CHAPTER 4

THE PROFESSIONAL RESPONSIBILITY OF THE ADVOCATES

I.

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I recall the title of a speech given by Will Davis at the University of California, circa 1947. It was "The Logic of Collective Bargaining." Mr. Davis' opening remark was, "There is no logic in collective bargaining." But he went on from there to develop the theme that illogical as it is, collective bargaining is a dynamic process, closely enmeshed with our ideals of democracy and self-discipline.

I am tempted to make the parallel assertion with respect to the topic of this session, "The Professional Responsibility of the Advocates," to say to you that the advocates in arbitration have no professional responsibilities that I have been able to discover, and sit down and let my fellow panelists fill up the rest of the program time. I hope to do a little better than that, however, and with your indulgence I will expand on some aspects of the theme. You will remember that the National Academy of Arbitrators was organized by founders who were motivated in substantial part by fear that the office and function of impartial arbitrator in labor-management disputes would be degraded by political and mercenary considerations. In 1947, when the Academy was founded, there were in existence a number of permanent umpire systems, which, although violatile with respect to the tenure of the incumbents, were stable with respect to the caliber of the relationships between the parties and the office of the arbitrator. The original umpires in steel, automobile, and the needle trades were men of national prominence and impeccable backgrounds. In those early years, however, there were whisperings of cronyism and incompetence with respect to some

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areas of the ad hoc arbitration practice and the Academy founders believed that it was advisable to organize the arbitrators on a professional level. While the American Arbitration Association was active in the promotion of arbitration on all fronts, it was not then, and is not now, primarily concerned with the *professionalization* of the arbitrator's function. Indeed, you may recall that in the earliest days of arbitration, the notion was widespread to the effect that persons of good will and prestige ought to serve as arbitrators as a pro bono function. By contrast, this Academy has focused the attention of others, and the efforts of its members, to the advancement of the proposition that the function of the arbitrator in labor-management disputes ought to be professionalized: that is, that it ought to be upgraded to a level of expertise based on training and experience, ought to be surrounded by a code of ethical practices, and ought to be self-policing.

Given that tradition of professionalism with respect to our own role as arbitrators, it is understandable that the Academy, at least this year's Program Committee, wanted to put on the table for consideration some questions concerning the professionalization of the role of the advocate in arbitration proceedings. The Chairman wrote to me that the topic had never before been dealt with at an Annual Meeting. In precise terminology, I think that his observation is correct, but the unprofessional behavior of some advocates in some circumstances has been adverted to on prior occasions. Recall the satirical rendition by our distinguished past President Lewis M. Gill at the 1962 Annual Meeting under the title of "Gamesmanship." Recall also the panel discussion at the 1965 Annual Meeting under the title "The Arbitration Hearing—Avoiding a Shambles." And at any shop talk gabfest among practicing arbitrators the conversation is likely to turn to exchanges of experiences dealing with unprofessional conduct by advocates.

Experience suggests that sooner or later every arbitrator will be confronted by conduct on the part of an advocate that would be regarded as unprofessional by the most generous standards. More broadly, I suppose we would all agree that, by and large, there is room for improvement in the manner and form of presenting disputes to arbitrators. Not being satisfied to speak about advocates' misconduct solely from my own experience, however, I wrote a letter of inquiry to about fifty members of the Academy, selected because I personally know each, and respect

his/her judgment. Let me here acknowledge their willingness to respond. I will paraphrase some of the responses to illustrate some of the generalities in which I may indulge, but I make no pretense to having made a "survey." What I say here today is a distillation of my own thoughts, tempered by the responses of others with whom I corresponded, or with whom on one occasion in Detroit I engaged in a group colloquy.

At the risk of belaboring the obvious, let me take a little time to define some terms. By "responsibility" we mean, or at least I mean, answerability . . . the fulfillment of a duty to account for one's actions or omissions. To be "responsible" according to Webster's New International is to be

> able to respond or answer for one's conduct and obligations; trustworthy, financially or otherwise.

