

CHAPTER 7

THE ARBITRATOR'S IMMUNITY FROM SUIT AND SUBPOENA

DENNIS R. NOLAN*
ROGER I. ABRAMS**

Introduction

As I prepared for class one quiet afternoon in April of 1985, a young man stopped at my office door, asked if I was Professor Nolan and, on being assured that I was, handed me a subpoena commanding me to testify the next month in a suit to vacate one of my arbitration awards. My first reaction was surprise, followed quickly by concern over what I might have done so wrong as to prompt a suit, and then by outrage at what I perceived to be an invasion of my prerogatives as an arbitrator. My disposition is fundamentally optimistic, however, so I soon righted myself and decided to make the best of a bad situation. I thus prepared to resist the subpoena and simultaneously began work on the paper which, with the help of my able colleague Roger Abrams, I am able to present to you today.

As recipients of bad news are inclined to blame the messenger, so the losing party in an arbitration will blame the arbitrator. Some take their anger so far as to sue the arbitrator for breach of contract or for any of a number of torts. Others, seeking to overturn the adverse award or to recover damages from the other party, may try to compel the arbitrator to testify in a deposition or at trial. Even if the plaintiff does not seek the arbitrator's testimony, the defendant may. Suits and subpoenas

*Member, National Academy of Arbitrators; Professor of Law, University of South Carolina, Columbia, South Carolina.

**Member, National Academy of Arbitrators; Dean, Nova Law Center, Fort Lauderdale, Florida.

The authors thank Elizabeth Mulliken, candidate for the J.D. degree, University of South Carolina School of Law, Class of 1988, for her assistance in the preparation of this paper.

against arbitrators threaten to undermine the most successful form of alternative dispute resolution. Damages or compelled testimony, or their possibility, or even the burden of resisting them, may deter some people from serving as arbitrators and may cause others to avoid potentially controversial rulings.

Over the last century, American courts have responded to actions brought against arbitrators by developing a doctrine of arbitral immunity. With very few exceptions, that doctrine protects arbitrators both from personal liability for their actions¹ and from compelled involvement in postaward legal actions. The doctrine is not absolute, however. There are some recognized exceptions and some aberrant cases. Surprisingly little has been written about arbitral immunity; thus its proper scope and limitations, and the theory underlying it, remain unexamined.

In this paper we propose to do three things: First, explore the origins and theory of arbitral immunity; second, describe the present scope and limitations of the doctrine; and third, evaluate possible responses to suits and subpoenas. Our primary conclusions are that the courts can best encourage private systems of dispute settlement by severely limiting the participation of arbitrators in postaward legal actions; that the best way for an arbitrator to avoid personal liability is to render an award—*any* award; and that the best defense for arbitrators subjected to suit or subpoena is an aggressive response, not legislative action.

Origin and Theory of Arbitral Immunity

Arbitral immunity stems from judicial immunity. Judicial immunity itself dates back at least to two early seventeenth century English cases, *Floyd v. Barker*² and *The Marshalsea*,³ in which Lord Coke announced the rule of judicial immunity, stated its purposes, and enumerated its limitations. In brief, the rule is that judges of courts of record are not liable for damages; the purposes are finality of judicial decisions and preservation of judicial independence; and the limitations are that immunity applies only to the judge's "judicial acts" in cases over which he had some jurisdiction. In other words, a judge is not immune

¹Rubin, *Arbitrators' Immunity from Damage Claims*, in *Arbitration 1986: Current and Expanding Roles*, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Walter J. Gershenfeld (Washington: BNA Books, 1987), 19.

²77 Eng. Rep. 1305 (1607).

³77 Eng. Rep. 1027 (1612).

from the consequences of administrative, legislative, or personal acts, nor from the consequences of any acts performed in the complete absence of jurisdiction.

American courts adopted and expanded the English understanding of judicial immunity.⁴ The United States Supreme Court expressed the doctrine of judicial immunity most forcefully in the 1871 case of *Bradley v. Fisher*:

[J]udges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, or are alleged to have been done maliciously or corruptly.⁵

The Supreme Court has adhered strictly to this rule ever since,⁶ even to the point of taking an extraordinarily narrow view of the "judicial act" limitation on immunity: an act is judicial, said the Court in *Stump v. Sparkman*⁷ in 1978, if it is one "normally performed by a judge" and if the parties "dealt with the judge in his judicial capacity."⁸ The only cases in which it has allowed actions against judges for their judicial acts are unlikely to affect arbitrators, since they involve injunctive relief and recovery of attorney's fees in Section 1983⁹ actions for violation of constitutional rights under color of state law.¹⁰ The Court has also indicated that a judge might be required to testify in certain instances.¹¹

If judicial immunity existed simply to protect those individuals holding judicial office, there would be no reason to extend it to others. That is not its object, however. Judicial immunity exists for a broader purpose—that is, to protect litigants and the litigation process by ensuring judicial independence and decisional finality; it is a means to an end, not an end in itself. That purpose requires that all who perform judgeline functions be protected from liability even if they are not true

⁴See generally, Block, *Stump v. Sparkman and the History of Judicial Immunity*, 1980 Duke L.J. 879, and Feinman and Cohen, *Suing Judges: History and Theory*, 31 S.C.L. Rev. 201 (1980).

⁵80 U.S. (13 Wall.) 335, 351 (1871).

