak up despite absence of any objection, sometimes to exclude, sometimes to admit after a diluting explanation, sometimes to admit and give considerable

weight, sometimes simply to explain the problem of lack of cross examination and leave the option to the profferer, and, on occasion, of course, to admit the proffered affidavit with no comment, all depending on the circumstances of the particular hearing and the issues of the case.

Another chronic hearing event occurring without objection is the leading question on direct examination, and here lawyers are not all that immune relative to other advocates in arbitrations. Personally, on occasions I have listened to many an extended leading question and its brief, predictable response simply as an argument of the examiner, set in dialogue rather than monologue. If I had any hope that my caution could be observed by the questioner, I have indicated as much. Fairly often, he simply cannot ask questions and will only be shattered if pressed to do so. At least if you let him run his series, you do know what he is after. On the other hand, the leading question put to an inarticulate witness, and put monosyllabically rather than in legal conclusionary jargon, can be helpful if it appears to elicit knowing and convinced response.

It seems a fair and accurate conclusion then that here again is a problem of proof which is not susceptible of generalized statement, but must be reacted to pragmatically and empathically.

2. *A Proffer Countered by an Objection.* As to the second situation, where an objection is made, the important thing is not that it be "excluded from evidence," which is really a tactic for the insulation of juries and in an arbitration hearing can constitute little more than a formulaic invocation to warm the cockles of an advocate's heart or that of his client. The important thing is that its unreliability or disutility be recognized by the arbitrator. The effort of counsel should be to avoid formulaic invocations and simply explain to the arbitrator the reasons why he regards the proffered evidence as unreliable or as lacking in utility. Aside from objecting only to inform the arbitrator so he may exercise his judgment intelligently, for which purpose objections should be welcomed in arbitration, actual exclusion is also sought on occasion. But exclusion (which is to say, a ruling of inadmissibility) should only be sought or deferred to where admission would seriously impede the conduct of the hearing either by un-

duly extending it or by charging the atmosphere with prejudicial elements. Otherwise, admission "for what it is worth" makes good sense, with or without mention of that cliché, so long as counsel is careful to state what he thinks it is worth. It seems to me that Harry Shulman's observation was very wise indeed that the real hazard in arbitration is not that the arbitrator will hear too much but that he won't hear enough. That reality ought to permeate our consideration of all exclusionary rules pressed upon arbitrators.

B. Pre-Hearing Procedures

1. *Vacuums of Intent and Effort.* Our observations concerning pre-hearing procedures start with two exhortations, one mild, deferential, and hopeless; the other strong, insistent, and hopeful. First, it would be nice were collective bargainers to be moved to write unambiguous and comprehensive agreements, each vacuum filled with its respective intent, each provision in logical tie to each other relevant provision, so that arbitrators would no longer be pilloried for amending, altering, and modifying the collective unagreement. Second, and more seriously, and without distinction among lawyer or nonlawyer advocates, preparation of cases for arbitration should be and so often is not undertaken with at least the thoroughness devoted to court litigation. In many ways, it is more difficult to "pitch" an arbitration than it is to try a case, that is, if the matter is to be presented as effectively and as efficiently as possible. At least in court, counsel know what the common ground rules are, and it is not usually necessary to persuade a trial judge happily, that the common law exclusion of egregious hearsay has some basis in reason and therefore an objection to its admission ought not to be laughed out of court. Explanations of evidentiary objections to arbitrators ought not to be made *pro forma,* but should be thoughtfully explained in relation to the case at hand.

2. *Resort to Pre-trial Techniques.* First, in *ad hoc* arbitrations pre-hearing procedures comparable to judicial pre-trial techniques have substantial justification. If the parties and the arbitrator get together to iron out ground rules or weigh arbitrability, there may be good sense to what they are doing, but it serves no purpose we can see to liken it to pre-trial conferences. It is the hearing. In-

deed, the typical grievance procedure sets up a recurrent opportunity (when it is observed other than as a formalism) to consider resolution of the dispute short of arbitration. Failing that, the parties are in arbitration.

Second, however, while we can perhaps see a possible utility in the occasional *ad hoc* case involving considerable complexity for the establishment of pre-testimony ground rules, it is in "permanent" umpire situations that we can more readily conceive routinized pre-hearing procedures involving something like pleadings being read by the arbitrator with a preliminary memorandum probing the issues as the basis for further consideration by the parties of possible settlement. Of course, there are parties who will be quite chary of unduly exposing to the arbitrator's mind without the full panoply of presentation and argument of evidence.

3. *Discovery Techniques.* Legal discovery procedures have evolved in response to the conviction that a law suit should not be a "game" but instead a "search for truth," a process not compatible with strategic moves or tactical surprises. They are ultimately intended to obtain admission, or at least access, to uncontroverted facts so as to narrow the issues and save the time and expense of preparing for unnecessary proof. Discovery has been effectuated under federal or state law by resort to various devices, notably, depositions; interrogatories to adverse parties; order, on motion, for inspection of the adverse party's records and things; order, on motion, for physical or mental examination; requests to the adverse party for admissions of the genuineness of documents or the truth of relevant matters of fact.

The California arbitration statute vests arbitrators with powers to issue subpoena, administer oaths, and order depositions of witnesses to be taken. But depositions may only be taken "for use as evidence and not for discovery." [37]

The withholding from the arbitrator of the power of compelling discovery may be prudent. In the arbitral lexicon of revolving cliché's one of the most frequently heard is that which charges a union with seeking to engage in a "fishing expedition."

It was also commonly heard in the argument of the opponents

[37] See Jones, *Nudging and Shoving* 340-344.

of the adoption some years ago of the federal discovery rules who feared either its abuse (or its effectiveness) in pre-litigation tactics.

There is little doubt that it could be a formidable weapon in collective bargaining, probably more against employers than unions. Since a substantial number of arbitrators are not lawyers, and since the concepts of exclusionary rules of evidence are considerably (and justifiably) looser in application in labor arbitration, perhaps the fair superintendence of discovery procedures in the administration of collective agreements should be vested in the courts where the ground rules can be administered more knowledgeably. On the other hand, a valuable byproduct of the use of discovery is the encouragement of settlements because of its bringing the positions of the disputants into sharp focus. It is certainly not implied here, thus, that discovery is inappropriate in matters arising under the grievance procedure. Quite the contrary. Its utilization could significantly enhance resort to negotiation rather than to arbitration.

Furthermore, a persuasive argument can be made that the grievance procedure itself constitutes an implied covenant to disclose as evidences in its typical pre-arbitral "steps." But this may be felt to be a phase of the sequential interaction between courts and arbitrators where the courts should be responsible. On the other hand, it would foreseeably introduce the unfortunate elements of delay and of possible unwarranted judicial intrusion in a delicate area of the collective bargaining relationship if arbitrators were precluded (or felt precluded) to afford this relief in proper circumstances. The question is open at this point.

It should be noted that discovery procedures must be distinguished from the power of subpoena to require the attendance and testimony of witnesses and the production of documents and other evidence. Thus, in California, for instance, the arbitration statute assures that arbitrators will have subpoena powers but not the power to compel discovery by ordering the deposition of witnesses. Even though pre-hearing discovery ought not to be the province of the arbitrator, there are discovery techniques which may still have utility in the course of an arbitral hearing. For example, the submission to the arbitrator of interrogatories to be answered by the adversary party in the course of the hearing on

direction of the arbitrator may on occasion prove helpful; it is a matter of circumstance.

In the *Lincoln Mills-Wiley* evolution it remains to be seen whether the federal rules of procedure shall be given preemptive effect over either contrary state statutes or rules or in situations where there is no applicable state policy.[38] Thus, the express denial to arbitrators of the power to order depositions for discovery purposes in the California statute may yet be found to have been displaced by the existence of federal discovery rules and this in the context of a Section 301 suit.

D. Content of the Hearing

This section of the report will deal successively (and selectively) with: (1) problems of deducing the intent of the parties; (2) problems of reliability of evidence; (3) problems of due process during the hearing; and (4) problems of practice in the hearing.

1. *Problems of Deducing the Intent of the Parties.* Three major areas of inquiry are encompassed by the problems of deducing the intent of the parties: (a) the parol evidence rule; (b) reformation of agreements; and (c) past practice.

a. *The Parol Evidence Rule.* The "parol evidence rule" is neither a rule of evidence nor are its effects limited to oral testimony.[39] Exclusionary in effect, it is conceptually a rule of substantive contract law which is applied to written as well as to parol evidence. Together with the corollary issues arising from the reformation of contracts, the parol evidence rule affords an excellent medium for exploring the implications of adapting exclusionary legal rules to problems of proof in labor arbitration. Furthermore, convictions about arbitral propriety tend here to be somewhat passionately held, indicating that some care in analysis may be appropriate.

The hope is that this discussion will tend to disclose difficulties which are common to resort to any of the various exclusionary legal rules.

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[38] *Cal. Code Civ. Proc.* § 1283. See *McRae* v. *Superior Court,* 221 A.C.A. 203 (1963).
[39] See Corbin, *Contracts,* § 573 at pp. 180-181 (1964 Pocket Part).

Our panel agreed that the parol evidence rule is irrelevant to legislative arbitration ("interests" disputes) in contrast to its possible relevances in grievance arbitrations under existent collective agreements. As to these latter, expressing the viewpoint held by a number of participants in the labor arbitral process, including a majority of our panel, one of our panel members felt strongly that arbitrators should never " 'reform' or accept any 'proof' to alter a clear, unambiguous contract term." To do so, he feels, is to commit "the number one mortal sin an arbitrator can commit." He reasons that, "For him to vary, add to, or subtract from the agreement that is clear cannot be tolerated in the arbitral system. The bargain, be it good or bad for either party, is nonetheless the contracting parties' bargain. The parties have a right to be acute, stupid, professional, naive, etc. And the arbitrator is totally and completely without authority (unless specifically granted) to alter, vary, etc. their bargain." He would have a court refuse to send the matter to an arbitrator or an arbitrator exercise the power to decide only to send the party seeking reformation to a court.

