authority to compel the employer to proceed before the party question is resolved. If there is insistence on such a position, the arbitrator should withdraw, putting pressure on the moving party to resolve the matter in the courts.

If the arbitration, in fact, goes forward, the union and the grievant shall speak with only one voice, which is the union's. Actually, counsel for either the grievant or the union may speak for the union, but only he is allowed to speak, both orally and in writing. The attorneys shall have time to caucus. The award, of course, is binding upon the union.

This arrangement will win no awards for neatness or the elimination of loose ends. All I can say for it is that thus far, at least, it has worked for me.

VII. Conclusion

As Justice Powell stated for a unanimous Court in *Alexander* v. *Gardner-Denver*,[34] judges interpret the law of the land and arbitrators interpret the law of the shop. Despite these important differences, the decision-making process of judges and arbitrators is much the same.

The principal function of trial judges and arbitrators is "fact-finding," a term that does not convey an entirely accurate impression of the process that occurs at the conclusion of a trial or hearing. Facts are not simply "found"; they usually must be "extracted" from the conflicting testimony of witnesses who, like most of us, have different perceptions of external events—differences compounded by the passage of time and fallibility of human memory. While triers of fact apply well-established credibility guidelines in the resolution of contradicting testimony, "fact-finding" remains a highly subjective process both as to witnesses who relate the facts and decision-makers who construe them. In addition, the interpretation of ambiguous language may add another element of uncertainty to the outcome of a contested case.

Once the case record is completed, the decision-maker mulls it over, then subjects it to an intensive scrutiny and examination. Eventually, as we have noted, a guiding idea, a tentative conclusion, will be crystalized.

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[34]415 U.S. 361, 7 FEP Cases 81 (1974).

Those of us who find it repugnant that a conclusion, even a tentative conclusion, should precede a stringent analysis of the record rather than emerge as the end result of the decisional process, may take comfort from the assurances of Justice Cardozo. "We think," he wrote, "we shall be satisfied to match the situation to the rule, and, finding correspondence, to declare it without flinching. . . . There is nothing that can relieve us 'of the pain of choosing at every step.' "[35]

Cardozo chided the skeptics:

> "We tend sometimes, in determining the growth of a principle or a precedent, to treat it as if it represented the outcome of a quest for certainty. That is to mistake its origin. Only in the rarest instances, if ever, was certainty either possible or expected. The principle or the precedent was the outcome of a quest for probabilities. *Principles and precedents . . . are in truth provisional hypotheses, born in doubt and travail, expressing the adjustment which commended itself at the moment between competing possibilities.*" [Emphasis added.][36]

As a postscript to the above extracts, we need only be reminded that probability, rather than mechanical certainty, is the underpinning of all social disciplines. The field of economics provides as good an illustration of this point as any. Most of us are familiar with the role of guiding ideas in that discipline, from the sublime of Adam Smith's invisible hand of the market place to the currently disputed Laffer curve. The question may be legitimately posed: If an economic theory which can determine the fate of millions be of necessity offered as a hypothesis, as a guiding operational idea the truth of which is based upon probability rather than certainty, why should we expect that the field of jurisprudence be an exception? Why should we insist that our decisional thinking be limited to the mechanical certainties of the syllogism while we eschew probability as a means of solving legal problems. Legal problems are, after all, human problems, and even jurimetric scholars base their computerized legal findings on the mathematics of probability.

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[35]Cardozo, Growth of the Law, ed. Margaret E. Hall (Albany, N.Y.: Matthew Bender & Co., 1947), at 215–216.

[36]*Id.*, at 216–217.

WEST COAST PANEL DISCUSSION

Chairman Block: Discovery in law is an aggregation of procedures that have evolved and been liberally administered by courts to compel early and full disclosure at a pretrial stage of prospective litigation, and also during trials, of all the information that may enable the litigants to understand and thus settle the dispute; it also enables courts more effectively to narrow and then resolve the issues in dispute. Can, or should, legal discovery procedures be transplanted to arbitration proceedings?

Judge Pfaelzer: Certainly the discovery procedures that are used in the federal courts could be transplanted to the arbitration process. But under no circumstances do I believe that that would be desirable. There cannot have been anything more disastrous and damaging in terms of the cost of litigation than the expansion of the discovery procedures in the federal district court. I cannot begin to describe to you what lawyers have been able to do in this field with the sets of interrogatories, one, two, and three, and depositions that take place in between those interrogatories, and the production of thousands and thousands of documents which are then computerized. If people want to know what makes it cost so much to litigate in the federal courts, all they have to do is to look to the expansion of the discovery procedures. If transplanted into arbitration, the length of time that it will take you to dispose of the matter and the cost of it will escalate dramatically. That discovery is not even used at the trial. That is what the problem is. At least three-quarters of this very expensive lawyer time and paralegal time is not utilized at the trial. So you could have asked 30 interrogatories, or 3,000 interrogatories, and probably two of them will be used at the trial. I would urge that you should be very careful about expanding discovery. It has a wonderful appearance, but it is purely an appearance. The reality of discovery has proved, I think, that it can have a very negative effect.