⁶E.g., *Pierson v. Ray*, 386 U.S. 547 (1967); *Stump v. Sparkman*, 435 U.S. 349 (1978).

⁷*Supra* note 6.

⁸*Id.* at 362. See generally, *What Constitutes a Judicial Act for Purposes of Judicial Immunity?* 53 Fordham L. Rev. 1503 (1985).

⁹42 U.S.C. §1983 (1982).

¹⁰*Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 735 (1984) (involving judges' administrative acts but suggesting in dicta that the same remedies would be available even in the case of judicial acts); *Pulliam v. Allen*, 466 U.S. 522 (1984).

¹¹*Dennis v. Sparks*, 449 U.S. 24, 30-31 (1980).

judges. Several sorts of persons, in both the public and private spheres, "adjudicate" disputes and they, like judges, must be free from fear of liability or harassment in order to exercise their responsibilities with complete impartiality.

This much is obvious. Accordingly, courts have extended a quasi-judicial immunity to the quasi-judicial acts of those serving as neutrals between disputing parties. The closer an individual's role and tasks are to those of a judge, the easier is the extension of immunity. A juror, for example, fills a role closely analogous to that of a judge. Therefore, jurors are absolutely immune from liability, in the words of an English treatise, "lest they should be biased with the fear of being harassed by a vicious suit for acting according to their consciences."¹² Referees and masters perform judicial tasks and possess a similar immunity.¹³ Hearing examiners and administrative law judges, although employees of the executive branch, are also absolutely immune, "not because of their particular location within the Government but because of the special nature of their responsibilities."¹⁴

The key factor in each of these cases is what the U.S. Supreme Court has termed the "functional comparability" between the decision maker and a judge,¹⁵ and functional comparability does not stop at the end of a government paycheck. Many disputes are resolved by private individuals who act as judges but without that title. Their impartiality would suffer if they had to fear a suit from a disgruntled party, and the disputants themselves would suffer most of all from any lessening of impartiality. Understandably, then, courts have not hesitated to grant immunity to privately selected neutrals such as engineers and architects in construction disputes,¹⁶ a surveyor whose appraisal was binding on parties to a contract,¹⁷ bipartite labor grievance

¹² Hawkins, *Pleas of the Crown* 349 (6th ed. 1787), quoted in *Yaselli v. Goff*, 12 F.2d 396, 403 (2d Cir. 1926), *aff'd*, 275 U.S. 503 (1927). See also *Imbler v. Pachtman*, 424 U.S. 409, 423 n.20 (1976).

¹³ McCormack and Kirkpatrick, *Immunities of State Officers Under Section 1983*, 8 Rut.-Cam. L.J. 65, 78-79 (1976); accord *Fath v. Koeppel*, 72 Wis. 289, 39 N.W. 539 (1888) (city fish inspector's duties are judicial).

¹⁴ *Butz v. Economou*, 438 U.S. 478, 511 (1978).

¹⁵ *Id.*, at 512 (1978); *Imbler v. Pachtman*, *supra* note 12.

¹⁶ E.g., *Lundgren v. Freeman*, 307 F.2d 104 (9th Cir. 1962); *Wilder v. Crook*, 250 Ala. 424, 34 So.2d 832 (1948); *Craviolini v. Scholer & Fuller Assoc. Architects*, 89 Ariz. 24, 357 P.2d 611 (1960); *Meer Corp. v. Farmella Trading Corp.*, 14 Misc.2d 242, 178 N.Y.S.2d 784 (1958).

¹⁷ *Hutchins v. Merrill*, 109 Me. 313, 84 A. 412 (1912).

committees,¹⁸ Railway Labor Act boards of adjustment,¹⁹ and stock exchange arbitrators.²⁰ Explicitly or implicitly, the extension of immunity rests in each case upon some judgment of functional comparability between the decision maker and a judge. This is especially true of arbitrators, described by the Supreme Court over a century ago as "judges chosen by the parties to decide the matters submitted to them."²¹

One finds in arbitral immunity cases references to two policy strands, one common to judges and arbitrators (finality and independence), the other peculiar to arbitrators (which we term for lack of a better term "recruitment"). Typical of the first strand is *Fong v. American Airlines*: "[T]he integrity of the arbitral process is best preserved by recognizing the arbitrators as independent decision makers who have no obligation to defend themselves in a reviewing court."²² Typical of the second strand is *Tamari v. Conrad*: "[I]ndividuals . . . cannot be expected to volunteer to arbitrate disputes if they can be caught up in the struggle between the litigants and saddled with the burdens of defending a lawsuit."²³

For one or another or both of these policy reasons, American courts have for more than a century afforded arbitrators a quasi-judicial immunity. Most frequently cited as the initial case on point is the 1880 Iowa decision of *Jones v. Brown*,²⁴ in which the

¹⁸*Larry v. Penn Truck Aids*, 567 F. Supp. 1410, 114 LRRM 3623 (E.D. Pa. 1983) and 94 F.R.D. 708, 112 LRRM 2949 (E.D. Pa. 1982); *Goodwin v. Teamsters Local 150*, 113 LRRM 3029 (E.D. Cal. 1982); *Shropshire v. Teamsters Local 957*, 102 LRRM 2751 (S.D. Ohio 1979); *DeVries v. Interstate Motor Freight Sys.*, 91 LRRM 2764 (N.D. Ohio 1976). But see *Warner v. McLean Trucking Co.*, 574 F. Supp. 291, 115 LRRM 2221 (S.D. Ohio 1983) (bipartite committee might be liable for "legislative" actions, breach of the duty of fair representation, or actions outside its jurisdiction or in bad faith).