Contemplate the dilemma of the arbitrator as he listens to that reasoning in an actual case. Admittedly, he is not to relieve one party of a bad bargain, nor is he to alter the bargain. But what *is* the "bargain?" No legal authority tells us that the written instrument is the bargain; it is viewed at law as the evidence of the agreement of the parties. It has no validity independent of the intent of the parties, yet it is the central element in ascertaining that intent. What happens when the intention of the parties—that is, the "bargain"—is demonstrably at variance with a provision in the written instrument?

In general, the import of the parol evidence rule is that proffered oral or written evidence of prior or contemporaneous negotiations ought not to be admitted in order to vary or contradict the terms of a written contract which on its face is apparently integrated and complete.[40] The rule has no applicability to alleged subsequent agreements; it does not preserve written contracts from later amendment whether evidenced in writing, orally, or by conduct. The rule also is inapplicable in a dispute between a party and a legal stranger to the contract.

[40] See *id.* at § 573 (1960).

In application, as with so many (perhaps all) exclusionary rules governing proof in judicial proceedings, the appellate courts have had little difficulty in giving lip service to the rule while still condoning admission in trials of parol evidence felt to be reliable, in the particular circumstances, in reflecting the actual rather than the recorded agreement of the parties to a contract. This permissiveness reflects the concern of the courts for reliability in this kind of problem of proof. If convinced in the circumstances that there is reliable evidence demonstrative of an actual intent at variance with the recorded intent, courts tend to invoke exceptions to the application of the rule, notably that of ambiguity. Typical of the criticism of the utility of the parol evidence rule as an analytic tool are the following pungent comments of Chief Justice Roger Traynor of California concerning the rule: "Its fatuity is demonstrated by holdings [of courts] that the conflicting contentions of the parties as to the meaning of a written instrument alone supply the ambiguity necessary to take the rule out of play. . . . Litigation as to the meaning of language arises only from dispute as to meaning; a rule applicable only when no dispute exists is of no assistance in resolving a dispute that does exist." [41] Furthermore, irrespective of whether the language of the written instrument is "plain, certain and unambiguous," evidence extrinsic to the written instrument is in no case "admissible to 'add to, detract from or vary its terms.' It is admissible to determine what those terms are . . . . The court must determine the true meaning of the instrument in the light of the evidence available. It can neither exclude extrinsic evidence relevant to that determination nor invoke such evidence to write a new or different instrument." [42]

The modern judicial and legislative trend is definitely to dilute the parol evidence rule as an exclusionary device in litigation. Symptomatic is the treatment of extrinsic evidence by the Uniform Commercial Code which accords to language used by the parties "the meaning which arises out of the commercial context in which it was used." [43] The UCC also rejects the notion that

[41] *Laux* v. *Freed*, 53 Cal.2d 512, 525 (1960) (concurring opinion).
[42] *Id.* at 527.
[43] Uniform Commercial Code § 2202.

ambiguity must first be found before evidence may be received to interpret language.[44]

Wigmore observed in his treatise on evidence that, "The conception of a writing as wholly and intrinsically self-determinative of the parties' intent to make it the sole memorial of one or seven or twenty seven subjects of negotiation is an impossible one." [45]

The fact is that most courts have had very little difficulty in recent years in manipulating the "parol evidence rule" so as to avoid injustice. It may understate its legal status today to observe that the rule is little more than a precept of caution. But that is certainly the direction in which its evolution is proceeding, more rapidly in some jurisdictions than in others.

An ironic footnote to that trend, however, is provided in a recent decision of the National Labor Relations Board. Since it is an experienced administrative tribunal one might reasonably expect it to be more sophisticated even than the courts in confronting the parol evidence rule. But in *Union Fish Company* [46] it felt constrained to bow to the rule in a mechanical way which very few courts today feel necessary, much less sound, and without articulating the underlying policy it sought to promote.

The three-man panel (one member dissenting) was confronted with a collective agreement that read in Section XVII, "This Agreement shall be effective on the third day of February, 1964, and shall be binding on the parties hereto for the period ending the first day of February, 1965, and continue from year to year thereafter, unless either party gives notice in writing sixty (60) days prior to the first day of February of each year, signifying his intention to modify or terminate this Agreement. . . ." Another provision, Section VII (b), read that, "It is agreed that this contract will be automatically open on wages only for the purpose of negotiating a wage increase to be effective February 1, 1965.

The Union contended that a typographical error, unnoticed when the agreement was executed, had substituted "1965" for "1966" in Section XVII, providing for the duration of the Agreement. In response, the employer relied on "the plain meaning of

[44] *Id.* at Comment 1.
[45] IX Wigmore, *Evidence* § 2431 at p. 103 (1940).
[46] 156 NLRB No. 33 (1965).

the contract" and asserted that "a contract whole and integrated on its face" could not be altered by "reliance on inadmissible parol evidence."

Strangely, the Board upheld the employer. It emphasized that its contract-bar doctrine depended on "the contract's fixed term or duration." It feared that "the desired predictability would be lost if reliance were to be placed on factors other than the fixed term of the contract." But there was no suggestion of any reliance on the face of the contract by any other union seeking to organize the employer and, therefore, gauging when it might properly, under the Board's contract-bar rules, petition the Board for an election. The dispute was solely between a reneging employer and the union party to the contract. The Board thus overlooked the real question, which was whether the designated term should be held to constitute the "contract." Accordingly, it concluded, "the Board requires that the term, as well as the adequacy of the contract, must be sufficient on its face, with no resort to parol evidence necessary, before the contract can serve as a bar. . . . For the Board now to rely on parol evidence outside the contract to vary the clear termination date established in the contract itself would be to destroy those objects of stability and predictability which our contract bar policies have long sought to achieve." But who could be misled in the circumstances of this case? The Board made itself more dogmatically subservient to the parol evidence rule than are most courts today.

The Union Intervenor had moved the Labor Board to stay its proceedings pending the decision of an arbitrator on the interpretation of the duration clause (Section XVII) and the wage reopening clause (Section VII). But the Board's response was to rely on the hoary direct-indirect fallacy. "To grant these motions and to subsequently rely on an arbitration award in this matter . . . in effect, would destroy by indirection that stability and predictability in the selection of bargaining representative which our contract bar rules have been designed to achieve." [47] Concern for the intent of the parties was subordinated to the administrative ease of reliance on a mechanical exclusion. The Board concluded, "in agreement with the Employer's contentions," that the

[47] 156 NLRB No. 33 at note 7.

contract termination date was February 1, 1965, and that the contract thus did not bar an election.

In contrast, the Board's opinion indicated in a footnote [48] that Member Brown, in dissent, "would find that February 1, 1965, was mistakenly inserted as the terminal date of the contract executed in 1964, and that it was the parties' intention that the contract run for 2 years to February 1, 1966. He is persuaded of this fact by the total impact of testimony and exhibits which show that prior contracts were for 2-year terms, the union proposed another 2-year contract during bargaining, a 2-year contract was actually agreed to, a summary of contract terms which the union sent to members of the [multi-employer] association involved immediately after the conclusion of bargaining recites that the contract is for 2 years but may be reopened for negotiations in a year, and the contract's provision for automatic reopening for the purpose of negotiating a wage increase as of February 1, 1965, is realistically irreconcilable with a contract termination date of February 1, 1965." He would have dismissed the petition for decertification and that for an election.

In this case, ironically, courts would have had little difficulty in dispensing with the employer's reliance on the parol evidence rule. The duration clause and the reopener clause were sufficiently out of gear in their interlinking at least to warrant the question whether there might here be an ambiguity. A number of courts would have had little difficulty in so finding. It is clear enough too from Member Brown's footnoted dissent that there was enough "extrinsic" evidence in the record, once past the conceptual barrier of the parol evidence rule, to warrant the conclusion that a mistake had occurred, and that the 1965 date was intended by the parties to be 1966.

Granted, the Board must not inhibit organizational planning by other unions who might gear their activities to the date shown in the contract. But that factor is more persuasive in answer to Union *A*'s plaint in response to Union *B*'s petition than it is to a union seeking to compel a reneging employer to live up to an an agreement. There is no policy necessity precluding arbitral enforcement of the actual agreement in circumstances like these.

[48] *Id.* at note 11.

But there is a strong policy supporting enforcement through arbitration.

It is a puzzling development to find an administrative tribunal like the Labor Board out-legalizing the courts in the invocation of this artificial rule of exclusion, and this, in addition, at the expense of an indicated arbitration. Irrespective of how an arbitrator might rule on which was the intended date, 1965 or 1966, it is an oddly dogmatic position for an administrative tribunal administering a labor relations statute to ignore the actual intent of the parties when no third party can possibly be disadvantaged, reasoning that to defer to that actual intent in a case of mistake warranting reformation "would destroy by indirection that stability and predictability in the selection of bargaining representatives which our contract bar rules have been designed to achieve."

The logic of that reasoning, if adhered to by the Board, of course, would as well fend off any inquiry into whether the written instrument was indeed the "contract" of the parties, despite proffered evidence of mistake, duress, illegality, fraud, mistake, or insufficiency of consideration. Yet evidence to prove the instrument is void or voidable on any one of those grounds is accepted without controversy by the courts to be admissible. The reasoning supporting these exceptions (including mistake, the one relevant in *Union Fish*) is that, even though this sanctions evidence of prior or contemporaneous agreements, it does not vary or contradict the terms of a "contract" to do so since such evidence actually shows that the language in the instrument cannot legally be accredited as a "contract." The circularity of reasoning involved is clear enough, but it is quite obviously utilized by the courts in order to avoid mechanical adherence to an artificial rule of exclusion of proof which would thereby bar effectuation of the actual intent of the parties.

The hazard to arbitration, even in even viewing the parol evidence rule as a cautionary precept, and no more, is indeed characteristic of each of the legal rules of evidence or procedure which might be thought to have a usable content of common sense caution. Legal principles do not remain static. There is a constant flux. They tend either to diminish in scope or to broaden. Cardozo once observed a growth tendency of legal principles to project to

the outermost reaches of their logic. It should be added that there is also observable a counterpoint tendency stimulated by the thrust of logical extension. To adopt (or tolerate) a principle may be to set in motion the dynamics of that kind of growth. What knowledgeable arbitrators may regard as no more than a healthy caution, thus, less experienced arbitrators (or a superintending Labor Board or court) may come to accept as a haven to avoid coping with the turmoil of facts or to blunt criticism by the invocation of a seemingly "neutral principle." [49] The trouble with this last, of course, is that it is just as decisive of the issue, but without heed for the actual intent of the parties.