Careful usage of the word, however, requires recognition of the context in which it is used. "Financial responsibility" is one thing, moral or ethical responsibility may be quite another, and "professional responsibility" has a different set of connotations. Any usage of the word "responsibility" implies, if it does not command, reference to the expectations of others regarding the behavior of the person being judged. For example, upon being asked, John Doe responds that Richard Roe is an *irresponsible* fellow, lazy, inattentive, prone to criticize others without being sure of his facts, and so forth. On the other hand, Mr. Charles Coe, upon being asked responds that the selfsame Richard Roe is an admirable fellow, an upstanding gentleman, well regarded by his neighbors as a *responsible* citizen. Reconciliation of this seeming contradiction is found in the backgrounds of the responders. Richard Roe, it appears, was a former employer of John Doe, and Doe, it seems, is simply not cut out to be a factory hand. He failed on several occasions to meet what we may assume were the perfectly valid expectations of Richard Roe as an employer of factory labor. The other responder, Charles Coe, is the pastor of a church which John Doe regularly attends, and is aware that following his discharge, Mr. Doe has honestly and successfully operated a florist shop and has a good credit rating in the community. The point I wish to make is whether or not we will characterize a person as *responsible* may well turn on what we expect from him or her.

The term "professional responsibility" can encompass various sets of expectations: those of the clients or patients of the practi-

tioner, those of his or her fellow practitioners, and those of the professional organization or licensing agency which regulates or controls the profession.

With respect to the legal profession, one with which most of this audience has more than slight acquaintance, the licensed attorney is answerable in a variety of forums for his actions or omissions with respect to a variety of expectations. He may be called upon to account for his behavior towards his client, towards another attorney, or towards a court or administrative tribunal. The standards by which he will be judged are usually well defined by codes of ethics and practices, statutes, court rules, and administrative regulations. The licensed attorney is susceptible to disciplinary action in a variety of forms, ranging from informal admonition to suspension to loss of his or her license to practice.

Similar sanctions may be brought to bear against members of the other recognized professions, and against a wide variety of tradespeople and service persons whose occupations are licensed by federal, state, or local governments.

What do we see when we take a look at those who function as advocates for parties in labor arbitration trials? Some of them are attorneys, others are not. Some are full-time employees of their principals, others are hired to try a particular case. None of them are obliged to hold certificates of proficiency, licenses, or other formal indicia of expertise in the handling of grievance disputes or contract administration problems. The style and manner of carrying out the duties of advocacy varies as widely as their personalities, and indeed their performance is in many instances only a manifestation of their personalities, be that for better or for worse. There does not exist any organization which parallels the National Academy of Arbitrators with respect to the professionalization of the role of the advocate in arbitration.

Whether the scene as viewed is good or bad deserves to be debated, not only by the National Academy of Arbitrators and its members, but also by others who are interested in the protection and enhancement of the arbitration process in the labor-management theatre. My colleagues on this panel may be willing to comment on the notion that there ought to be some means for improving the performance of advocates in arbitration and some means for inducing conformity with higher standards of performance and conduct. It is hoped that your participation in questions and exchanges after we have completed our dis-

courses will generate some constructive expressions on the subject. For surely I have no panacea of my own to offer.

There is a feeling among experienced arbitrators that some advocates are not "responsible," meaning that they do not accept and abide by the fundamental precepts of voluntary labor arbitration as we arbitrators understand them. Let me pass along to you a few of the critical comments which I received in response to the inquiry I mentioned previously.

> There is a firm of attorneys here, with whom I will not take a case. . . . The reason is their presentations make everyone fair game. They attack the arbitrator, the opposing counsel or representative and the witnesses. They set traps of a sort which would discredit the most conniving criminal lawyer. . . . No arbitrator needs to put up with that nonsense.

Another correspondent responded in part as follows,

> Seven experienced labor attorneys participated in the trial before me, some as witnesses, others as advocates. The technical legalese got so bad that the court reporters would work only half a day before being relieved, and after a couple of days of that stuff, I admonished them substantially in these words . . . "you folks may have the responsibilities to administer the labor relations in the United States, but you are setting the worst example I have ever seen. You both hired me knowing I was not an attorney, and then proceeded to play court. I refuse to go on unless your conduct changes . . . and if you so pledge, I want it on the record that thus far the hearing was fairly conducted." They acceded and things went smoothly after that, although it was impossible for them to depart from a courtroom posture.