¹⁹E.g., *Fong v. American Airlines*, 431 F. Supp. 1340 (N.D. Cal. 1977); *Merchants Despatch Transp. Corp. v. System Fed'n No. One, Ry. Employees Dep't*, 444 F. Supp. 75, 97 LRRM 2644 (N.D. Ill. 1977).

²⁰*Corey v. New York Stock Exch.*, 691 F.2d 1205 (6th Cir. 1982); *Melady v. South St. Paul Live Stock Exch.*, 142 Minn. 194, 171 N.W. 806 (1919).

²¹*Burchell v. Marsh*, 58 U.S. 344, 349 (1955).

²²*Supra* note 19 at 1343-44; accord *Hoosac Tunnel, Dock & Elevator Co. v. O'Brien*, 137 Mass. 424, 426 (1884) (There is as much reason "for protecting [the arbitrator's] impartiality, independence and freedom from undue influences, as in the case of a judge or juror. The same considerations of public policy apply, and . . . the same immunity extends to him."); *Goodwin v. Teamsters Local 150*, *supra* note 18; *Merchants Despatch Transp. Corp. v. System Fed'n No. One, Ry. Employees Dep't*, *supra* note 19.

²³552 F.2d 778, 781 (7th Cir. 1977); accord *Skidmore v. Consolidated Rail Corp.*, 619 F.2d 157, 159, 105 LRRM 2363 (2d Cir. 1980); *Locomotive Eng'rs v. New York Dock R.R.*, 94 ALC ¶13,704 (E.D.N.Y. 1981) ("Recruitment of qualified arbitrators would be severely hindered if [they] were subject to lawsuits by dissatisfied carriers or employees.")

²⁴54 Iowa 74, 6 N.W. 140 (1880). *Jones* was not, in fact, the first American case on arbitral immunity. The defendant in *Shiver v. Ross*, 3 S.C.L. (1 Brev.) 293 (1803), sought leave to

losing party charged that the arbitrator had conspired to defraud him. The court simply noted the arbitrator's immunity for his judicial acts and dismissed the action.²⁵ First Massachusetts and later New York followed Iowa's lead.²⁶ Since then arbitral immunity has been the almost unquestioned rule in commercial and labor arbitration.²⁷

Although arbitral immunity was first recognized in commercial arbitration cases, neutrals in labor arbitration deserve even more protection because of their critical role in national labor policy, a role recognized by Congress and the Supreme Court. Congress endorsed arbitration in 1947 as "the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."²⁸ In the *Lincoln Mills*²⁹ case of 1957 and again in the *Steelworkers Trilogy*³⁰ of 1960, the Supreme Court committed the entire authority of the federal courts to the support of labor arbitration. In the Court's view, national labor policy demanded that the courts enforce arbitration agreements against recalcitrant parties and refrain from second-guessing an arbitrator's interpretation of the collective bargaining agreement. Labor arbitration's special role requires that its arbitrators possess at least as much immunity as other arbitrators, and perhaps even more. As a federal district court in Ohio said in 1987:

If national policy encourages arbitration and if arbitrators are indispensable agencies in furtherance of that policy, then it follows that the common law rule protecting arbitrators from suit ought not only

examine an arbitrator about an alleged error. The district court refused the request, stating that only the voluntary statements of a majority of the arbitrators could be used to impeach an award, and the Constitutional Court affirmed. Arbitral immunity was applied but without use of the term.

²⁵The arbitrator was not allowed to recover his fee, however. *Bever v. Brown*, 56 Iowa 565, 9 N.W. 911 (1881).

²⁶*Hoosac Tunnel, Dock & Elevator Co. v. O'Brien*, 137 Mass. 424 (1884); *Babylon Milk & Ice Cream Co. v. Horvitz*, 151 N.Y.S.2d 221 (Sup. Ct. 1956), *aff'd mem.*, 4 A.D.2d 777, 165 N.Y.S.2d 717 (1957).

²⁷Domke, *Commercial Arbitration* §23.01, rev. ed. (Englewood Cliffs: Prentice-Hall 1984); Elkouri and Elkouri, *How Arbitration Works*, 4th ed. (Washington: BNA Books, 1985), 143.

²⁸Labor-Management Relations Act §203(d), 29 U.S.C. §173(d) (1982); see Nolan and Abrams, *American Labor Arbitration: The Maturing Years*, 35 U.Fla. L. Rev. 557, 582-84 (1983). The statute does not expressly refer to arbitration, but arbitration is clearly one type of "[f]inal adjustment by a method agreed upon by the parties."

²⁹*Textile Workers v. Lincoln Mills of Ala.*, 353 U.S. 448, 40 LRRM 2113 (1957).