Judge Lucas: I agree with Judge Pfaelzer. The judicial air is filled with concern about the abuse of discovery in lawsuits. Often we see the discovery process used for strategic purposes by the larger of the entities involved in the litigation in expending more money and adopting very onerous discovery procedures not necessarily to discover something, but to impress on the other side that the task they are taking on is going to be very

burdensome and expensive. And to infuse that in arbitration I think would be a substantial mistake.

Panel Member Bernstein: Not being a lawyer and not being terribly enamored of judicial-type procedures in the arbitration process, I am very reluctant to issue subpoenas. My first step would be, if I felt the information was necessary to the disposition of the matter before me and if I needed the information, to call the other side and say, "I think that you ought to produce it. I have the authority to issue a subpoena. I don't really want to issue a subpoena, but I want you to produce it"—and see whether it works. If it doesn't, then issue a subpoena.

Mr. James H. Webster: The federal law imposes an obligation to share information. If in a typical discharge case the employer refuses to explain to the union, upon clear request, why the person was fired, I think default is an appropriate order, for that evidence which was not produced forthrightly upon clear request in prearbitration stages should not be admitted in formal arbitration because the union has not known the grounds for discharge and is taken by surprise.

Mr. Philip Scheiding: In the 1980 steel contract, the parties put in the contract a provision whereby neither party would call upon witnesses of the other side in an arbitration proceeding. This, I think, would negate any attempt to introduce discovery in our proceedings. We did that for a good reason. In our union constitution, it is a disciplinary matter for a member to give testimony against a fellow member—and we have had a few embarrassing situations in the past in arbitration in that area.

Chairman Block: In evaluating evidence, a significant difference in the trial judge approach as contrasted to that of the arbitrator is observable in the application of "burden of proof" concepts. Judge Lucas, how important a criterion is burden of proof in contested proceedings?

Judge Lucas: It is with some trepidation that I discuss burden of proof after what Ted said this morning. Our use of it, he said, was "disingenuous," or something of that nature. Well, it is a very nice security blanket to have as a judge, and certainly in criminal cases, for example, it is an important criterion. The lawyers spend hours on hours cumulatively talking about "reasonable doubt." They build brick by brick this impossible wall of reasonable doubt for the prosecution to get over, and then the prosecutor hastens, before the mortar hardens, to take some of the bricks down and to tell them that "It is not beyond *all*

possible doubt, but *reasonable* doubt." Then they talk about what is "reasonable doubt." And don't forget "moral certainty." Everybody knows what "moral certainty" means! As I am indicating, it *is* an imprecise standard. I was amazed and interested in our panel discussions when Irv said, "Well, we generally don't go into burden of proof. Sometimes if we have a discharge involving moral turpitude, for example, then we require proof beyond a reasonable doubt. But other than that, we search around together and we find what we feel is the appropriate result and let it go at that." I don't mean to denigrate that. But we are looking at that marvelous "preponderance," and if that scale doesn't tip slightly, well, that is too bad. The burden is on the one who is preponderating that issue, and if he hasn't done it, thank God I don't have to think through that whole thing, because that is the end of it. And in terms of civil litigation in the federal courts at least, it is a much more significant criterion than in arbitration. For better or worse I don't want to say, but it is a much more significant criterion.

Judge Pfaelzer: I would like to mention an area in which this matter of burden of proof has become extremely interesting. That is the area of Title VII cases. The United States Supreme Court in *McDonnell Douglas* v. *Green* has articulated a standard way of approaching these cases. In that case they said that the plaintiff must come forth and prove that he belongs to a racial minority, that he applied and was qualified for a job for which the employer was seeking applicants, that despite his qualifications he was rejected, and that after his rejection the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. When that has been proved, the burden then shifts, and when it shifts, it shifts to the employer. The employer must then show that he had a legitimate, nondiscriminatory reason for the decision. And then it shifts back to the plaintiff to show that that reason was in fact prejudicial—that it was a mere pretext. The concept of burden of proof applied in that kind of case, I think, has a beneficial result. I am looking now at *Fernco* where the Supreme Court said, "A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if they are otherwise unexplained, are more likely than not to be based on the consideration of impermissible factors." And what they are saying is that "we don't want to be that rigid and mechanical and ritualistic about this, but we are just trying to

furnish litigants and judges with a pattern, a way of approaching these cases, which is logical." And so if you take burden of proof, and you don't become so terribly technical about it and you apply it in this way, I think it is beneficial.

Chairman Block: Are you saying then, too, that burden of proof is sufficiently flexible to provide an equitable remedy when that seems indicated?