Substantive rules of law, once launched, seem to demonstrate the validity of Cardozo's observation. The exclusionary rules of evidence certainly evidenced that principle of growth in earlier years. But they now appear to be in the second major phase, that of counterpoint reaction to having outrun their initial logic. So it is that courts and legislatures generally seem for some time to have been narrowing the applicability of exclusionary rules. That is why it is particularly unfortunate and ironic to find the Labor Board mechanically applying an exclusionary rule illiberally out of step with the courts, and this to the point even of forestalling arbitration in reliance on that well-worn nonsequitur, the direct-indirect fallacy ("one ought not to be allowed to do indirectly what he cannot do directly"). The Board's *Union Fish* reasoning well illustrates that the hazard of applying exclusionary rules of proof is less that tribunals like the Labor Board or arbitrators will not heed common sense cautions implicit in exclusionary rules, as that they will apply them over-reliantly and erroneously, relative to their origins and evolution.

Observing the trend in the courts and legislatures to liberalize the application of exclusionary rules in general, and the beguiling simplicity of application illustrated in the Labor Board's *Union Fish* reasoning, one well may wonder whether prudence would dictate our embracing the parol evidence rule when the power exists to reject it altogether.

Perhaps the most helpful way to conclude this discussion of

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[49] See the lucid discussion in Mueller and Schwartz, "The Principle of Neutral Principles," 7 *U.S.L.A.L. Rev.* 571 (1960).

the parol evidence rule is to turn to the modern legal authority on contracts, Arthur Linton Corbin, for the final observation: [49a]

> Any contract, however made or evidenced, can be discharged or modified by subsequent agreement of the parties. No contract whether oral or written can be varied, contradicted, or discharged by an antecedent agreement. Today may control the effect of what happened yesterday; but what happened yesterday cannot change the effect of what happens today. This, it is believed, is the substance of what has been unfortunately called the "parol evidence rule." . . . The use of such a name for this rule has had unfortunate consequences, principally by distracting the attention from the real issues that are involved. These issues may be any one or more of the following: (1) Have the parties made a contract? (2) Is that contract void or voidable because of illegality, fraud, mistake, or any other reason? (3) Did the parties assent to a particular writing as the complete and accurate 'integration' of that contract?
>
> In determining these issues, or any one of them, there is no 'parol evidence rule' to be applied. On these issues, no relevant evidence, whether parol or otherwise, is excluded. No written document is sufficient, standing alone, to determine any one of them, however long and detailed it may be, however formal, and however many may be the seals and signatures and assertions. No one of these issues can be determined by mere inspection of the written document.
>
> In determining these issues, however, there is no necessity for being gullible or simple minded. The party presenting the writing will testify to its execution and to its accuracy and completeness. The form and substance of the document may strongly corroborate his testimony; or it may not. There may be disinterested witnesses who corroborate him; or who contradict him. There may be corroboration in other circumstances that are proved; or there may not. When the other party testifies to the contrary on any of these issues, he should always be listened to; but does not have to be believed. His testimony may be so overwhelmed that it would be credited by no reasonable man; or it may not. Perhaps a verdict should be directed; but perhaps not. This is a question of weight of evidence, not of admissibility.

b. *The Reformation of Collective Agreements.* If we may conclude that arbitrators ought at the very least to be quite cautious, in turn, in their acceptance of the cautions implicit in the origin of the parol evidence rule (the credulity of laymen juries), and, if more often than not, perhaps even typically, arbitrators will be found admitting evidence extrinsic to the collective agreement in

[49a] Corbin, *Contracts* §§ 573-574 at p. 357-362, 371-372 (rev. ed. 1960).

order to determine the actual intent rather than mechanically putting it out of their sight, what of the question of using that extrinsic evidence to "reform" the agreement?

For many managements apparently this can be a prospect of great concern. Particularly for employers with plants located in various parts of the country, having collective agreements negotiated with different unions, the face-meaning of particular language has great value. Central administrators rely on the face-meaning to correlate policies among plants. So too with administration of the grievance procedure. A Los Angeles arbitrator will have occasion to interpret language identical to that which has been before a New York arbitrator in cases arising out of the same employer system. Consistency of interpretation within the system is a major need lest an unsettling and, in a sense, artificial competitive dynamic be created among plant managements, and between representatives of various unions, vying for advantage by stressing and straining identical language. A further, perhaps subtle observation was made in our pre-San Juan Panel discussions, to the effect that it may be better for the courts, with their impersonality, to take the brunt of contract reformation so that counsel will not have to defend the arbitral process and collective bargaining to a dismayed central management learning that "the words" did not mean "what they say." Of course, one might query whether it is sound for arbitrators, given the irascible temper of the times relative to judicial decisions of highly controverted public issues, to shift to the courts one of the irritants endemic to collective bargaining. One might argue that each system of decision making should be willing to cool its own chestnuts.

Finally, there was a strong sense among three of the four "partial" representatives on the Panel that the industrial reality is that when the parties direct that "the agreement" shall not be altered, they actually do contemplate "agreement" as meaning "this assemblage of words" and not "our intent." Of course, one must recognize that reformation of contracts is not a matter of shading meanings. It is the outright substitution of one set of words for another in response to the conclusion that, because of an objectively provable circumstance like mistake, the printed words do not in fact reflect the actual intent. The hazard has always been that of the creative recollection or manufactured

exhibits, in short, of fraud. Of course, that prospect has been obvious to the courts throughout the development of the doctrine of reformation.

Among the courts, "the majority rule is, that 'where an evident mistake is shown to be in the drafting and not in the making of the contract which it evidences, the court may grant reformation, and, in equitable circumstances, should do so.' " [50]

Legal rules governing reformation of contracts reflect a judicial assumption of difficulty in proving the "true" term of the contract by reliable evidence, given the credulity of laymen juries. That is not, however, a particularly persuasive basis for refraining from inquiry in an arbitration into what bargain was actually negotiated by the parties. True, it must be an inquiry properly skeptical of the danger either of a willfully or of an inadvertently creative recollection. The arbitrator nonetheless is retained jointly by the parties to administer their intent, their real bargain, not a bargain altered, amended, or modified to fit the dictates of some exclusionary rule of evidence not negotiated by them as the measure of their language. Shall that responsibility be said to require (let alone warrant) him to ratify some unintended advantage mistakenly inserted or slyly allowed to pass without comment into the typed or printed reproduction of the agreement? How can even an assertedly detrimental reliance on erroneously included language justify insistence by an advantaged bargainer on a mistaken provision at the expense of the other party? It hardly suffices for an advantaged party to accuse the other of negligence on the ground that it should have looked more carefully at what it signed. So should have each of them. If neither noticed the error, yet each executed the document distorting their intent, both were careless. Neither should now be entitled to assert some rule to its artificial, unnegotiated advantage whereby to perpetuate an erroneous inclusion or exclusion contravening their negotiated bargain. If, instead, the advantaged one actually observed the error, he had a good-faith bargaining duty to disclose it so that it could be corrected. In either event, thus, silence on the part of the advantaged party at the time of the execution can hardly be said now to warrant withholding correction of the error.

[50] Williston, *Contracts*, § 1549, n. 4 (1965 Cum. Supp.).

It should perhaps be emphasized that this discussion has been concerned with the mistaken expression in a written instrument of an intent at variance with the actual intent of the bargainers. It is not enough to justify reformation in a court, nor should it be in an arbitration, that the decision maker is satisfied that the parties would have come to a certain agreement had they been aware of the actual facts.[51] That is the crucial divider between an application of a bargain of the parties and its creation by the tribunal. It is to the latter that the cautions of our panel members (and the courts) are persuasive, even conclusive.

Interestingly, quite aside from labor arbitration, the legal principles governing reformation of contracts affirm rather than disaffirm that arbitral reasoning. Thus, in the words of the Restatement of Contracts, Section 504, Comment c, "The province of the remedial right of reformation is to make a writing express the bargain which the parties desired to put in writing." Section 507 of the Restatement also provides that, "Where circumstances justify reformation of a writing, affecting the contractual relations of the parties to the writing, a court may in its discretion without a preliminary decree of reformation give effect to the transaction as if it had been reformed." A double action in court is thereby avoided, in favor of a single proceeding which treats the contract as reformed. "The same result is often achieved," the Restatement authors realistically observe in Section 507, Comment a, "under the guise of a construction of the original writing, where in fact there is a substitution of the intended contract for a contract that the parties expressed in writing."

The California legislature, at the turn of the century, expressed the thought quite succinctly thus: "When through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded." [52] Indeed, it has been held that the neglect to read a contract is not a breach of legal duty sufficient to preclude reformation.[53]

The parol evidence rule has been held inapplicable to bar submission of proof to establish an actual agreement at variance with

[51] See *id.* at § 1548, n. 9 (rev. ed. 1937).
[52] *Cal. Civil Code* § 1640. Dv. *Bradbury* v. *Higginson,* 167 Cal. 553, 559 (1914).
[53] See Williston, *Contracts,* § 1596, n. 3 (rev. ed. 1937).

a written document which is mistakenly descriptive of the agreement between bargainers.[54] As the Restatement puts it, "In any case, a contract expressed in a writing that is inaccurate because of mutual mistake will not be enforced according to its terms." [55] That inaccuracy, it is true, must be "proved by clear and convincing evidence and not by a mere preponderance." [56] The parol evidence rule does not preclude oral evidence, however, to establish that the parties have agreed on a pattern of intent which, through mistake, is not accurately reflected in the written document which is ostensibly reflective of their intended transaction.[57] Even though "clear and convincing evidence" and not "a mere preponderance" is required to support the remedial right of reformation on the ground of mistake, it has long since been held that "a mere conflict of testimony as to the mistake does not necessitate a denial of the relief." [58]

c. *Past Practice*

As it has come to be used in labor arbitration, the phrase "past practice" may be defined as a course of action knowingly adopted and accepted by the parties over a significant period of time. It becomes significant in arbitration where one of the parties relies on its existence to support the contractual regularity of its conduct or claim. It may be invoked: (1) as amendatory of express contractual language at variance with it; or (2) to supply contractual intent where none is expressed. In either event, there may or may not be contained in the agreement: (1) a provision requiring that amendment be accomplished only by a writing executed with the same formality as the collective agreement itself; (2) a provision which limits accretion of past practices to the term of the present agreement.