³⁰*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960). See Nolan and Abrams, *supra* note 28, at 584-91.

to be affirmed, but, if need be, expanded. The immunity rule was sound when announced by two state supreme courts over eighty years ago; it is still sound today.³¹

Consequently, federal and state courts alike have almost without exception dismissed suits against labor arbitrators.³²

Before exploring arbitral immunity's scope and limits, we should summarize the core of the doctrine. Because arbitral immunity stems from the same pressures giving rise to judicial immunity, the doctrines are quite similar. (1) Some quasi-judicial immunity for arbitrators is essential to guarantee finality to their awards, to protect their independence and impartiality, and to encourage their recruitment; (2) this immunity applies only to quasi-judicial acts performed in the course of a dispute over which the arbitrator arguably has jurisdiction; and (3) the immunity is limited, not absolute—as will be seen, it applies more powerfully to suits for damages, less powerfully to suits for injunctive relief and to demands for testimony, and not at all to criminal prosecutions.

Current Status of Arbitral Immunity

The General Rule

The general rule of arbitral immunity is that neutral arbitrators are absolutely immune from liability for their arbitral acts in cases over which they have jurisdiction. The scope and limits of arbitral immunity are largely determined by the degree of "functional comparability" between the arbitrator's role in the given case and that of a judge. In short, where the arbitrator functions in a way comparable to a judge, the arbitrator's immunity will extend at least as far as a judge's would. Where the arbitrator functions in a fashion foreign to judges, different rules apply. Subpoenas and depositions pose singular problems requiring separate discussion.

Before we explore the general rule, we should clarify what we mean when we refer to "arbitrators." We speak only of neutrals, because settlement by interested parties themselves is negotia-

³¹*Hill v. Aro Corp.*, 263 F. Supp. 324, 326, 64 LRRM 2315 (N.D. Ohio 1967). See also *I. & F. Corp. v. Heat & Frost Insulators*, 493 F. Supp. 147, 150 (S.D. Ohio 1980).

³²In addition to the cases already cited, see *Cahn v. Ladies' Garment Workers*, 311 F.2d 113 (3d Cir. 1956); *Calzarano v. Liebowitz*, 550 F. Supp. 1389 (S.D.N.Y. 1982); *Goodwin v. Teamsters Local 150*, *supra* note 18; *Babylon Milk & Ice Cream Co. v. Horvitz*, *supra* note 26.

tion, not arbitration. Although for other purposes the Supreme Court has treated joint grievance committees as a form of arbitration, there are sound reasons for not doing so.³³ If the members of those committees do not engage in arbitration, they are not arbitrators, and thus they may not be entitled to the immunity some courts have given them.³⁴ (It may be, however, that negotiators deserve a limited immunity for other reasons.)

Party-appointed members of tripartite arbitration boards present a much more difficult question. In commercial arbitration all arbitrators, however chosen, are supposed to act as neutrals. Thus, it is almost unheard of for a party to appoint one of its own agents as an arbitrator. Accordingly, party-appointed commercial arbitrators are entitled to, and have received, the full protection of arbitral immunity. (Indeed, most of the law of arbitral immunity has arisen in cases involving such arbitrators.) In labor arbitration, however, party-appointed arbitrators are understood to serve primarily as representatives of their appointers. The typical appointee is a union officer or a company supervisor, or an attorney retained by one or another of the parties. Only in a few relationships are these arbitrators expected (or even allowed) to act independently. They are, in a near-oxymoron, "partisan arbitrators," not just "party-appointed arbitrators." One of the primary reasons for arbitral immunity, preservation of arbitral independence, obviously does not apply to partisan arbitrators. A second reason, recruitment, probably does not apply with the same strength. Only the third reason, decisional finality, applies no matter who the arbitrators are.

It would be a mistake to treat all party-appointed arbitrators alike, because they are not alike. Party-appointed arbitrators expected to exercise independent judgment should have the same protection in labor arbitration they possess in other types of arbitration. Partisan arbitrators, on the other hand, should not be immune as arbitrators. Their immunity, if any, should stem from their true functions as agents of the appointing party.

³³See, for example, the thoughtful papers on this subject delivered by David Feller and Clyde Summers at the Academy meeting in 1984. Feller, *The Legal Background*, in *Arbitration 1984: Absenteeism, Recent Law, Panels, and Published Decisions*, Proceedings of the 37th Annual Meeting, National Academy of Arbitrators, ed. Walter J. Gershenfeld (Washington: BNA Books, 1985); Summers, *Teamster Joint Grievance Committees: Grievance Disposal Without Adjudication*, in Proceedings of the 37th Annual Meeting, National Academy of Arbitrators, ed. Walter J. Gershenfeld (Washington: BNA Books, 1985), 130.

³⁴For example, see the cases cited *supra*, at note 18.

The difficulty, of course, is determining the category in which a given arbitrator belongs. The key to classification is the degree of independence the putatively immune arbitrator possesses. If he is an employee of the appointing party and bound by order, rule, or custom to uphold that party's position, he will be a partisan arbitrator; if he is not an employee and is free to exercise his own judgment, he will appear to be a party-appointed arbitrator. Obviously the judge should investigate the circumstances of the case before extending immunity to one who is not indisputably neutral.