Judge Pfaelzer: Yes. Sometimes burden of proof is an excuse, because burden of proof is very often just a conclusion in a case. If the fellow is going to lose, he didn't bear his burden of proof; if he is going to win, he did. I agree with what Ted said this morning: in lots of cases it is just a conclusion.

Panel Member Bernstein: To set it in a little broader framework, it seems to me that labor arbitration is kind of a schizoid process. In part, it is an aspect of collective bargaining as a terminal point in the grievance procedure in which it is utilized in order to resolve problems presumably of mutual interest and benefit to the parties who are involved in it. And then, secondly, it is in the great stream of Anglo-American jurisprudence arising out of the common law as a kind of trial procedure for making determinations in a quasi-judicial manner. And, of course, the two are mixed up, with varying degrees of emphasis in particular relationships. And here you are dealing with one of the traditional standards of the second variety.

My own preference is to treat labor arbitration primarily (but not exclusively) as an aspect of collective bargaining, so my mind just doesn't run in this kind of channel. For example, the question arises (and I think Judge Pfaelzer referred to it in a different context) very frequently in discipline cases in arbitration as to who goes first—which is, it has always seemed to me, a very silly argument; I really don't care. It seems to me that my job in a disciplinary matter is to determine the facts, and who presents Fact A first and who presents Fact B first is not a matter of very great concern to me. And the question of whether or not the employer, if in fact he goes first, discharged his burden of proof is just a question that I don't find very interesting or helpful. However, as Judge Lucas has indicated, when you get to the actual decision-making process and you are dealing with questions of credibility and there are particular problems involved—for example, in a discharge case where the allegation against the individual is that he or she had a very bad attendance record—it seems to me that the standard of proof in that type

of situation, while it ought to be sufficiently high, need not be terribly high. And I would suspect that the common law standards, which I assume were worked out over centuries, are fundamentally reasonable and that "preponderance of evidence," or whatever the phrase might be, in comparison with some other represents a distinction. So, in my illustration I would want to have a higher, perhaps the highest, standard of proof where a question of moral turpitude was involved, and I really would be falling back on the old standard. But I would do that on a very selective basis.

Panel Member Alleyne: If you do not apply any kind of burden-of-proof standard, what do you do when the evidence is of equal weight on both sides?

Panel Member Davis: That is the "irresolution" part.

Panel Member Bernstein: You have to make a decision. That is what Ted Jones said. That is hard to do, but they submitted the question to you and you have to say "yes" or "no." I have almost never had that experience, Reg. In puzzling over the thing and, in most cases, in simply writing a case up, in 19 out of 20 answers automatically come from the findings of fact for me. But you know there *are* close cases. I think I have one presently which involves a version of a theft in which I will have to apply the standard, and I don't really know the answer. My guess is that the guy did it, but I am not sure that I can reach that conclusion.

Chairman Block: I have tried to follow Bertrand Russell's formula. When the scales are evenly balanced or when confronted with a problem that seems insoluble, he says that he puts the problem into "subconscious incubation" and lets the work go on underground—and within a day or two it will surface with, as he puts is, "blinding clarity." That has been helpful to me in cases.

Mr. Ralph Seward: In my experience there can be few more dangerous or damaging concepts, in labor arbitration at least, than this business about the burden of proof. The most important thing in labor arbitration, in my opinion, is always what happens after the decision in the plant rather than what happens before the decision. The effect of the decision, in helping labor relations get along or in making them worse, is so important. The job of an arbitrator is always to convince the losing side that it has had a fair shake, whether that is the company or the union —that the procedure has been a fair and good procedure. When you turn down a case on the ground that "Yes, maybe they had

a lot to say, maybe they were right, but they didn't prove it for this or that technical reason," that is not very convincing. It just means to the union that they had a lousy representative or to the company that maybe it ought to switch lawyers. But it is not good for the proceeding. I hope at least that some of these legal procedures are not used because of their effect later on in convincing people that they just didn't get a really fair or full consideration of their real position.

Panel Member Bernstein: Going back to this "schizoid" comment I made earlier and leaving the judicial language of burden of proof, it seems to me that one of the basic purposes of collective bargaining is to impose a standard of rationality in conduct —the conduct of the employer, the conduct of the union, and the joint conduct of the union and the employer. So you have to justify actions and be able to defend actions. You have to have a wage structure which is not what the wage structure in the steel industry was prior to collective bargaining, but what it became after collective bargaining when you had some approximately rational classification of jobs and the establishment of differentials between various levels of skill, and so forth.

I am not a union representative, but if I were one, I would be very concerned about what evidently is the fact that unions lose more cases than they win in arbitration because, by bringing cases, they are enforcing a standard of rationality on the employer. By challenging his decision again and again, they are requiring him to be able to defend the action he took, particularly in disciplinary matters. And I think that this is a very essential ingredient of the whole bargaining process of which arbitrators become a part and a very important one. And you can use legal or judicial terminology to describe it, but you can also frame it in reference to collective bargaining in the way that I just tried to do in a rather cumbersome fashion.