Where a written amendment is required, or where past practices are limited to the duration of the prior agreement, presumably an arbitrator would give no weight to past conduct, certainly at the outset of the new agreement. As time passes, however, and

54 *California Packing Co.* v. *Larsen,* 187 Cal. 610, 614 (1921); *Los Angeles Co.* v. *Liverpool Salt Co.,* 150 Cal. 21, 27, 28 (1906).
55 *Rest. Contracts* § 509, Comment a.
56 *Id.* at § 511.
57 *Id.* at § 511, Comment a.
58 *Sullivan* v. *Moorhead,* 99 Cal. 157, 161 (1893).

conduct is repeated under the existing agreement in accord with the earlier pattern evidenced under the old agreement, several past practice questions may then arise: (1) Has a prior past practice been reaffirmed so as to bind under the new agreement? (2) Should the answer be different, dependent on the presence or absence of an express provision contrary to the conduct? (3) Shall a written amendment requirement be deemed to take precedence over past conduct spanning several agreements and at variance with an unaltered express provision?

There is a general principle which seems to me to distinguish past practice cases from those cases in which "intent" evidence, contemporaneous or antecedent to execution of an agreement and extrinsic to it, is proffered to vary or contradict the terms of the agreement. It is a basic idea in contract law that parties can amend an earlier agreement by later conduct (oral, written or otherwise), so long as it is not in conflict with an agreed and operative mechanism for amendment. It is also a basic element of the parol evidence rule that the rule is inapplicable where the issue is whether an earlier agreement has been altered by subsequent conduct.

Of course, the factual permutations here are numerous indeed. Absent a written amendment requisite, or given one but also given its inapplicability due to estoppel or waiver, however, there is no legal reason of which I am aware why parties cannot later amend their earlier agreement by what we call "past practice."

In another dimension, akin to estoppel, our panel was unanimous that in any instance of actual detriment to an individual, reliance on proven past practice should prevail over contrary terminology in the agreement, even including a written amendment requisite.

Several distinctions appeared useful to our panel, although a concern was expressed lest they be too technical for sound administration. *First*, an active past practice (for example, condoning fighting despite an express no-fight rule) appears to differ from a passive past practice (for example, an express right to require overtime never previously asserted); a passive past practice, in this distinction, would be given no amendatory effect whereas an active one might. The reasoning is something akin to

the adverse possession requirement in the acquisition of property rights by occupancy. *Second,* conduct collateral to and in conflict with an express provision ought not to be allowed to alter an express provision which affects institutional rights (on this, the panel split down the middle) in contrast to individual rights (unanimous, as indicated above), although there was some thought that if there was reliance and consequent actual (not merely theoretical) detriment to the institution, perhaps it should also be allowed to rely on the conduct like the individual. *Third,* absent either a written amendment requisite or an operative limitation restricting past practice to the duration of the prior agreement, collateral but nonconflicting conduct was felt to be properly observable as amendatory of the agreement.

2. *Problems of Reliability of Evidence.* This portion of the report will deal in a summary manner with problems of (a) relevance and materiality; (b) hearsay; (c) best evidence; (d) offers of compromise; (e) opinion evidence; (f) circumstantial evidence; (g) new evidence; (h) quantum of proof; and (i) burden of proof.

There is observable in the arbitration literature an expected difference in the treatment of discipline matters in contrast to other types of grievances. Because of that, the discipline problems will be treated in the section below which will be addressed to problems of due process.

a. *Relevance and Materiality.* "No evidence is admissible except relevant evidence," flatly declares the California Evidence Code.[59] Yet Professor Edmund M. Morgan has observed that "in many instances it is impossible for the trial court to determine whether or not an offered item of evidence is relevant." [60] It is a common reaction of arbitrators and trial judges to feel, in reaction to an objection to the proffer of evidence, that the error to risk is that of undue inclusion. Harry Shulman's sage observation is still valid that the hazard is that the arbitrator will not hear enough, rather than that he will hear too much. The echoes of a case can be helpful in gauging dimensions of prudence.

Indeed, the hazard of vacation of an arbitral award is almost

[59] *Cal. Evid. Code* § 350.
[60] Morgan, *Basic Problems of Evidence* 399 (rev. ed. 1962).

totally absent when the arbitrator admits evidence, irrespective of its remoteness of relevance. In contrast, under the California arbitration statute, for example, one of the few ennumerated grounds for vacating an arbitral award is that "the rights of [a] party were substantially prejudiced by . . . the refusal of the arbitartors to hear evidence material to the controversy. . . ." [61] The legal pressures are thus directed toward admission of evidence rather than its exclusion.

Actually, prevailing legal definitions of what constitutes "relevant" evidence are quite broad. Thus the California Evidence Code defines "relevant evidence" as "evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." [62] It encompasses both direct and circumstantial evidence, including "not only evidence of the ultimate facts actually in dispute but also evidence of other facts from which such ultimate facts may be presumed or inferred."

Clearly, however, the remote in relevance and the miniscule in materiality should be denied admission. On the other hand, we have found no Professor Panacea who has authored the definitive treatise on relevance and materiality. It must continue to be a matter of individual discretion in the context of a specific hearing.

There was a strong sense among us, however, that it would be helpful if the arbitrator were more often to inquire why particular evidence is being proffered when its relevance or materiality is somewhat obscure to him.

b. *Hearsay.* The most commonly heard legal word on the cocktail circuit is "hearsay." It is not apt to be any less misconstrued there than it is in courtrooms or arbitration hearings. It is an evidence word with a relatively simple definition and an incredibly complex set of exceptions and exceptions to the exceptions. Its teaching is rather elemental and, had it originally taken an affirmative form, perhaps it would not have become so inscrutable even to its servitors. It has most recently and most accurately been defined as "evidence of a statement that was made other

[61] *Cal. Code Civ. Proc.* § 1286.2 (e).
[62] *Cal. Evid. Code* § 210.

than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." [63] Thus defined, hearsay evidence is inadmissible in court, "except as provided by law." It is those last five words that unlock the hundreds (perhaps thousands) of judicial decisions which have arisen from the quite precisely articulated interpretations of the traditionally ennumerated exceptions to (as it is called) "the hearsay rule:" confessions and admissions; declarations against interest; prior statements of witnesses; spontaneous, contemporaneous, and dying declarations; statements of mental or physical health; statements relating to wills and to claims against estates; business records; official records and other official writings; former testimony; judgments; family history; reputation and statements concerning community history, property interests, and character; dispositive instruments and ancient writings; commercial, scientific, and similar publications.

An elemental, but often overlooked, aspect of the hearsay rule is that evidence which does qualify under an exception as admissible does not necessarily get admitted. The exception provides only that the evidence, qualified under the hearsay exception, is not inadmissible under the hearsay rule. It must still make its own way past other evidentiary exclusionary objections based, for instance, on the need to qualify as relevant, material, credible, the best evidence available, or not barred by some testimonial privilege.

The garden variety hearsay, "George told me," or the hearsay once removed, "George said that Harry told him," or twice removed, "George said that Bertha told Harry," is subject to great and increasing skepticism as the tongues and ears are multiplied, because, to put it solemnly, human interpersonal communication is notoriously inaccurate. To insist on the minimal prudent precaution is to insist that George, Harry, and Bertha each appear and be sworn as a witness then to be examined and cross-examined. So much is certainly arbitral prudence, no less than judicial. But the courts long ago became thoroughly enmeshed in refined prescriptions of the allowable because the initial negative premise of inadmissibility, fearful of the credulity of laymen jurors, was far too sweeping. It left inadequate opportunity for the judges to react to the specifics of a particular case, and this resulted in the

[63] *Id.* at § 1200.

evolution over the decades of the complex of admissible exceptions to the hearsay rule dictate of exclusion.

Since the law does not impose the hearsay rule on arbitrators, it should suffice in the interests of caution to rephrase the hearsay rule for purposes of arbitration as follows:

> "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. Unless corroborated by truth-tending circumstances in the environment in which it was uttered, it is unreliable evidence and should be received with mounting skepticism of its probative value as it becomes more remote and filtered. If a witness can testify at the hearing and does not, his statements outside the hearing should be given no weight, indeed, should even be excluded if there appears to be no therapeutic, nonevidentiary reason to admit it.

c. *The Best Evidence Rule.* The best evidence rule at law is a rather narrowly drawn prescription which mandates that "no evidence other than the writing itself is admissible to prove the content of a writing." [64] As thus stated it is far too circumscribed. Its kernel of prudence, however, can more broadly be stated for arbitrations: the most reliable evidence available, irrespective of its form, should be required to be produced. Failure, without adequate explanation, to produce a more reliable form of evidence should itself be recognized to have evidentiary weight adverse to the profferer of the lesser valued proof.

d. *Offers of Compromise.* Despite the exceptions to the hearsay rule that admissions or declarations against interest are reliable enough to pass the barrier of the hearsay rule, they are nonetheless barred in a number of jurisdictions, as, for example, they are under the new California Evidence Code, when they involve negotiations and offers leading to possible compromise.[65] The rationale is that otherwise "the complete candor between the parties that is most conducive to settlement" would be penalized, thereby frustrating the public policy favoring settlement of disputes by the disputants without recourse to litigation.[66]

Section 1152 of the California Evidence Code provides that,

[64] *Cal. Evid. Code* § 1500.
[65] *Id.* at § 1152.
[66] *Id.* at § 1152, Law Revision Commission Comment, p. 235 (1965).

"Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or claims to have sustained loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his liability for the loss or damage or any part of it." The same result obtains, under Section 1153, with respect to withdrawn offers to plead or to pleas of guilty in a criminal action.