Another member of this Academy, who has vast experience as a factory worker, as a local and international union representative who screened cases before they were presented to a permanent arbitrator, as a federal mediator, as a university instructor and as a corporate director of labor relations before becoming an arbitrator, wrote me describing a drawn-out clash with an experienced cantankerous management attorney over the attorney's tactics at the trial. The scenario was the familiar one of counsel seeking to dominate the proceedings regardless of the perceivable negative impact on the arbitrator who simply wanted to get to the heart of the dispute, and regardless of the impact on all the persons who were in attendance at the hearing. I won't go into the details, but will simply note that while the arbitrator was perfectly capable of taking care of himself in the confrontation that occurred, the impact of counsel's behavior on

the grievant and on the workers and their representatives who were present or who became aware of it cost the company management dearly in terms of respect and confidence. I recall one of my own hearings at a steel company which involved some difficult issues of incentive applications to maintenance work. Both the company and the union were represented by aggressive young attorneys. The hearing room was crowded with perhaps thirty employees and supervisors. The attorneys played courtroom to such an extent that I stopped the hearing and pointed out that whatever resulted from the hearing would have to be understood and lived up to by the employees and supervisors who were observing it, and that the observers had by then lost all perception of what was going on. I deliberately embarrassed both attorneys in front of their principals. Ordinarily that is not a tactic to be resorted to . . . particularly in ad hoc practice by new arbitrators . . . but each situation has to be dealt with as it arises.

Some advocates (lawyers and nonlawyers) seem to forget the simple truth that in almost all cases the persons directly involved, or some of them, have to continue to live together at the work place with whatever consequence follows the trial, and that winning a dispute by means that are neither understood nor accepted by those people will not advance the long-term interests of any participant. In final analysis, the labor arbitration system, as we know it, rests on a bedrock of voluntarism and acceptance on the part of the parties, meaning employees and their representatives and employers and their representatives. Loss of that confidence will inevitably transform the process into legislated labor courts, exercising the power of the state to coerce resolutions of disputes. Hypertechnical or overlegalistic tactics by advocates will surely hasten that transformation.

My own experience, however, and the replies I received from other arbitrators indicate another dimension to the problem of professional responsibilities of advocates. Overt misbehavior of the sort indicated by the quoted responses seldom occurs. The other manifestation of irresponsibility is ineptitude and oversight in the presentation of cases, that is, in the presentation of the evidence and arguments on which the arbitrator's decision must be based.

Almost all of the replies to my inquiries indicated that the respondents had one or two memorable confrontations over spans of twenty to thirty years of arbitration, but many told me

that over the years, they continually experienced difficulties in administering hearings as the consequence of inept presentation on the part of advocates, occasionally attorney advocates, but more often nonattorneys.

It is distressing to me and to others who serve as arbitrators to see advocates who, by frequent requests for recesses, indicate that they have not conferred with their witnesses in advance of trial; who are reluctant to spread their cards face up on the table; and who exacerbate what I call the "joys of the trial." Especially annoying is the ploy of the defense counsel who, after hearing the opening statement of the moving party, says he will "reserve his opening statement." In some cases, of course, the line of defense is perfectly clear from the records of prior grievance processing. But that is not always true, and when the arbitrator is working without a transcript and is taking minutes of the testimony, it is simply absurd for counsel to fail to indicate at the outset, and in carefully prepared utterances, exactly what points of fact are agreed to, or are deemed significant and not agreed to, or are really not significant with respect to his theory of the case. To fail to do so is to invite the arbitrator to err in his reduction of the evidence to minutes.

On a number of occasions I have been distressed by the failure of advocates to present corroborating evidence with respect to the expressions of employees regarding their future intentions. I have in mind cases in which an advocate seeks to modify the discharge of an employee for absenteeism attributed to alcoholism on claims that the employee has refrained from drinking since his discharge, has joined some organization like Alcoholics Anonymous, and is sure that he will be steady in his future attendance. All too often no corroborating witness is produced, and the union rests wholly on the employee's own word. (The problem in that kind of a case is to differentiate between those which seem to give promise of success, and those which do not, a difference which seldom can be evaluated without corroborating evidence.) Another manifestation of poor preparation and lack of professional competence is an attempt by recently retained counsel to substantially alter the complexion of the dispute from that which it carried in the previous steps of the grievance procedure. I have in mind the situation where counsel was hired only after the case was appealed to arbitration and believes, with some reason, that some different theory ought to be relied on by his client. Circumstances of that sort ought to be

dealt with at times other than at the opening of the hearing: by additional bilateral dealings between the parties, or at least by pretrial conferences. Otherwise, the consequences are adjournments, reschedulings, and the like. The grievance arbitration system, especially in the ad hoc practice, is ill-equipped to accommodate that kind of last minute approach by counsel. My perception is that all too often attorneys take arbitration trials in stride without any, or much, attempt to differentiate them from administrative tribunal hearings on trials before judges and juries.