Panel Member Byrne: I have to disagree with the assertion that collective bargaining is necessarily a *rational* process. Quite often it is just brute strength on one side or the other that will force language, or there can be a heck of a lot of confusion among people in what they are doing. So I think that to look upon arbitration as part of the collective bargaining process is a bad mistake. I think that what the arbitrator has to do is to look at that contract and all of the facts involved and make a judgment—and then let the parties worry about his decision in their next negotiation.

Chairman Block: There are rather divergent views on how a

trial judge or arbitrator should conduct a hearing. Some say that the judge or arbitrator should simply make the appropriate rulings on motions and announce the arrival of a lunch break and not much more. Others take the position that the judge's or arbitrator's function is to get all the relevant evidence necessary to reach a proper result, and if the parties don't do it, then the judge or arbitrator should do it. What is the arbitrator's proper role in conducting a hearing, active or passive?

Panel Member Bernstein: This is a very old argument. It was an argument between George Taylor and Wayne Morse as to how arbitrations ought to be conducted. In the overwhelming majority of cases within my experience, you can't really tell the difference between being a passive and an active arbitrator because it doesn't matter in that particular instance. But from time to time it becomes important, particularly in disciplinary matters, that I am a dispenser of justice and that in order to answer the question which is submitted to me, I have to know everything that is relevant in order to make a correct award. I find it very difficult to deal with union people being unwilling to testify when called by an employer, and employers being unwilling to call union people in the bargaining unit, so that sometimes crucial testimony is simply unavailable. Then how do you discharge your role in that situation? Fortunately, it does not happen often, but it happens from time to time. How do you discharge your role of making a proper and just award when you don't know the facts and the facts are crucial? It seems to me that this is a kind of litmus-paper test of the difference between the passive and the active arbitrator. In that situation, I would fall in the active group. I would call the guy on my own motion: "I want to know. You saw what happened. Nobody else here testified to what happened. You were there. What did you see? I have got to know." I have done this on rare occasions and I am sure that I made people mad by doing it. Jerry has already indicated that he doesn't care for this kind of conduct. But I don't see how you can answer the question submitted to you unless you do that sort of thing—and I feel that it is my duty to do it.

Chairman Block: How should the trier of facts respond at the hearing when relevant testimony has not been elicited from a witness on the stand?

Panel Member Davis: In the situation in which a question that you consider to be relevant was not asked, if I were the arbitrator I would ask the question.

Chairman Block: When a witness who can offer testimony relevant to the issue has not been called by either party, would you on your own motion call that witness? Judge Pfaelzer, are there courtroom situations where you might feel impelled to call a witness on your own motion?

Judge Pfaelzer: I think if I felt that way, I would go in my chambers and put a cold cloth on my head. I strongly disapprove of that. I think that that is weighting one side against the other, and I wouldn't do it.

Chairman Block: Judge Lucas, do you belong to the "cold cloth" school?

Judge Lucas: I belong to the Chancellor Hutchins school. I would lie down until the impulse goes away! As we discussed earlier, in federal court, at least, there has been massive discovery, and presumptively there are able counsel. They know fully what the facts of the case are. The fact that they don't happen to call a witness whom I maybe perceive to be somebody who might be able to testify, I often look upon as a godsend. We have so many cases anyway. They are not calling another witness, which demonstrates their facility and ability. And it certainly would not occur to me to run out and gather more witnesses if they, from their respective sides, have shown me what is sufficient.

Panel Member Alleyne: What I find fitting about the responses of Judge Pfaelzer and Judge Lucas is that we often hear from parties and from arbitrators that in arbitration proceedings we should not follow courtroom procedures. Arbitration is different; these are parties who must live with each other. And yet on the subject that we are discussing, I think that there are stronger reasons in the industrial relations setting in arbitration for the arbitrator's minding his or her own business and not calling as a witness an individual whom one party could have called and refused to call. There simply may be reasons that transcend the result in the immediate case that go to peaceful relations in that plant and which call for that witness to remain isolated and in anonymity.

Mr. H. Dawson Penniman: Would it not be proper in these circumstances for the arbitrator simply to draw the necessary inference that he does not get himself into this matter, but draws inferences from the failure of one party or the other to call a witness who appeared to be a material witness?

Panel Member Bernstein: That might be difficult. Suppose

you had a case involving an allegation of theft and the employer produced one individual who said that he saw this person steal something. The person said, "I didn't do it." There was another individual who was present who was a member of the bargaining unit, a Steelworkers unit, where he was forbidden under their constitution to testify. And the employer had a policy, which I believe Bethlehem used to have, in which they do not call anybody from the bargaining unit. How in the world do you decide that issue without the testimony of that individual? The question before the arbitrator is, "Did you have just cause in firing this guy?" Well, I take that seriously. In that kind of rare case, I think it is terribly important to get that person in who saw what happened—and the rules of the Steelworkers and your rules frustrate me.