To escape the general rule of arbitral immunity, plaintiffs' lawyers have phrased their actions against arbitrators in at least a half dozen different ways. The first type of action against an arbitrator is a challenge to jurisdiction. The leading case on point is *Tamari v. Conrad*,³⁵ in which a brokerage house customer who had signed an arbitration agreement sued the arbitrators to challenge the composition of the arbitration panel. The district court dismissed the suit and the court of appeals affirmed. Holding that arbitral immunity extended to challenges to the arbitrator's authority, the appeals court noted that the risk of involvement in litigation would discourage potential arbitrators, and, since the arbitrators had no interest in the outcome of the dispute, they should not be forced to become parties to it.³⁶ Although *Tamari* is the only reported case involving a pre-award challenge to the arbitrator's jurisdiction, other authority recognizing immunity from a postaward jurisdictional challenge supports the *Tamari* holding.³⁷

Tamari's ban on pre-award jurisdictional challenges against an arbitrator places the potential plaintiff in something of a bind, because participation in the arbitration hearing may amount to a recognition of the arbitrator's jurisdiction.³⁸ The dilemma is easily resolved. The party doubting the arbitrator's jurisdiction can raise the issue in a suit against the other party. The arbitrator has no legal interest in the dispute, is not an essential party, and should therefore be dismissed from the case.

³⁵552 F.2d 778 (7th Cir. 1977).

³⁶*Id.* at 781.

³⁷*Krecun v. Teamsters Local 734*, 586 F. Supp. 545, 550 (N.D. Ill. 1984). It has even been held that an arbitrator has immunity for acts outside his jurisdiction. *Railport v. Provident Nat'l Bank*, 451 F.Supp. 522, 527 (E.D. Pa. 1978).

³⁸*Durden v. Lockheed-Georgia Co.*, 123 LRRM 2262 (N.D. Ga. 1985).

The second and perhaps most numerous class of actions against arbitrators consists of collateral attacks on the arbitrator's award. A losing party seeking to challenge an award in court might, to avoid missing any opportunity, name the arbitrator as a defendant along with the other party. That would be an error. Having rendered the award, the arbitrator's task and sole concern in the dispute (other than collecting a fee and expenses) is over. The arbitrator is, in the technical term, *functus officio*. The proper challenge to an award is an action to vacate it brought against the other party, the real adversary, not against the arbitrator. As in jurisdictional challenges, the arbitrator is not a proper party in a suit over the award³⁹ and has no interest in the dispute once the award is rendered.⁴⁰ Given this lack of interest, judicial economy is served by dismissing an unnecessary party.⁴¹ Dragging arbitrators into subsequent litigation would drastically interfere with arbitral recruitment.⁴²

Only one published decision departs from this application of arbitral immunity. The plaintiff in *I. & F. Corp. v. Heat & Frost Insulators*⁴³ filed an action to vacate the award of a joint trade board and named both the union and the board as defendants. Among the plaintiff's allegations were charges of partiality and misconduct on the part of the board. Without much explanation, the district court held that the allegations, if true, "would vitiate the cloak of immunity which surrounds the activities of an arbitrator" and thus were sufficient to withstand a motion to dismiss.⁴⁴

If one treats the joint board members as arbitrators, the court's decision cannot be explained within the confines of immunity doctrine. Not only do many of the cases establishing judicial and arbitral immunity involve similar charges of misconduct, but the nature of the problem also guarantees that such

³⁹*Corey v. New York Stock Exch.*, *supra* note 20, at 1211. Most cases finding arbitrators not to be proper parties involve adjustment boards under the National Railway Labor Act, 45 U.S.C. §151 (1982). See *Skidmore v. Consolidated Rail Corp.*, 619 F.2d 157, 105 LRRM 2363 (2d Cir. 1979); *Locomotive Eng'rs v. New York Dock R.R.*, *supra* note 23; *Merchants Despatch Transp. Corp. v. System Fed'n No. One, Ry. Employees Dep't*, *supra* note 19; *Fong v. American Airlines*, *supra* note 19; *System Fed'n No. 30, Ry. Employees Dep't v. Braidwood*, 284 F. Supp. 607, 70 LRRM 2523 (N.D. Ill. 1968).

⁴⁰*E.g.*, *Corey v. New York Stock Exch.*, *supra* note 20, at 1211; *Skidmore v. Consolidated Rail Corp.*, *supra* note 23; *Fong v. American Airlines*, *supra* note 19, at 1341.

⁴¹*E.g.*, *Fong v. American Airlines*, *supra* note 19, at 1341.

⁴²*E.g.*, *Corey v. New York Stock Exch.*, *supra* note 20, at 1211; *Fong v. American Airlines*, *supra* note 19, at 1341.

⁴³493 F. Supp. 147 (S.D. Ohio 1980).

⁴⁴*Id.* at 149, 152.

charges will be the most common ones brought. A party challenging an award needs to advance some reason for overturning the award; acceptable reasons are quite limited and misconduct is one of the likely possibilities. To say (as the *I. & F.* court seems to) that whenever a party alleges misconduct the arbitrator must defend himself would nullify arbitral immunity. The most plausible explanation for this aberrational decision is that the court simply confused the grounds for vacating an award with the grounds for suit against an arbitrator. Thus, the court properly denied the union's motion to dismiss the action to vacate because the allegations, if true, were sufficient to overturn the award, but it should have granted the arbitration board's motion to dismiss. A better rationale for the decision, unfortunately overlooked by the court, is that the board members were not arbitrators and thus were not immune.