Even so, the California Law Revision Commission which drafted the comprehensive new Evidence Code reasoned that, "An offer of compromise, like other incompetent evidence, should be considered to the extent that it is relevant when it is presented to the trier of fact without objection." [67]

In a labor arbitration, however, where frequently the advocates will not object solely because of lack of knowledge of what is objectionable, the arbitrator may well regard negotiations for settlement in the earlier stages of the grievance procedure so vital to the success of collective bargaining that he may himself interpose objection, indicating to the proffering party why this kind of evidence ought really not to be heard by him. Indeed, our panel was unanimous that an arbitrator would be warranted in excluding this kind of proffered evidence on his own motion. Of course, facts typically pop out in the informality of arbitral hearings where counsel do not represent the parties, and an arbitrator may well elect in some situations simply to ignore the settlement maneuvers without explaining the incomprehensible for the benefit of the uncomprehending; most arbitrators shy away from appearing to be "legalistic," in the sense of obstructionist, none so much as lawyer arbitrators!

What of facts known to the proffering party but purposely withheld during the earlier stages of the grievance procedure in order to have maximum impact on the arbitrator? The pressures to settlement are greatly inhibited where the participants in the grievance procedure have no assurance that they are confronting the facts operative in the decision of one of them not to settle. The atmosphere of full disclosure should be that required by the parties themselves in the pre-arbitral stages of the grievance pro-

[67] *Id.* at p. 234.

cedure. The point of that procedure is not to lay the groundwork for a "win" in arbitration, but to find a mutual basis for resolving the grievance short of arbitration. At the very least, the hole-card approach, reserving the hole card for full impact in arbitration, should be recognized as a gamesmanship device to which resort is normally had only in an immature relationship in which issues are simply bucked on to arbitration. It has no place in a mature relationship where the parties earnestly and conscientiously seek adjustment of differences.

Yet it is most difficult for an arbitrator to do more in these instances than indicate his disfavor of this kind of "surprise" evidence, liberally using continuances, if appropriate in the circumstances, to enable the surprised party to respond properly. In that event, the withholding party loses the advantage of surprise, visibly delays the arbitration, and thereby also increases the expense of the hearing. Exclusion of the proffered evidence would seem to go too far in the direction of foreclosing access to the relevant. Perhaps, on balance, the use of continuances by arbitrator, plus an indication by him that the hole-card technique cannot be allowed to advantage its user, is all that is required to encourage pre-arbitral disclosure.

e. *Opinion Evidence.* Opinion evidence may be proffered through the testimony either (1) of witnesses testifying as experts on a particular subject or (2) of witnesses with no expertise. There is little need in labor arbitration to be concerned with the legal distinctions between the "lay" witness and the "expert" or with procedures for qualifying "expert" witnesses. These are rules which are designed to insulate laymen jurors from being gulled.

Section 800 of the California Evidence Code perhaps provides a rational guide when it directs that, "If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is . . . rationally based on the perception of the witness . . . and helpful to a clear understanding of his testimony."

f. *Circumstantial Evidence.* "Direct evidence" is definable as that which "directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that

fact." [68] All else may be regarded as circumstantial evidence, relying on inferences or presumptions to construct the causal chain linking the allegation of fact to proof of it.

"Presumptions," in the modern view, are not regarded as "evidence," but are viewed "solely as [analytical] devices to aid in determining the facts from the evidence presented." [69] They are categorized in law as conclusive or rebuttable.[70] Illustrative of a conclusive presumption is that which assumes that children born of a wife living with her husband, who is not impotent, are legitimate; no evidence to the contrary is admissible.[71] An illustration of a rebuttable presumption is that which presumes, subject to evidence to the contrary, that a letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail.[72]

On the other hand, an inference is definable as "a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action."[73] That is serviceable also as an accurate definition of "circumstantial" evidence.

Since "direct" evidence may be falsified due to the commission of perjury by witnesses, it is not necessarily more probative than circumstantial evidence. Indeed, the latter may be more reliable than so-called "direct" evidence to the degree that close reasoning by inference in a particular situation may actually weave a tighter factual web, often less subject to the diversion of doubts of credibility than is true where reliance must be had solely on the "I seed him do it" kind of direct evidence (See Glossary of Selected Terms, p. 210).

g. *"New" Evidence.* It is standard legal reasoning to limit the controversy to those events which occurred prior to the date on which the action was filed. What occurs thereafter is irrelevant, except with respect to the remedy, unless provision has been made for the filing of supplemental complaints in the jurisdiction. The

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[68] *Cal. Evid. Code* § 410.
[69] *Id.* at § 600, Law Revision Commission Comment, p. 75 (1965).
[70] *Id.* at § 601.
[71] *Id.* at § 621.
[72] *Id.* at § 641.
[73] *Id.* at § 600(b).

basis in law of that cutoff rationale is that the cause of action asserted should be deducible, if at all, from events occurring prior to the date of the filing of the action. A plaintiff ought to be required to make his case out of the events that stimulated him to file it initially, else litigation on hunch would be encouraged; our social policy, in contrast, is to discourage the litigious souls among us.

In labor arbitration, however, the continuing relationship between the parties extends beyond the resolution of the immediate dispute. This may make it advisable to consider "new" evidence arising after the date of the grievance which triggered the arbitration. Instead of a dogmatic exclusion, attention should be given by the arbitrator to the relation between the proffered post-grievance evidence and the contractual issues in dispute. Sometimes he will then conclude to bar (or admit and ignore) the proffered post-grievance evidence; at other times, he will admit it and it may be dispositive of the case.

It will fall into either of two categories: (1) evidence of events discovered after the grievance but occurring prior to its filing; (2) evidence of events occurring after the filing of the grievance.

In a discipline case, the employer should be held to its proof of the incidents prior to the imposition of the discipline in justification of the discipline, irrespective of later discovered or later occurring incidents. If events occurred thereafter, our panel unanimously agreed, let the employer mete out new discipline; the import of events should not be cumulative past the discipline date. The employer must justify its action on the information which prompted it.

In grievances other than discipline, a different pattern of reasoning may be appropriate. Thus, for instance, in a seniority promotion case the conduct of either the senior displaced or the junior preferred employee after the grievance is filed may confirm or vitiate the judgment of supervision in effectuating the promotion out of seniority. It would be a sterile and unreasonable reliance on a sequence of litigation were the employer either to be confirmed or reversed in its action despite contrary indications arising after the grievance had been filed.

h. *Quantum of Proof.* Perhaps the most durable layman's myth about proof is the false notion that one is required by law to have a witness in addition to oneself to back whatever one asserts as having happened. There are quite limited and unusual situations where corroboration by another is required (for instance, treason; solicitation to commit felonies; perjury; abortion and prostitution cases; obtaining property by oral false pretenses; testimony by accomplices; divorces). But in the vast number of cases, it remains true that "the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact." [74]

It is a proposition of common sense that "if weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." [75] Again, and in the same vein, in assessing what inferences should be drawn contrary to a party from the evidence admitted, an arbitrator, as the trier of fact, "may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case." [76]

The quantum of proof required to prefer one party over the other on the issue may be said to be achieved once there is the establishment by evidence of a requisite degree of belief concerning the decisional facts in the mind of the arbitrator.[77] "Usually, the burden of proof[78] requires a party to convince the trier of fact that the existence of a particular fact is more probable than its nonexistence—a degree of proof usually described as proof by a preponderance of the evidence." [79] In some instances, how-

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[74] *Id.* at § 411.
[75] *Id.* at § 412.
[76] *Id.* at § 413.
[77] " 'Proof' is the establishment by evidence of a requisite degree of belief concerning a fact in the mind of the trier of fact or the count." *Cal. Evid. Code* § 190.
[78] " 'Burden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." *Cal. Evid. Code* § 115.
[79] *Id.* at § 500, Law Revision Commission Comment, p. 67 (1965). Cf. Witkin, *California Evidence* § 59 (1958).

ever, a substantially greater degree of belief is required to be established in the mind of the trier of fact concerning the existence of the fact in civil litigation—referred to as "clear and convincing proof"—or, in criminal prosecutions—referred to as "proof beyond a reasonable doubt."

But, ultimately, what finally sways a decision-maker (whether he be judge or arbitrator) is not subject to general explication outside of the context of a specific case, and, we may surmise, rarely with any objective precision even in a specific case.[80] No one thus far has been able to establish a reliable description, let alone an assured mechanism, of prediction, of the functioning of the psychological complex which is the mind of a "trier of fact" forming and crystalizing a judgment in a disputed matter of immediate consequence to the disputants. Thus, it is impossible to state the applicable "quantum of proof" other than in terms which themselves can only be suggestive, not definitive. Perhaps the most useful way to think of the requisite quantum of proof is to think in terms of variable degrees of caution, so long as it is recognized that the degrees are metaphorical, not mathematical. In that sense, then, an arbitrator may wish simply, on balance, to be more persuaded than not ("preponderance") in many cases; pretty certain in some others ("clear and convincing"); and completely convinced in yet others ("beyond a reasonable doubt").

i. *Burden of Proof.* In the face of the dilemma that the standards or criteria of the quantum of proof cannot be objectively expressed, the law, something like the philosopher, has fallen back on exhortation, and this in terms of a "burden of proof." So it is that courts are required to instruct juries "as to which party bears the burden of proof on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt." [81] This the courts must do, not in the abstract but in relation to specific types of fact situations (for example, a

[80] For an example of an effort to describe as objectively and completely as possible the elements of a decision in a specific case, see Jones, "Autobiography of a Decision: The Function of Innovation in Labor Arbitration and the National Steel Orders of Joinder and Interpleader," 10 *U.C.L.A.L. Rev.* 987 (1963).
[81] *Cal. Evid. Code* § 502.

claim that a person is guilty of crime or wrongdoing; [82] or did not exercise care; [83] or is or was insane).[84]

The "burden of proof" has been described as being divided into the burden of ultimate persuasion and the burden of producing or going forward with the evidence, the former borne throughout the trial by the proponent of an issue, the latter shifting according to the cumulative effect, at any given stage of a trial, of the proof established by one or the other of the parties in affirming or denying the existence or significance of a particular decisional fact.

More modern usage is exemplified in the California Evidence Code in its distinction between "burden of proof" and "burden of producing evidence." It may be paraphrased for arbitrators thus:

(1) "Burden of proof" [85] means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the arbitrator. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. Unless a heavier or lesser burden of proof is appropriate to the particular circumstances, the burden of proof requires proof by a preponderance of the evidence.

(2) "Burden of producing evidence" means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue.[86]

Our panel is unanimous (albeit not overly helpful) in its conclusion that the legal concepts of burden of proof are not very relevant to an arbitrator, that he is simply going to have to make up his mind with the empathy and caution appropriate to the circumstances.