But it would be a mistake, I believe, to debate the need for professional responsibility on the part of advocates only from the standpoint of arbitrators. I recall vividly an admonition given to me by George Taylor many years ago. Responding to my complaint regarding the inadequacy of presentations by representatives of a company and union, he said,

> Remember, Gabe, that it is not their mission in life to make your life easy.

Recalling that admonition refreshes me, when from time to time I feel the strain of coping with the inefficiencies of trial procedures as a means of establishing facts.

To what extent should arbitrators concern themselves, individually or as a group, with the professional responsibilities of advocates? The history of the Code of Ethics for labor arbitrators shows ambivalence with respect to that concern. The original Code, published in 1951 under the aegis of the National Academy, the Federal Mediation and Conciliation Service and the American Arbitration Association contained as Part III, eleven paragraphs, under the title "Conduct and Behavior of the Parties."[1] Some of the prescriptions therein set forth are:

> Parties should approach arbitration in a spirit of cooperation with the arbitrator and should seek to aid him in the performance of his duties.
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> Parties should not unduly delay the fixing of a date for the hearing nor the completion of the hearing. They should be prepared to proceed expeditiously with their evidence and their witnesses, have their exhibits ready and cooperate with the arbitrator in furnishing whatever additional information he may deem necessary.

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[1]The text may be found in 15 LA 961, and in The Profession of Labor Arbitration, Selected Papers From the First Seven Annual Meetings, National Academy of Arbitrators, 1948–1954, ed. Jean T. McKelvey (Washington: BNA Books, 1957), 159–163.

> Parties having agreed to arbitration should accept and abide by the award.

For reasons which I do not now know, and do not remember having been informed, the Code of Ethics now in effect, revised and published in 1974, makes no direct reference to the responsibilities of the parties or their advocates. The preface to the new code states:

> It has seemed advisable to eliminate admonitions to the parties except as they appear incidentally in connection with matters primarily involving responsibilities of arbitrators.[2]

I submit for your consideration the notion that inasmuch as none of the parties who promulgated the Code (the Academy, FMCS, and AAA) had any means of enforcing standards of behavior and responsibility upon the parties or their advocates, it was indeed advisable to refrain from diluting the revised Code by inclusion of those admonitions. While the Academy has always been dedicated to the preservation and enhancement of the professionalism of labor arbitrators, and has and will continue to impose sanctions upon its members who are guilty of breaches of the Code of Ethics, it seems to me very unlikely that the Academy will find a means of policing by sanctions the professional responsibilities of advocates.

I recall that many years ago, say twenty or more, our distinguished past president Russell Smith put forth the notion that perhaps the Academy should broaden its statements of purpose. The catch phrase which focused the point was whether instead of being a National Academy of *Arbitrators,* we should become the National Academy of *Arbitration.* About the same time, I recall, I wrote a memorandum and made statements at meetings in support of the idea that the Academy should sponsor an affiliate group, with a name such as "Friends of the National Academy," membership in which would be limited to advocates and representatives of employers and collective bargaining agents who were committed to the ideas and ideals of professionalism and professional responsibility in the representation of their principals in labor arbitration disputes. (While the Academy seems ill-equipped to assume responsibility for the policing of unprofessional conduct by advocates, it may be in good posi-

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[2]*Code of Professional Responsibility for Arbitrators of Labor-Management Disputes,* in Arbitration—1975, Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), 217.

tion to identify by publicized commendations those advocates who demonstrate the best professional conduct. One or two annual commendations would constitute pleasant additions to Academy annual or local meetings.)

Well, as is evident, nothing came of it insofar as the Academy or the appointing agencies are concerned. As far as I know no organization exists which has as an announced goal the improvement and enforcement of standards of professional responsibility for advocates in labor arbitration. There does not exist anywhere, to my knowledge, a labor arbitration bar association or entity with the same connotations.

I do not mean to say or imply that irresponsibility manifested by advocates appearing for employees or employers is beyond remedy, although the means for obtaining remedy and the efficacy of remedy may be unsatisfactory. Advocates who are attorneys-at-law are answerable to their clients for errors and omissions, and are answerable to their peers for violations of the codes of ethics which apply to them as attorneys. Most of us who are experienced in labor contract administration and arbitration, however, hold firm to the belief that being a licensed attorney, even a licensed attorney well versed in labor law, is only a good beginning towards becoming a skilled contract administrator and arbitration advocate. I have previously quoted some comments by members of this Academy concerning the tactics of some attorneys in arbitration hearings. Let me add at this point one intense experience of my own.