The third class of actions against arbitrators involves alleged torts. Disappointed parties have mined the entire tort quarry to discover theories to breach arbitral immunity. Apart from a few cases involving an arbitrator's inaction, which will be discussed separately, courts readily dismiss tort actions of every stripe. Among the unsuccessful tort actions are ones alleging negligence,⁴⁵ tortious interference with contractual rights,⁴⁶ and collusion and conspiracy to defraud.⁴⁷

The fourth class of cases includes constitutional and statutory claims. Seldom will an arbitrator exercise the "state action" necessary to raise a charge of violation of constitutional rights. Possibly a labor arbitrator in a public sector case would be treated as sharing in the public employer's authority,⁴⁸ but even in such cases the arbitrator is really only a third party filling an office created by a contract. He may find a public employer's decision

⁴⁵*Bullock v. Dolnick*, No. 80 C-4694 (N.D. Ill. Dec. 3, 1980).

⁴⁶*Larry v. Penn Truck Aids*, *supra* note 18.

⁴⁷*Jones v. Brown*, *supra* note 24; *Hoosac Tunnel, Dock & Elevator Co. v. O'Brien*, *supra* note 26; *Babylon Milk & Ice Cream Co. v. Horvitz*, *supra* note 26; *Cahn v. Ladies' Garment Workers*, 311 F.2d 113 (3d Cir. 1962), *aff'd* 203 F. Supp. 191 (E.D. Pa. 1962).

⁴⁸See Abrams, *The Integrity of the Arbitral Process*, 76 Mich. L. Rev. 231, 261 n.135 (1977) ("An argument can be made that the action of labor arbitrators is governmental action and thus subject to constitutional strictures. When a state delegates public functions to private parties, the private parties must act in a manner consistent with constitutional principles."). For example, *Holodnak v. Avco Corp., Avco-Lycoming Div.*, 381 F. Supp. 191, 87 LRRM 2337 (D. Conn. 1974), *aff'd in relevant part*, 514 F.2d 285, 88 LRRM 2950 (2d Cir.), *cert. denied*, 423 U.S. 892, 90 LRRM 2614 (1975), held that a defense contractor violated an employee's First Amendment rights when it discharged him for publishing an article critical of the company and the union. Although the arbitrator who sustained the discharge was not a party to the case, he could be said to have acted as an agent of the parties, at least one of whom (the employer) acted as an agent of the U.S. Government.

(e.g., a decision to discharge an employee) consistent with the contract and thus approve something later challenged as unconstitutional. When he does so, however, he is merely rendering an interpretive opinion. He is not acting as a government agent and is neither making nor implementing a governmental act. The employer's action may be unconstitutional, but the arbitrator's cannot be. Accordingly, even though the decision may be overturned as inconsistent with constitutional provisions, the arbitrator will not have violated the constitution.

*Calzarano v. Liebowitz*⁴⁹ seems to be the only reported case against an arbitrator which cited a specific provision of the Constitution. The plaintiff charged, apparently without much elaboration, that the arbitrator's decision constituted cruel and unusual punishment. The court dismissed the complaint because the Eighth Amendment applies only to criminal punishment and because the arbitrator was immune from suit. Another federal district court dismissed on immunity grounds a suit alleging violation of unspecified federal and state constitutional rights.⁵⁰

Civil rights cases appeal to some of the same rights upon which constitutional plaintiffs rely, but they may have the additional force of a statute arguably authorizing the suit. Courts often dismiss these charges as frivolous.⁵¹ Occasionally the charges are more substantial, but to date no court has held an arbitrator liable for damages under a civil rights statute. Two cases brought under Section 1983 illustrate the point. *Raitport v. Provident National Bank*⁵² involved a contract claim and *Morales v. Vega*⁵³ involved a discharge from a government job. Both plaintiffs sued the arbitrators who ruled against them, and both courts dismissed the cases on immunity grounds. Cases brought under other statutes have fared no better.⁵⁴

In light of the Supreme Court's recent approval of injunction actions against judges,⁵⁵ future plaintiffs might be inclined to forego damages and sue arbitrators for equitable relief and an

⁴⁹*Supra* note 32.

⁵⁰*Hill v. Aro Corp.*, 263 F. Supp. 324, 64 LRRM 2315 (N.D. Ohio 1967).

⁵¹E.g., *Bullock v. Dolnick*, *supra* note 45; *Hill v. Aro Corp.*, *supra* note 50.

⁵²451 F. Supp. 522 (E.D. Pa. 1978).

⁵³483 F. Supp. 1057 (D.P.R. 1979).

⁵⁴E.g., *Cahn v. Ladies' Garment Workers*, 203 F. Supp. 191 (E.D. Pa.), *aff'd*, 311 F.2d 113 (3d Cir. 1962) (antitrust); *Automobile Workers Locals 656 & 985 v. Greyhound Lines*, 701 F.2d 1181 (6th Cir. 1983) (pension).

⁵⁵*Pulliam v. Allen*, *supra* note 10.

award of attorney's fees. This could constitute a fifth class of actions against arbitrators, but it would be a very small class indeed. Many such actions would really be challenges to the arbitrator's authority or to the award; if so, the arbitrator should be dismissed as an unnecessary party. Moreover, injunctive and declaratory relief are usually prospective remedies of little concern to ad hoc arbitrators. Finally, the most likely authority for injunction actions is Section 1983; that statute applies only to an arbitrator acting under color of state law, a very rare situation.