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[82] *Id.* at § 520.
[83] *Id.* at § 521.
[84] *Id.* at § 522.
[85] See note 78 *supra* for the text of *Cal. Evid. Code* § 115 defining "burden of proof."
[86] This is the full text of *Cal. Evid. Code* § 110.

3. *Problems of a Due Process Nature.* The problems discussed in this portion of the report will involve: (a) testimonial privileges of witnesses; (b) the significance of the failure of a grievant to testify; (c) the impeachment of witnesses; (d) sources from which evidence is forthcoming, including the observation and interrogation of employees; (e) collateral criminal proceedings; and (f) the presence at the hearing of prospectively affected persons.

a. *Testimonial Privileges of Witnesses.* There are several areas of subject matter concerning which our law has established "privileges" entitling witnesses to decline to answer questions despite their obvious relevance to issues in the proceeding. A testimonial "privilege" is a legally sanctioned or protected right of silence recognized to be held by a person called to testify, or asked to respond in testimony to questioning, in relation to a matter which is legally privileged, which is to say, insulated against inquiry.

The principal legal privileges, as exemplified in the California Evidence Code, may be enumerated as: (1) the privileges of a defendant in a criminal case not to be called as a witness and not to testify; [87] (2) the privilege of any witness to refuse to disclose any matter that may tend to incriminate him; [88] (3) the privilege of nondisclosure of confidential communications between persons in certain relationships, notably those of lawyer-client; [89] husband-wife; [90] physician-patient; [91] and clergyman-penitent; [92] newsman-informant [93] (identity of the latter); and public official-informer [94] (identity of the latter).

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87 *Cal. Evid. Code* § 930.

88 *Id.* at § 940. Note, however, that this is a preemptive federal constitutional right under the Fourteenth Amendment. *Malloy* v. *Hogan,* 378 U.S. 1 (1964). See also *Griffin* v. *State of California,* 380 U.S. 609 (1965) (adverse comment on failure to testify, not allowable); *Tehan* v. *United States,* 86 Sup. Ct. 459 (1966) (*Griffin* rule not retrospectively applicable).

89 *Cal. Evid. Code* § 950.

90 *Id.* at §§ 970, 980.

91 *Id.* at §§ 990, 1010.

92 *Id.* at § 1030.

93 *Id.* at § 1070, insulating against contempt proceedings a newsman's refusal to disclose identity of his source of information.

94 *Id.* at § 1041. See also § 1040, 1042.

The law varies among state jurisdictions in the degrees of insulation either conceptually or actually afforded a particular claim of privilege. Furthermore, there is a body of federal law which has tended to be more protective of asserted privileges than has the law evolved among the several states. Finally, it is not yet known how much, if any, of the federal law regarding privileges may be applicable in arbitrations of labor disputes affecting interstate commerce. Shall state law in these matters be preempted? *Lincoln Mills* required a federal law to be evolved which might resort to but which would then transform helpful state law into federal for purposes of the Section 301 enforcement of agreements to arbitrate.[95]

Consideration of the new California Evidence Code in this respect may be enlightening. Although the general proposition of the state's arbitration law is that "rules of evidence and rules of judicial procedure need not be observed," [96] there is a unique exception contained in the new Evidence Code, which, following a like New Jersey enactment in 1960, expressly includes arbitration among those proceedings in which testimonial privileges may be asserted as of right in the witness and not discretion in the arbitrator. This follows logically since the California arbitrator is vested with the power of subpoena to compel persons to appear and give evidence under oath.[97] The rationale for inclusion of arbitration is stated by the California Law Revision Commission thus: [98]

> A privilege is granted because it is considered more important to keep certain information confidential than it is to require disclosure of all the information relevant to the issues in a pending proceeding. . . . If confidentiality is to be protected effectively by a privilege, the privilege must be recognized in proceedings other than judicial proceedings.

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[95] See discussion of this in Jones, "On Nudging and Shoving the National Steel Arbitration Into a Dubious Procedure," 79 *Harv. L. Rev.* 327, 342-43 (1965).

[96] *Cal. Code Civ. Proc.* § 1282.2 (d).

[97] *Cal. Code Civ. Proc.* §§ 1282.6, 1282.8. Also, § 1209 (9) defines as one of the "contempts of the authority of the count" the "Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness." Although a contempt not committed in the immediate presence of the court, § 1211 provides that there shall be presented to the court "a statement of the facts by the . . . arbitrators," which then becomes the basis for penal punishment by the court. (Interestingly, § 1211 requires an affidavit of those who witness the contempt, except for referees, arbitrators "or other judicial officers" who need only present a statement of facts.)

[98] *Cal. Evid. Code* § 910, Law Revision Commission Comment, pp. 158-9 (1965).

It would also follow that if federal or state law is interpreted to vest an arbitrator with the subpoena power, expressly or impliedly, the same requisite of deference to a proper assertion of privilege would obtain. It does not necessarily follow, however, that absence of the subpoena power means that the entitlement of the privilege to protection is diminished in an arbitration.

So determined is the statutory effort in California to protect the testimonial privileges that neither the arbitrator "nor counsel" may comment on the fact that a privilege was exercised either "in the instant proceeding or on a prior occasion." [99] Beyond that, "no presumption shall arise because of the exercise of the privilege, and the [arbitrator] [100] may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding." [101] The rationale for this statute is that, "If comment could be made on the exercise of a privilege and adverse inferences drawn therefrom, a litigant would be under great pressure to forgo his claim of privilege and the protection sought to be afforded by the privilege would be largely negated. *Moreover, the inferences which might be drawn would, in many instances, be quite unwarranted.*" [102]

On the other hand, there is a doctrine of waiver which is subject to abuse. The right of any person to claim a statutory privilege rooted in confidential communications is subject to waiver "with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone." [103]

Overruling a 1908 contrary decision, the constitutional privilege against self-incrimination arising from the Fifth Amendment has recently been held by the Supreme Court in *Malloy* v. *Hogan* [104] to be safeguarded by the Fourteenth Amendment

[99] *Id.* at § 913 (a).
[100] Defining a "proceeding" to include "arbitrator" in § 901, the California Evidence Code in § 910 expressly preempts the "provisions of any statute making rules of evidence inapplicable in particular proceedings, or limiting the applicability of rules of evidence in particular proceedings."
[101] *Cal. Evid. Code* § 913 (b).
[102] *Id.* at § 913, Law Revision Commission Comment, p. 164 (1965) (Emphasis added).
[103] *Id.* at § 912.
[104] 378 U.S. 1 (1964).

against state action. "It would be incongruous," wrote Justice Brennan for the Court, "to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court. Therefore, the same standards must determine whether an accused's silence in either a federal or state proceeding is justified." [105]

As Professor Arthur E. Sutherland has recently observed, "If any proposition of constitutional law has obtained completely demonstrated legislative consensus in the United States, it is the privilege against self-incrimination." [106]

Will the Court now tolerate a "different standard" in labor arbitration, already federalized by the Court in *Lincoln Mills,* one less protective of a witness than in the courts? It seems unlikely.

Judges are not yet required affirmatively to intervene so as to caution witnesses of the availability of either a constitutional or a statutory privilege. It is questionable how long it will be before the Supreme Court requires judges to do so in self-incrimination cases so as to assure an informed rather than an unwitting waiver of the privilege by the witness. This is so because it is common courthouse knowledge that many instances occur in which witnesses ignorantly waive their privileges because they are not represented by counsel in a judicial proceeding, civil or criminal in nature, in which they are called by one of the parties to testify. And if judges acquire that affirmative duty, what of arbitrators? Ignorant witnesses and uninformed advocates are the rule, not the exception, in arbitrations. More affirmative guidance is needed here, quite possibly, than in the courtroom. It seems to me foreseeable, even probable, given the federal trend to strengthen labor arbitration as a tribunal, coincident with the federal strengthening of the privilege against self-incrimination, that arbitrators may be required to be at least as observant as judges of the dictates of that privilege, perhaps even more so, and this at the expense of vacation of an award where failure to observe the privilege may reasonably be concluded to vitiate its

[105] 378 U.S. at 11.
[106] Sutherland, "Crime and Confession," 79 *Harv. L. Rev.* 21, 35 (1965).

reasoning. Even if the arbitrator is himself uninformed of the privilege, can his disability reasonably be deemed to dilute the privilege at the expense of the witness? Hardly.

It is unclear what courts might do to remedy this kind of defect in an arbitral hearing, other than vacate awards of offending arbitrators, although even that would frequently be uncalled for as interfering instead with the rights of the bargainers without salvaging those of the privileged witness. As to the latter at least, refusal to recognize waiver on his part in the circumstances of disclosure in arbitral hearing may be the solution.

In any event, arbitrators will have to become more knowledgeable in regard to privileges than they generally are now. Suffice here to observe that they may well find themselves deemed to be conservators of legal privileges, like it or not, and that failure so to function may jeopardize the validity of their awards.

b. *Failure of a Grievant to Testify.* In grievances which do not involve an employer's challenged discipline, there is no particular problem arising from the failure of a grievant to testify. If it results in an omission of evidence which only he can supply, then an arbitrator is entitled to be skeptical of the merits of his case.

But if a disciplinary action is at issue, the failure to testify may have different connotations. Is the reasoning apposite which bars comment on the failure of a defendant in a criminal proceeding to testify in his own behalf, or to refuse to testify at the summons of the prosecution? Discharges can have so devastating an effect on an employee that many arbitrators apply a more rigorous standard of proof to test the employer's action, perhaps most rigorous of all in cases where acts involving moral turpitude are alleged as the ground for discharge. In this last case, of course, silence of a grievant may have no guilt signification whatsoever. There are various innocent explanations of failure to testify. As a common example, it not infrequently happens that advocates in arbitrations, even as counsel in court trials, will keep a witness off the stand, not because he is dishonest, but because he is bumbling, inarticulate, unintelligent, or easily confused or confounded, one in whose mouth the truth may indeed lie, but never to be dislodged.