Chairman Block: In Title VII cases there has been an increasing backlog in the district courts, and most of these cases cannot wait for three or four years to be heard. Judge Pfaelzer, is arbitration a feasible alternative for some of these Title VII cases?

Judge Pfaelzer: I have been a very strong advocate of using arbitration in Title VII cases. I think that it far outweighs the beneficial effect of a court proceeding. So in response to some of our panel conversations, the arbitration committee of our court explored the question of whether we could indeed institute a mandatory policy of sending Title VII cases to arbitration. Arbitration experiments have been conducted in two districts in the United States where they have actually compiled the results, analyzed them, and sent questionnaires to the lawyers who were involved in them, and so on. And the result of all of this is that in those two districts the arbitration experiment has not worked terribly well because everybody regards arbitration as being a tryout outside of trial. You may, as a matter of right, have a trial if you are not satisfied with the result of the arbitration—and in 53 percent of the cases they then asked for a trial. Now, I would think that those were not Title VII cases in which that experiment was conducted. They were business-transaction, commercial-type cases. I think, because of the level of feeling involved in a Title VII case, that if we had to permit them to have another trial or a trial as a matter of right, 75 to 80 percent of them would take it—and they would also use that arbitration proceeding just as an attempt to take discovery of what is going to happen at the actual trial. And so, on the present state of the record of experiments, I would say that it won't work, although I deplore the fact

that Title VII cases are tried in federal district courts and the individuals are made to wait for seven years, especially if they are still working for the same company, as happens all the time.

Panel Member Byrne: I do not think that in the normal collective bargaining context where lawyers are appointed by unions and employers that there is a viable method of handling Title VII or discrimination matters. If there is a discrimination problem, quite often the union that is involved can be as much a part of it as the employer may be. I don't think that that is a resource upon which we can depend. It occurs to me, however, that the backlog of Title VII cases is really a terrible indictment not of the federal courts, which are overburdened, but of our procedures which permit, as Judge Pfaelzer's earlier comments pointed out, this enormous discovery proceeding even in a case that is not certified as a class action, which is quite a different situation. Take the individual case that is not certified as a class. It occurs to me that it would be highly desirable to establish a panel of magistrates who would be able to make final and binding decisions in cases of that type, once the case is certified to such a magistrate by a federal judge. But as a quid pro quo in that area, I certainly would prohibit the type of discovery proceedings that are currently engaged in in that individual-action Title VII case. I think that that would go a long way toward relieving a burden on the courts and would be important because these things would be resolved at a time when the witnesses are available and the records are available, and it can do some good one way or another instead of being delayed for three or four years. That, of course, would require legislation, but it does open up a different area, it seems to me, for magistrates or arbitrators—whatever you wish to call them. And you could develop a group of people who would have expertise in this area. It might be a group similar to that which is represented in the National Academy of Arbitrators.

Panel Member Alleyne: It would be desirable to substitute for a portion of the large number of cases that are now being filed in the federal district court under Title VII a procedure calling for arbitration. But when I ask myself, "How does one create the procedural structure and format for bringing that about?" I have very grave difficulties. Judge Pfaelzer has raised an interesting point in noting that if the parties can simply use arbitration as a means for bringing about some kind of discovery before they really get into the big arena of the federal district court, that

is certainly not desirable. You can get around that by getting the parties to waive the right to file in a federal district court and to commit to accept the arbitrator's decision as final and binding. But I am not sure how many parties would mutually enter into an agreement to waive the right (and I think waiver would be required, certainly with *Gardner-Denver* on the books) to proceed in the federal district court following termination of proceedings in the arbitration forum.

Mr. Frederick H. Bullen: I entered into that kind of an agreement when I was an advocate in New York. We had a series of cases in which the individuals involved in the litigation agreed to waive their right to proceed in any other forum. They then had an expeditious disposition of cases that were before several different agencies and otherwise would have taken years to resolve. I think that the basic point is that the EEOC has acted irresponsibly with the tremendous backlog that they have in not pushing parties—at least in not encouraging the parties—to use a process which is well established and which can lead in the end, I think, to as much justice as going through all of the litigation, trying cases de novo in a federal district court.

Judge Pfaelzer: I agree. I think that would be highly desirable, if they would agree to it. It is a much more expeditious process.

(Second Day)

Chairman Block: Our first subject today is the decisional thinking of judges and arbitrators as triers of fact, some of the more troubling aspects. At what stage, if ever, do you form a tentative or a final conclusion?