The sixth type of action against arbitrators alleges breach of contract. Again excepting suits involving an arbitrator's inaction, which we will discuss in a moment, these cases too have been completely unsuccessful.

The initial hurdle for a party suing on contract grounds is to demonstrate the existence of the contract the arbitrator allegedly breached. The simplest position, of course, would be to charge that the arbitrator breached an employment contract with the parties, a contract that is more commonly implied than expressed. As will be seen, that position has some merit when the arbitrator fails to perform at all. When the arbitrator has rendered an award, proving a breach of the employment contract becomes much more difficult. A successful suit would require proof that the quality of the award fell significantly below the expectations of the parties—and since the arbitrator's implied contract usually consists only of an engagement to hear and decide a case for a certain fee, it might not be possible to provide that proof. Furthermore, this sort of suit strikes at the very essence of the immunity doctrine: The claimed breach amounts to no more than disagreement with the award, and if the arbitrator were liable whenever a reviewing judge or jury disagreed with the decision, there would be no immunity at all. Perhaps this problem is so obvious that no one would make such a claim; in any event there are no reported cases of successful suits charging that an arbitrator's actions violated an employment contract.

The necessity of finding a contract in order to sue an arbitrator for breach has led to some creative lawyering. In *Hill v. Aro Corp.*⁵⁶ for example, the plaintiff claimed to be a third party beneficiary of the arbitrator's implied agreement with the Federal Mediation and Conciliation Service requiring the

⁵⁶*Supra* note 50.

arbitrator to comply with its regulations. The court did not dignify the plaintiff's claim with a direct reply; it simply dismissed the entire suit because of the arbitrator's immunity.

Other plaintiffs have claimed a statutory basis for a direct contract action against the arbitrator for breach of the collective bargaining agreement. Section 301(a) of the Labor Management Relations Act does authorize "[s]uits for violation of contracts between an employer and a labor organization,"⁵⁷ but the quoted phrase is ambiguous. It could refer to any suit arising out of a contract between an employer and a labor organization, in which case an arbitrator conceivably could sue or be sued in federal court for breach of the collective agreement, or it could refer more narrowly to "suits . . . between" an employer and a labor organization, in which case an arbitrator would not be a proper party.

Federal courts have not been receptive to Section 301 suits against arbitrators, but seldom have they explained their reluctance. Two district courts have apparently read Section 301(a) in the second of these two ways, holding that since an arbitrator is neither an "employer" nor a "labor organization," he could not be a party to a Section 301 suit.⁵⁸ Both sentence structure and legislative intent support this reading of Section 301. The simplest reading of the language is that it authorizes federal courts to hear cases between employers and unions, and that simple reading accurately reflects the section's purpose. To give the section a broader reading just to provide a remedy against an arbitrator would unnecessarily and undesirably distort the statute. Other courts have dismissed Section 301 cases simply because of arbitral immunity.⁵⁹ Both reasons protect the arbitrator's immunity, but, in light of the possible breadth of Section 301(a), dismissal on the basis of immunity is the sounder course.

The confusion caused by failure to specify the contract allegedly breached by the arbitrator stands out most clearly in *Graphic Arts Local 508 v. Standard Register Co.*⁶⁰ When an

⁵⁷29 U.S.C. §185 (1982).

⁵⁸*Goodwin v. Teamsters Local 150*, *supra* note 18, at 3032; *Shropshire v. Teamsters Local 957*, *supra* note 18, at 2752; *see also Franklin v. Sandra Greer Real Estate*, 89 LRRM 2575 (S.D.N.Y. 1975).

⁵⁹*Krecun v. Teamsters Local 734*, *supra* note 37; *Yates v. Yellow Freight Sys.*, 501 F. Supp. 101, 105, 106 LRRM 2438 (S.D. Ohio 1980); *DeVries v. Interstate Motor Freight Sys.*, 91 LRRM 2764, 2769 (N.D. Ohio 1976), *aff'd mem. sub nom. DeVries v. Teamsters*, 620 F.2d 302, 106 LRRM 2440 (6th Cir. 1980).

⁶⁰103 LRRM 2212 (S.D. Ohio 1979), *motion to stay pending appeal denied*, 91 ALC ¶12,668, *motion to stay pending petition for certiorari denied*, 633 F.2d 215, 103 LRRM 2214 (6th Cir. 1980).

arbitrator failed to render his award three years after briefs were filed, the union sought the company's agreement to replace the arbitrator. The company refused, and the union sued both the arbitrator and the company for breach of contract, seeking compensatory and punitive damages and injunctive relief. Finally, in 1979, some six years after the record in the case was closed, the district court found in favor of the union, fired the arbitrator, and prohibited him from collecting his fee. Plainly, the contract the arbitrator breached was his own employment contract, yet the court left the question of damages against him to the new arbitrator because "all of these damages grow out of the collective bargaining agreement" and thus "are also properly subject to arbitration."⁶¹ The first arbitrator was not a party to the collective agreement, however, so the new arbitrator would have no power to levy damages against him. Had the court distinguished between the two contracts at issue, it could have sent the original grievance and the union's claim for damages against the company to the new arbitrator while awarding damages against the first arbitrator on its own authority.⁶² (When the defendants later reminded the judge that the only matters before him were their motions to dismiss, he set aside his original order.⁶³)

One last possible attack on the general rule should be mentioned, even though it has not yet been tested, because it has caused much discussion among arbitrators. We refer to the potential treatment of arbitrators as "fiduciaries" under federal statutes regulating pension plans.