Allied to the significance of silence, is the question whether an employer, as an adversary party, should be allowed to call a grievant to the stand in a discipline case. Perhaps, in the pragmatic vein, there should be no hard and fast rule counseling aye or nay; but there nevertheless appears to be a latent problem akin to that of the uninformed witness in regard to the constitutional and statutory privileges. A grievant may certainly exercise his constitutional privilege to decline to testify and refuse to do so at the call of the employer. Typically, an employer is required by an arbitrator to proceed to divulge the factual basis for a discharge. If a grievant may decline to take the stand, that blocks any effort by the employer to prove its case out of the mouth of the grievant, whether or not he later elects to testify on his own behalf.

That suggests, however, another approach less fraught with the supposed implications of a resort to a constitutional privilege of silence which many would find distasteful, even suspect, to assert. It may be that the simplest and fairest way to handle this problem is for the arbitrator to exercise his acknowledged discretion (and responsibility) to control the order of proof in the circumstances.[107] This would make sense to me as a counsel of prudence, however, only if he were also to adopt the premise that an orderly proceeding of an adversary nature does not normally allow one party to take tactical command of the other party's development of its case. Thus, if there are unusual reasons why the employer should be enabled to summon the disciplined employee to prove its *prima facie* case that the discipline was warranted, which is to say, of course, convicting the grievant out of his own mouth, then the arbitrator can allow it.

Our panel split on this issue, the employer representatives opting for the capacity to call the grievant, the union representatives regarding it as an intrusion in the development of their cases. In this instance, the judicial analogy may be said to support the employer,[108] although arbitral procedure may, on occasion, be contrary.

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107 Compare *Cal. Code Civ. Proc.* §§ 607, 631.7; *Cal. Penal Code* §§ 1093, 1094.

108 *Cal. Evid. Code* § 776 (a) provides that "A party to the record of any civil action, or a person identified with such a party, may be called and examined as if under cross-examination by any adverse party at any time during the presentation of evidence by the party calling the witness." Furthermore, in California the prevail-

c. *Impeachment of Witnesses.* As to the impeachment of witnesses, the federal courts have generally adopted the standard of the Uniform Rules of Evidence that limits the admissibility of character evidence, proffered to challenge credibility, to convictions for crimes involving dishonesty or false statement.[109] The Supreme Court may well soon limit indiscriminate admission in state courts of the defendant's prior record for purposes of impeachment on the ground that the unnecessary introduction of prejudicial evidence constitutes a violation of due process.[110]

The new California Evidence Code allows credibility to be attacked by proving a prior felony conviction (but not a misdemeanor), unless he has since been pardoned.[111] Perhaps this too is ultimately a question of relevance even as, someone has observed, are all problems of proof.

Illustrative of the modern trend, that Code also, in one sentence, discards anachronistic limitations of long standing on who may attack the credibility of a witness: "The credibility of a witness may be attacked or supported by any party, including the party calling him." [112]

On the negative side, inadmissible at law, upon objection, are evidence of traits of character other than honesty or veracity; or of specific instances of conduct (other than prior felony convictions) relevant only to prove a trait of character; of religious

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ing view appears to be to allow a party to call adverse witnesses before, during or after calling his own witnesses, as he may elect relative to the best presentation of his case. Witkin, *California Evidence* 660 (1958). Indeed, it has been held to constitute reversible error for a trial judge, purporting to act under his power to control the order of proof, to refuse to allow examination of a defendant as an adverse witness because the plaintiffs had not yet made out a *prima facie* case. The adverse witness could be used to prove any fact or the whole case if needed. *Murray* v. *Manley,* 170 Cal. App. 2d 364, 338 P.2d 976 (1959).

On the other hand, the Attorney General of California has indicated that a respondent in an administrative proceeding may not be called as a witness until he has had opportunity to testify in his own behalf and has failed to do so, 6 *Ops. Cal. Atty. Gen.* 219 (1945), expressly noting that evidence rules for judicial proceedings do not apply to proceedings under the Administrative Procedure Act.

109 Rule 21 of the Uniform Rules of Evidence. See Note, "Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime," 78 *Harv. L. Rev.* 426, 444 (1964). Rule 21 also limits introduction of prior conviction of an accused to those instances only where he has "first introduced evidence admissible solely for the purpose of supporting his credibility."

110 See Note, *Procedural Protections, supra,* note 109.

111 *Cal. Evid. Code* § 788.

112 *Id.* at § 785.

belief; of good character (unless responding to bad character evidence); of prior consistent statements (unless countering evidence of inconsistency or recent fabrication), all being inadmissible at law upon objection. Once again, however, for arbitral purposes, proffers of this kind of evidence may well be reacted to in terms of relevance.

On the positive side, confronted with nonlawyer advocates engaged in Perry Masonish pursuit of the impeachment of a witness ("Is it not a fact [pause] that you are an *officer* of the union?"—"Now tell us, Mr. Ogledoch, [raised eyebrow] is it not true that you are up for *promotion* from assistant foreman?"), perhaps the most effective "ruling" for an arbitrator is simply to say, "Fellas [knowing grin], let's get on with it."

d. *Sources from which Evidence Is Forthcoming.* Evidence may be garnered from an infinite variety of sources, some of which raise interesting and complex questions of admissibility based on public policy and others on reliability.

(1) The use of lie detectors has been subjected to comprehensive analysis by the American Bar Association's Section of Labor Relations Law through its Committee on Labor Arbitration and the Law of Collective Bargaining Agreements. The evidence marshalled by the Committee's study is devastating and will not be repeated here as it is readily available in the 1965 report of the Section.[113] Lie detector evidence should be flatly rejected by an arbitrator with or without objection having been made.

(2) Our panel was unanimous in the conclusion that if there can be no confrontation of accusers by an aggrieved employee in a discipline case, the grievance should be sustained. This same reasoning applies to employer reliance on allegedly confidential records not available as proof.

(3) Irrespective of whether it can be said in the particular circumstances to constitute sound industrial relations practice, evidence acquired through the use of movie, television, or recording equipment is entitled to admission if relevant and reliable. The only generalization as to the latter is that the proffered evi-

[113] *Report, A.B.A. Section of Labor Relations Law—1965*, at 288-297.

dence should be required to pass stringent examination to assure its reliability.

On the other hand, circumstances irrespective of reliability or relevance are readily conceivable where the use of such equipment might be said so to violate concepts of fair play or reasonable privacy as to merit exclusion. Questions of removal of material from employee lockers are subject to the same inquiry of reasonableness in the circumstances.

(4) Interrogation of employees is a normal and vital prerogative of an employer. It is to be favored, but it also has its boundaries of reason. The disposition of cases arising in courts concerning the interrogation of persons suspected or accused of crime reflects a basic expectation in our society that proof of wrongdoing is best undertaken in an open hearing with the right of cross-examination and without first subjecting the person to the psychological torment of accusation and inquisition without the safeguards of representation by counsel.

In the context of collective bargaining, therefore, the concern of the arbitrator at the proffer of evidence of "confessions," elicited unilaterally in a pre-grievance procedure interrogation, will be for its reliability, and, in egregious circumstances, for its allowability in terms of fair play and reasonable privacy. Emotional strain at accusation and the latent fear of the power of an employer to cause criminal prosecution irrespective of guilt or innocence, render this kind of evidence unreliable, and unless it is demonstrated that reasonable safeguards were observed in the investigation, including the real opportunity for representation,[114] evidence of employee admissions during interrogation should be deemed inadmissible in arbitrations.

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[114] There is an analogy in the Supreme Court's growing emphasis on the right to counsel for accused persons. See *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) (held, for the first time, that a confession obtained from a suspect who had been prevented by the police from consulting with his retained counsel during interrogation could not constitutionally be introduced as evidence against him in a state criminal proceeding); Mishkin, "Foreword: The High Court, the Great Writ, and the Due Process of time and Law," 79 *Harv. L. Rev.* 56, 96: "A less obvious, and perhaps less common, but certainly no less important effect of *Escobedo* is the possibility that the presence of counsel at the prearraignment stage may serve a useful role in minimizing error as to the basic issues in the case. Thus, availability of counsel during the interrogation stage may help to insure that any statements made by the accused clearly represent what he intends to communicate and are accurately reported when later introduced in evidence. Moreover, to the extent that the

e. *Collateral Criminal Proceedings.* The existence or the prospect of criminal proceedings collateral to an arbitration hearing have no necessary consequence in an arbitration other than to enhance the caution with which the arbitrator treats questions of proof and privilege. The standards of proof, the relevant policies at issue, the cast of judgment of the triers of fact, and the environment in which the respective hearings take place, are sufficiently different to warrant the conclusion that a decision in one tribunal should not bind the other, although it should be admissible as relevant evidence. That appears to have been the basis for the Second Circuit's recent decision in *Jenkins Bros.* v. *Steelworkers,*[115] in which it was held that an arbitration over a discharge for theft would not be enjoined on the ground that an employee had already been convicted of theft in a state court.

f. *Presence of Prospectively Affected Persons.* There are situations which arise from time to time in which an arbitration decision under a collective agreement appears to have the prospect of adversely affecting the rights of persons who are not parties to the collective agreement but who nonetheless cannot realistically (in contrast to "legally") be said to be "strangers" to the collective bargaining relationship. They may be individual employees, former employees, other employers, or other unions. To observe that they are caught up in the collective bargaining complex is, of course, not to conclude that they should somehow be allowed to participate formally or informally in the arbitral proceeding between this employer and this union. But it may also be true that the presence of their interests, coupled with the absence of their participation, may make the matter not readily susceptible of fair resolution in arbitration under those circumstances.

The possibility of the use of voluntary joinder techniques will thus occur. Since this is a matter fairly extensively probed elsewhere and recently, it is only noted in passing here in the context

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Escobedo rule in fact serves to bring about retention or appointment of counsel at an earlier stage of the process than is true at present, it may help to improve the efficacy of investigations undertaken on behalf of the defendant—with concomitant contribution toward an ultimately reliable determination of guilt." See also "Developments in the Law—Confessions," 79 *Harv. L. Rev.* 935 (1966); Note, "Procedural Protections," *supra,* note 109; Note, "Improper Evidence in Nonjury Trials: Basis for Reversal?", 79 *Harv. L. Rev.* 407 (1965).