Judge Pfaelzer: It is certainly true that a tentative conclusion is in your mind at the end of hearing the facts and studying the law. In the Ninth Circuit, generally speaking, it is frowned upon to permit the parties to prepare the findings of fact and conclusions of law and submit them to the judge. The reason is that the appellate court wants to know why you decided the case and not that you just looked into the blue eyes of one of the counsel and said, "I am holding for you. You submit the findings of fact and conclusions of law—and I will find them." That is frowned on. And I think that that is entirely proper because the appellate court and the parties are entitled to know what caused you to come to the decision. There are always those opinions that you begin to write and you get to the point where the tentative

conclusion will not work; the opinion will not write. So you must go back and rethink the tentative conclusion. That does not happen to you when the winning party hands you the findings of fact and the conclusions of law, and you make a few changes here and there. It only happens to you when you have gone through the entire process of thinking about what supports that initial, tentative conclusion. So even though it causes a great deal more work than we would like to engage in when we all have 400 civil cases to decide and deal with, I still think that that is a beneficial rule and created simply to face that point.

Chairman Block: Do the advocates think differently than does a trial judge or an arbitrator?

Panel Member Davis: After you have found or had the facts given to you by a union official in a discharge case, perhaps you make a tentative conclusion. But that has to be examined a little bit further before you make your final decision whether to tell the union, "I think that you have a good case because of equity grounds and based on the facts," or you tell him that "Your chances are not very good and *you* are going to have to decide whether you want to go anyway." In a second type of case, a contract-interpretation case, there are so many different types that there is no way that you can reach a tentative conclusion by simply listening to the grievant whom the union officer brings to you, or by reading the grievance that the grievant brings to you. You have to study the language of the contract, find out if there is any past practice that might affect it and what the relationships of the parties have been in the past on this issue, and finally go to arbitration texts and decisions and see if there are other decisions which bear on this point and may be helpful. It is after that process that we reach a tentative conclusion either not to go to arbitration or to proceed.

Panel Member Byrne: First of all, let's separate the advocate role from the role of the adviser in the situation. You first are the adviser as to what kind of a case you have. I think at that point you try to psych out a decision-maker as to what that decision-maker would be interested in—what from your knowledge, maybe without any research of the body of law or practice, would be important from the salient facts that have been presented to you. Not *all* the facts, because you haven't done that degree of preparation yet that is so important for presenting a case. And you really go into the decisional process of the trier of fact, whether that is to be the arbitrator or a judge, as to what

would appeal in the situation, one way or another, to reach a result. You tend to be, in that role, quite objective. At some point in time (and I don't know how quickly it occurs, for it depends on a lot of factors), all of a sudden when you get working on the case, you find that you have become the advocate. The objectivity that you had before, I find, moves into the background; you begin building and constructing the case, perhaps on the basis of some of that thinking work you have done before. But you go forward with it and lose a little bit of that objectivity you had when you were first trying to figure out the decision. I do not think that that process is much different in a court matter or an arbitration matter. The difference is that in a court matter you have a heck of a lot more time. You have the luxury of discovery, and you have the finality (if you are a defense counsel) of a pleading which you have to confront. But you know that in the course of that discovery process you can, a little more slowly, go about the advisory function first of all, subsequently turning it into the advocacy function.

Chairman Block: But in that decisional process there may be some cases where you advise a client: "Well, look. You have a loser here. Maybe you'd better settle it and forget it."

Panel Member Byrne: Of course.

Chairman Block: So there is a decisional process that might lead in that direction?

Panel Member Davis: That is the point. You come to a decision, but in the case of an advocate, I think you do it only after you have studied the case and the facts as opposed to an arbitrator's sometimes arriving at that tentative conclusion fairly early in the hearing. He hasn't necessarily heard all of the facts. I think an advocate has to do just the opposite. If he is going to advise his client properly, he has to get all of the facts and then make his judgment on those facts before he decides—and only then does he reach a tentative conclusion.

Chairman Block: A judge normally decides cases involving one-shot litigation, whereas arbitrators' decisions affect the continuing relationship between parties to a collective bargaining agreement. To what extent, if any, should these differences affect the decision-making process as between a courtroom decision and an arbitral decision?

Panel Member Davis: I have heard discussions to the effect that the arbitrator plays a different role, that he should be concerned with the relationships of the parties, and impliedly that

that enters into how he reaches a decision in particular cases. I don't think I agree with that approach. I believe that an arbitrator in this connection should act as a judge. He should find the facts as they appear to him; he should reach his conclusion—rationally, we hope—and then let the chips fall where they may. If the parties have made a mistake, and the arbitrator fears that his decision based on the approach that I advocate will have an adverse effect upon the relationship of the parties, let it be. I think the parties then should wrestle with that problem amongst themselves and perhaps at the next negotiation see if they can repair any damage that the arbitrator may have done. So I don't believe that an arbitrator should take any different position than he would otherwise take based on the record that is before him.