The issue to be decided by me as arbitrator was whether cause existed for the disqualification of the grievant from the job of mechanical maintenance to laborer in a canning factory. The employer's evidence was presented first. Both the company and the union were represented by attorneys. A supervisor testified that one morning, upon experiencing difficulty dealing with a minor machinery malfunction, the grievant had demonstrated loss of coordination and comprehension to a degree that led the supervisor to believe that grievant could not be trusted to tend machinery alone, as he was required to do on some shifts.

Grievant was called to testify. He admitted that on the specified occasion he had difficulty, and that he became "upset" at the time. He denied however that he completely lost his composure. On cross-examination the company attorney put this question to the grievant,

> Didn't you admit to the union's attorney that you broke down and cried that morning?

At that point I leaned forward and asked where counsel was heading with an inquiry as to what was said between grievant and the attorney who was representing him. I think my voice was a little harsh at that point. What really caused the confrontation was company's counsel's reply, substantially in these words,

> Well, I was seated in the next booth in the coffee shop at breakfast this morning, and I overheard grievant discussing the case with the union's attorney, and I heard him tell the attorney that he had broken down and cried at that time.

I was furious, of course. It seemed to me then, as it seems to me now, that for counsel on one side to eavesdrop on counsel for the other side, in a labor contract administration frame of reference was base misconduct. I choose to believe that there still exists in some corners of the labor-management panorama a mutual notion that how the game is played is more important in the long run than the outcome of any single contest.

As arbitrators we have no powers to deal directly with advocates who transgress even the minimum requirements of honesty and candor, to say nothing of the higher level attributes which are necessary to preserve the confidence of workers and employers in the integrity of the arbitration system. The only apparent force which sets limits on the behavior of advocates is the possibility that if they displease the arbitrator by unbecoming conduct, they are weakening their position with respect to the outcome of the case. And I do not deny that on the whole scene, such concern, combined with the normal motivation of persons to maintain the respect of their peers, has been and will continue to be sufficient to preserve the high caliber of labor arbitration in the United States.

But there exists a cadre of insensitive ones, attorneys and nonattorneys, to whom winning is the be-all and end-all in labor arbitration as in all else. Given the structure of the system as it exists today, with the arbitrators serving at the whim, will, and caprice of the parties, I see no likelihood of any positive developments for the better. While arbitrators by and large are still being selected on the basis of their ability to understand and adjudge, success as an advocate, by and large, turns on the box scores of wins and losses. In the labor relations family in which we all

coexist, there is need for a higher set of values for those who speak out for the disputants.

II.

GEORGE H. COHEN*

Without doubt, I am in an unenviable position today. It reduces to this: over a twenty-five-year career, on countless occasions I have had the good fortune to be invited to address distinguished professional groups whose interests have spanned the entire spectrum of labor-management relations. The assigned task in each instance was at once simple yet profound—assess and evaluate from a union lawyer's perspective some emerging and potentially critically important legal issue. The unstated premise was that the speaker would provide some brilliant insights into a virgin territory, thereby assuring that the audience would marvel at the demonstration of his intellectual prowess and, as well, his mastery of what we love to call the practical realities of industrial relations. On each such occasion my management counterpart on the panel has sat poised with pen in hand, hoping against hope, that I would utter some pearl of wisdom—however minuscule—so that he, in turn, could author a memorandum to all his corporate clients immediately upon return to the office. That memorandum, carefully couched in language analogous to an F.B.I. "All Points Bulletin," would alert those corporations that union labor lawyers throughout the land were about to launch a diabolical scheme to persuade some unsuspecting judge, NLRB member, or arbitrator that working men and women were entitled to some hitherto unrecognized right.

But, alas, the subject at hand—as I shall now demonstrate—simply does *not* lend itself to any such exciting treatment.

My initial surge of enthusiasm in response to the Academy's invitation to address its plenary session was tempered considerably upon receiving the Chair's follow-up letter describing the subject matter of this particular session—what was expected of Cohen and Zazas was the disclosure of our own private laundry list of the "sharp practices" that advocates unleash upon each other in arbitration. Apparently, it was contemplated that my list

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