115 341 F.2d 987 (2d Cir. 1965), *cert. denied,* 60 LRRM 2233 (1965).

of due process.[116] Readers of Justice Black's dissenting opinions in *Carey* v. *Westinghouse Electric* [117] and *Republic Steel Corp.* v. *Maddox* [118] may feel that inquiry is not only still open here, but is of pressing necessity to avoid conversion of those dissenting due process concerns into majority conclusions hampering arbitration in future years.

4. *Problems of the Conduct of the Hearing.* The problems summarily viewed in this final section of the report are: (a) reliable guides to credibility; and (b) the examination of witnesses.

a. *Reliable Guides to Credibility.* There is only *one* reliable guide to credibility, and that is there are *no* reliable guides to credibility.

Given that reality of human perception and deception, Section 780 of the new California Evidence Code has as useful a checklist as exists. Preliminarily, it directs that the trier of fact "may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing." It then ennumerates several factors to be considered in listening to a witness testify: (1) "his demeanor while testifying and the manner in which he testifies"; (2) "the character of his testimony"; (3) "the extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies"; (4) "the extent of his opportunity to perceive any matter about which he testifies"; (5) "his character for honesty or veracity or their opposites"; (6) "the existence or nonexistence of a bias, interest, or other motive"; (7) "a statement previously made by him that is consistent with his statement at the hearing"; [119] (8) "a statement made by him that is inconsistent with any part of his testimony at the hearing"; (9) "the existence or nonexistence of any fact testified to by him"; (10)

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116 See Jones, "On Nudging and Shoving the National Steel Arbitration into a Dubious Procedure," 79 *Harv. L. Rev.* 327 (1965); Jones, "An Arbitral Answer to a Judicial Dilemma: The Carey Decision and Trilateral Arbitration of Jurisdictional Disputes," 11 *U.C.L.A.L. Rev.* 327 (1964); Jones, "Autobiography of a Decision: The Function of Innovation in Labor Arbitration and the National Steel Orders and Interpleader," 10 *U.C.L.A.L. Rev.* 987 (1963). Compare Bernstein, "Nudging and Shoving All Parties to a Jurisdictional Dispute Into Arbitration: The Dubious Procedure of National Steel," 78 *Harv. L. Rev.* 784 (1965).

117 375 U.S. 261, 273 (1964) (dissenting opinion).

118 379 U.S. 650, 666 (1965) (dissenting opinion).

119 But see *Cal. Evid. Code* § 791.

"his attitude toward the action in which he testifies or toward the giving of testimony"; (11) "his admission of untruthfulness."

Of course, the trouble with this kind of listing is that there are enough variations among witnesses as to preclude any assured generalization. Anyone driven by the necessity of decision to fret about credibility, who has listened over a number of years to sworn testimony, knows that as much truth must have been uttered by shifty-eyed, perspiring, lip-licking, nail-biting, guilty-looking, ill at ease, fidgity witnesses as have lies issued from calm, collected, imperturbable, urbane, straight-in-the-eye perjurers.

Perhaps the wisest safeguard of all in probing credibility is that adopted in California through the new statutory rule that, "The credibility of a witness may be attacked or supported by any party, including the party calling him." [120] That gloves-off rule should do more to assuring honest testimony than all of the ennumerated elements of Section 780 put together. It shrewdly adopts and projects the amply demonstrated premise of cross-examination over the centuries: that probing of alleged truth will be most successful which is driven by acute self-interest. The urge to prevail in litigation is strong fuel indeed to skeptical inquisitiveness.

b. *The Examination of Witnesses.* In the arbitrator's gradually deafening ear, the most common echo from the arbitral hearing room is the one that almost invariably starts out, "Now, isn't it true that . . ." or, more subtly, "Is it true that . . .". There then follows one of the choice points on that list that the advocate (and, sad to relate, he is as often as not a lawyer) has put together last night during the commercials on the Perry Mason program, as he planned how to surround and assault the citadel of discretion.

It might possibly help in alleviating the problem of proof alluded to in the observations just concluded were we to listen to the following section from the California Evidence Code: "A 'leading question' is a question that suggests to the witness the answer that the examining party desires." [121] In order to avoid misunderstanding, however, it may be appropriate, with apologies

[120] *Id.* at § 780.
[121] *Id.* at § 764.

to the California Law Revision Commission, to quote, as from a transcript, the following questions and answers, after the manner of Section 767 of the California Evidence Code:

(1) *Question:* Is it true that "a leading question may not be asked of a witness on direct or redirect examination"?
Answer: Yes.
(2) *Question:* Isn't it true that "a leading question may be asked of a witness on cross-examination or recross-examination"?
Answer: Yes.

E. *Post-Hearing Techniques*

It was ever thus, that arbitration decisions either (in the vast majority of cases) were not brought to court on appeal or (in the vast majority of the miniscule that were appealed) only an infinitesimal few have ever been vacated. Some attribute this rather incredible ratio of durability merely to inadequate finances to support the legal profession's expensive proclivity for appellate argument; others credit it to the almost incredible admixture of wisdom and prudence commonly observed by arbitral participants among labor arbitrators; yet others, cynically perhaps, and regrettably, see no more than the usual democratic symptoms of inertia in the face of error.

Whatever, there is a readily usable mechanism for assuring at least that the arbitrator may have the opportunity to reassess his own decision in the light of the incredulous reactions of the disappointed party, as balanced by the panegyric accolades of the prevailing party. He may elect to include, or parties may mutually direct him to include, a provision in his award that one or the other of the parties may file with him a motion to reconvene the hearing on the ground of a material error of omission or commission within a certain period of time, falling within the contractual time limitations, say, within seven days after issuance of the award. This at least enables him to rectify that kind of error which, in any event, he would want to eliminate. It also has the function, in many cases, of relieving the sense in the losing party of the felt necessity to appeal. In the light of the overwhelming legal inhibitions against successful appeals, the opportunity to avail of that second exposure appears to have some utility.[122]

[122] This provision is suggested in Jones, "Arbitration and The Dilemma of Possible Error," 34 *Los Angeles Bar Bulletin* 216, 11 *Labor L. J.* 1023 (1960).

IV. Glossary of Selected Terms

The following are some of the legal terms which arbitrators and arbitral participants may find useful in thinking of problems of proof. They are frequently found in discussions by courts and lawyers of applications of the rules of evidence. They may have possible utility in considering problems of proof in labor arbitration. They are (c'est à rire) self-explanatory. Hopefully, the discussion in the pages preceding this section of the Report will enable a somewhat sophisticated reading of this section.

A. *Evidence.* "Evidence" means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact. The general principle is well settled that matter which is technically inadmissible in court under an exclusionary rule is nonetheless evidence and may be considered in support of a judgment if it is offered and received in evidence without proper objection or motion to strike.

1. *Direct evidence.*—"Direct evidence" means evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact. Direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except that in some proceedings in court additional evidence may be required by statute.

2. *Circumstantial evidence.*—"Circumstantial evidence" tends to establish the "principal fact" by proving one or more other facts from which the principal fact can then rationally be inferred. It is "founded on experience and observed facts and coincidences, establishing a connection between the known and proved facts and the fact sought to be proved. The advantages are that, as the evidence commonly comes from several witnesses and different sources, a chain of circumstances is less likely to be falsely prepared and arranged, and falsehood and perjury are more likely to be detected and fail of their purpose." [123] It has been observed that, "Any attempted differentiation between direct and circumstantial evidence at times becomes indistinct, and in law, unimportant." [124] And "no separate charge is to be made suggesting

[123] Chief Justice Shaw in *Commonwealth* v. *Webster,* 5 Cush. 295, 311 (1850).
[124] *Rodella* v. *United States,* 286 F.2d 306, 312 (9th Cir. 1960).

that circumstantial evidence is on a different and lower plane than other forms of evidence." [125]

3. *Inference.*—An "inference" is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the matter. An inference is not evidence, but is the result of reasoning from evidence.

4. *Presumption.*—Courts use the word "presumption" to signify an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in an action. Presumptions are categorized as either conclusive or rebuttable. Presumptions are not evidence in some jurisdictions, but in others are loosely referred to as evidence.

5. *Relevant evidence.*—"Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the matter. It includes not only evidence of the ultimate facts actually in dispute but also evidence of other facts from which such ultimate facts may be presumed or inferred.

B. *Proof.*—"Proof" is the establishment by evidence of a requisite degree of belief concerning a fact in the mind of the arbitrator.

C. *Burden of proof.*—"Burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the arbitrator. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. Unless a heavier or lesser burden of proof is appropriate to the particular circumstances, the burden of proof requires proof by a preponderance of the evidence.

D. *Burden of producing evidence.*—"Burden of producing evidence" means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue.

E. *Party who has the burden of producing evidence.*—The burden

[125] *United States* v. *Valenti*, 134 F.2d 362, 364 (2d Cir. 1943).

of producing evidence as to a particular fact is on the party against whom the finding on that fact would be required in the absence of further evidence. The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to the fact, but the former may shift from one party to another while the latter remains fixed.

F. *Conduct.*—"Conduct" includes all active and passive behavior, both verbal and nonverbal.

G. *Hearsay evidence.*—"Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. A statement offered for some purpose other than to prove the fact stated by it is no hearsay. In courts, hearsay evidence is inadmissible unless it falls within judicially and legislatively established exceptions to the "hearsay rule." [126]

H. *Declarant.*—"Declarant" is a person who makes a statement and is normally used in formulations of the legal rules of evidence to refer to a person who makes a hearsay statement, as distinguished from the witness who testifies to the content of the statement.

V. Conclusion

We have sought to discuss problems of proof so as to enable labor arbitrators and participants in the process, whether or not legally educated, to handle and react to proffered evidence more effectively. Perhaps, in conclusion, one might reasonably or profitably close this survey with the words of a statute which was designed to be implemented by hearing officers, some lawyers, some not, of state agencies in the conduct of hearings.

The California Administrative Procedures Act, binding on most of the administrative agencies of the state (for example, FEPC), provides as follows for the conduct of hearings: [127]

> The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be

[126] For a working definition of hearsay for arbitrators, see the text at page 187.
[127] *Cal. Gov. Code* 11513 (c).

admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The rules of privilege shall be effective to the same extent that they are now or hereafter may be recognized in civil actions, and irrelevant and unduly repetitious evidence shall be excluded.