Panel Member Byrne: I certainly agree a hundred percent with my colleague. I think I would attack the kind of thinking that would say that the arbitrator is really part of the collective bargaining process. I really feel that he must be the judge. For that matter, I don't think that judges are so oblivious to the extended relationships of the parties. Judges are dealing with child support in matrimonial disputes; they are dealing in Title VII actions with situations where the people are continuing to work in an industry or in a plant; they are dealing with on-going business relationships. It may not be between X and Y, but it will be between X and A, B, and C. I don't think that there is that much difference. I think that we got off wrong with the *Trilogy*. It came down at a time when there was a jealousy in the courts to protect their preserve from these arbitrators. There was a desire for speed and finality, all of which one would agree with. But then we have this overblown language saying that "Labor arbitration is something quite different from anything else that was ever created." I don't think it is. It does require expertise and knowledge. But if Judge Pfaelzer today has a patent case and tomorrow a Title VII case, and the next day she has a plain old business-contract case and the next day an immigration problem, a criminal problem the next day, she has to become an expert in all these fields. She has to learn from what the lawyers can present to her, from what her clerks can dig up for her, and so forth. I just don't think that we can say that labor arbitration is something totally different.

Panel Member McCulloch: I agree. We are not looking for a mediator. We are looking for an arbitrator to make a decision. If we wanted a mediator, we would hire a mediator and sit down

and discuss the subject with the mediator. The parties have been through this thing for a long time. It started all the way back in the grievance procedure. It was discussed by many people. If the parties aren't able to reach an agreement by the time they get to arbitration, I would assume that the arbitrator's sole role is to make a decision. He ought to make it on the basis of the record. If he doesn't understand the issue, all he has to do is to question the parties. I haven't seen many of them bashful in that respect. But after that is done and you get to the influence on the two parties, I guess you would have one who is happy and one who is mad. But you are going to have that in every case, so that really shouldn't enter into it.

Judge Pfaelzer: Nobody comes to a decision in a case without considering what the consequences would be, particularly where the parties are in a continuing relationship with each other. I always take into consideration the impact of the decision on the continuing relationship of the parties. Perhaps what I am doing is just acknowledging what other people don't want to acknowledge, which is that that is a factor which influences your decision. To say that you were just asked to make a decision and that's all—let the chips fall where they may—is, I think, a little naive. I mean, with all due respect to my friends up here, you will, subconsciously I think, always take that into consideration. There will be more and more of the kind of cases that will test some of this—the kind that I had just yesterday on sexual harassment where the supervisor has been regularly harassing the women employees. Now, if you don't think about the continuing relationship of the parties there, you are wrong. If I said, "You just came to me for a decision and I'll give it to you," I think I would be naive.

Mr. Harry H. Klee: With respect to this issue of morale and the continuing constructive relationship of the parties, how do arbitrators know what effect their decision will have on those continuing relationships if they don't really know the factory, the plant? Before I became a labor attorney I was an industrial relations manager for about 15–16 years. It took me several years to sense in a plant or a division that I was working in what kind or quality of "morale" there existed, what would be a more constructive relationship between the parties. I have always preferred decisions where someone was happy and someone was miserable. I would rather you call it as you see it and don't worry about what the effect is going to be. We're

going to sit down in three years and we will resolve it at that time.

Panel Member Alleyne: I think the speaker who posed that last question is really in agreement with virtually all of the arbitrators whom I know. I think the answer is that generally we do not take into account what the morale in the shop might be because in 99 out of 100 cases we simply don't know what effect our decision will have on morale.

Mr. Chester C. Brisco: As I understand the panel's thinking, it is that the tentative decision is a crucial starting point in this decisional process. My question is: Where does the "tentative" decision come from? My feeling is that the decision-maker (and I am referring to my own experience) reaches the tentative decision by somehow appealing to his own hierarchy of values which he brings into the room with him as part of his equipment. I want to ask Judge Pfaelzer: In arriving at a decision, for example in a sexual-harassment case, do you recognize a choice of values that you have and do you try to identify those in the decision, or do you let them lie there and use judicial language without going back to your own values?

Judge Pfaelzer: I think the way you put that is very interesting and I will answer it directly. But I brought a quote here today which I wanted at some point to mention to you. Lillian Hellman once said that "Nobody outside of a baby carriage or a judge's chambers can believe in an unprejudiced point of view." I think that that is absolutely true.

Mr. Brisco: "Values" is a very dignified word.

Judge Pfaelzer: I understand that. I constantly tell juries that they have to be totally unbiased and leave all prejudices outside of the courtroom. I try to take that point of view myself. But I am not so blind that I think that each and every individual does not bring to the fact-finding situation a whole "value structure," as you put it, which influences the decision. I have seen that happen over and over again. No matter how you try, it happens. Perhaps that is why the choice of the arbitrator is so important, or why the choice of the judge (if you choose one) is so important. And I will tell you just how serious this has become. The lawyers around town have decided now that they want a mandatory peremptory challenge of the federal judges for that very reason. One of them said, for example: "Can't you put yourself in my position? I am a patent lawyer, and I know that there is a judge on that bench who has never in the 20 years he has been

on the bench ever held a patent valid." That is because of a predisposition to look at it that way. I think that we would be blind if we didn't all recognize the fact that we have this "value structure," as you put it.

Mr. Harvey F. Pings: We have heard a lot today about how you make decisions. I would like to raise the question of *when* you make decisions. I think those of us who have practiced advocacy have noticed in certain instances that the attention, shall we say, of the arbitrator wanders a little bit. Sometimes you think, "The case has been decided. Let's go to lunch." I realize that we are talking about tentative conclusions, reexamined and perhaps others tried out. Do arbitrators feel that they are successful in overcoming a first impression which, in fact, really was wrong?

Chairman Block: There is a great distinction between a "first impression" and a "tentative conclusion" as used in our report. The "tentative conclusion" comes at the conclusion of the case, when the record is complete. That does not mean that some impressions are not formed along the way, but the "tentative conclusion" that is used to test the evidence in the record is reached at the end of the case.

Mr. Pings: Does that not sometimes coincide with an impression halfway through the case?

Chairman Block: It may very well. After hearing hundreds of cases of a similar nature, some do fall into familiar patterns, and it is very likely (it happens frequently, I would say) that a first impression is reinforced by evidence that comes in later. But the "tentative conclusion" of which we speak is not arrived at until the conclusion of the case when all the evidence is in. And no arbitrators with whom I am familiar would reach that conclusion until the record was complete, even though one's mind may "wander" on occasion. Judge Pfaelzer, what has been your experience with briefs where credibility is at issue?

Judge Pfaelzer: It is not helpful in that kind of case. I would urge the arbitrators not to adopt the same techniques that are adopted by lawyers who go to court. Lawyers who go to court never ever want there to be a time when the last word has been spoken! They just can't stand it! And that's why you have final briefs—not because you need them.

Chairman Block: May we infer that in credibility cases, by the time that you have heard the testimony from both sides you have a pretty good idea which side you are going to believe?

Judge Pfaelzer: Yes, yes.

Mr. John Phillip Linn: I guess I am somewhat surprised by the reaction I have heard up to this point with respect to the ability to decide immediately an issue of credibility at the end of a hearing. I don't find it that easy at all. And I must admit that I seldom take my hand from my yellow pad during the course of a hearing, even when Ed Conklin is reporting the case. I think the issues of credibility generally cannot be decided on demeanor. I have taught evidence. I have tried to find out what it is that I am supposed to learn through demeanor, but I can't recognize it. I think most evidences of credibility are established on a factual basis in terms of what reasonably can be anticipated with these particular witnesses involved. So I simply wouldn't want to leave without saying that I think that there is another point, and that is that all arbitrators certainly can't decide issues of credibility at the end of the case. That does not mean that you need a brief to help you, but I just don't think that you can make the decision as rapidly as it appears.

Judge Pfaelzer: I think that this is the most important part of the conference: How do you go about judging this credibility matter? When you have a jury in front of you, you are telling a group of people who are totally unsophisticated (some of them are sophisticated in some fields, but not in fact-finding): "Now, *I* am not the fact-finder; *you* are, and at the end of the case when we are all through, I am going to tell you how you go about finding facts. I am going to give you a list of instructions about how you do that." One of the instructions that is given, and that is considered to be almost mandatory, is: "Consider each witness's intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider the witness's ability to observe the matter as to which he has testified and whether he impresses you as having an accurate recollection of these matters." It goes on to say: "Two or more persons witnessing an incident or transaction may see or hear it differently, and innocent misrecollection, like failure of recollection, is not an uncommon experience." And then I go on to explain to them how they weigh that evidence: Their only time as finders of fact to judge whether those witnesses are credible or not is when those witnesses are there. The same thing, I think, it true of me. I have an opportunity to see them; I try to make myself evaluate the document and the other testimony while the hearing is going on because, if I am later on going to take a cold piece of paper, after three or four weeks I have no possible way of saying that I am

giving a proper judgment. And so while I am taking notes I write in the margin, "He is lying," or "He has been impeached," or "That document clearly contradicts that former witness." I really am a strong believer that in a credibility case you must do that as the testimony is coming on.

Mr. Eli Rock: I have been sitting through these two days of discussion, and I think it needs to be emphasized, on this basic issue of the *Trilogy*, that arbitration is a vastly diverse phenomenon, and really to make sense in this kind of discussion, I think you would have to have had about six separate categories and discussed each one of them differently. Much of arbitration is like domestic relations; of course you try to anticipate the future result. But the problems are different for different issues, and in different plants, and in different unions. There are still an awful lot of cases where no lawyers appear and where even the local people who present the case do not have the expertise. I don't know what percentage of the arbitrators are still economists, or political scientists, or law professors, or law graduates as I am. But I think it would be a mistake to accept some of the statements that we have made here about the whole field.