Congress has long encouraged or required arbitration of pension plan disputes. Section 302(c)(5) of the Labor Management Relations Act of 1947,⁶⁴ for example, exempts jointly administered pension and welfare trust funds from a prohibition on employer payments to employee representatives only if deadlocks are subject to arbitration. The Multi-Employer Pension

⁶¹103 LRRM at 2214. The court implicitly recognized the existence of the arbitrator's separate contract of employment when it enjoined him from collecting a fee from either party.

⁶²Assuming, that is, that the court had pendant or diversity jurisdiction over the arbitrator's employment contract. If not, only a state court could grant damages. In either case the new arbitrator had no authority over the old.

⁶³103 LRRM at 2214. After the union lost the second arbitration, the court dismissed its action against the company but it never resolved the action against the arbitrator. Telephone conversation between the company's counsel, William F. Ford and Dennis R. Nolan, April 10, 1987.

⁶⁴29 U.S.C. §186(c)(5) (1982).

Plan Amendments Act (MPPAA) mandates arbitration of disputes over the liability of employers withdrawing from a plan.⁶⁵ The Employee Retirement Income Security Act of 1974 (ERISA) requires that every benefits plan must contain a claim and appeal procedure such as arbitration.⁶⁶ ERISA contains a broad definition of a fiduciary, however, perhaps even broad enough to include arbitrators.⁶⁷ Because ERISA fiduciaries are personally liable for breaches of their obligations,⁶⁸ the statute may create a statutory basis for suit against an arbitrator.

Neither ERISA nor its legislative history refers to arbitrators as fiduciaries,⁶⁹ but the U.S. Department of Labor has taken the position that one who performs any of the defined functions of a fiduciary is a fiduciary.⁷⁰ The Department's position rests on the arbitrator's purported discretionary authority over the pension plan. That position has been roundly criticized by one expert in the field and by arbitrators and arbitration organizations.⁷¹ Their objections are both legal and practical. As a legal matter, an arbitrator's role is quasi-judicial, not managerial or administrative; it involves interpretation, not discretionary authority.⁷² Moreover, there is absolutely no indication that Congress intended ERISA to abrogate arbitral immunity. As a practical matter, arbitrators simply will not risk the enormous potential liability that fiduciary status would entail:

⁶⁵Employee Retirement Income Security Act of 1974 (ERISA) §4221, 29 U.S.C. §1401 (1982). We concentrate on ERISA rather than MPPAA because the role of arbitration is severely limited under MPPAA. See Scheinholtz and Miscimarra, *The Arbitrator as Judge and Jury: Another Look at Statutory Law in Arbitration*, 40 Arb. J. 55, 65-66 (June 1985). The same principles apply to both laws, however. On MPPAA arbitration, see Gilman and Gilman, *The Arbitration of Disputes Involving ERISA and MPPAA*, Proceedings of the 12th Annual Conference of the Society of Professionals in Dispute Resolution (1984), 184, 192-203.

⁶⁶ERISA §503, 29 U.S.C. §1133 (1982).

⁶⁷ERISA §3(21)(A), 29 U.S.C. §1002(21)(A) (1982):

[A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

⁶⁸ERISA §409(a), 29 U.S.C. §1109(a) (1982).

⁶⁹Dobranski, *The Arbitrator as a Fiduciary Under the Employee Retirement Income Security Act of 1974: A Misguided Approach*, 32 Am. U.L. Rev. 65, 70 (1982).

⁷⁰Pens. & Welfare Benefit Programs Op. Letter 81-50A, 2 Pens. Plan Guide ¶5606.155 (June 4, 1981); Pens. & Welfare Benefit Programs Op. Letter 79-66A, 4 Pens. & Profit Sharing ¶¶120,122 and 120,123 (Sept. 14, 1979); Labor Dep't Advisory Op. Letter 78-14A, 4 Pens. & Profit Sharing ¶120,116 (July 27, 1978). See generally, Dobranski, *supra* note 69; Scheinholtz and Miscimarra, *supra* note 65, at 64-66.

⁷¹Dobranski, *supra* note 69, especially at 75.

⁷²*Id.*, at 78-79.

An arbitrator cannot be expected to decide disputes if he may be saddled with the burden of defending his decision in a law suit. Arbitrators, especially the most experienced and knowledgeable ones, will not accept appointment in such cases. Their refusal will deprive trustees and plan beneficiaries of their valuable expertise and will thwart the congressional intent . . . that deadlocks be broken to avoid paralyzing the administration of trusts.⁷³

The issue of the arbitrator's personal immunity under ERISA and MPPAA, in the words of two experienced practitioners, "has not yet been widely addressed and remains somewhat uncertain."⁷⁴ Nevertheless, the one case on point affirmed that arbitrators were immune from ERISA suits and by implication rejected the Department of Labor's position. In *Automobile Worker's Locals 656 & 985 v. Greyhound Lines*,⁷⁵ the employer refused to comply with an arbitration award and added the arbitrator as a cross-defendant in an enforcement action because, it argued, the arbitrator had not complied with ERISA's bonding requirements for fiduciaries. The court held that just as Section 1983 did not eliminate judicial immunity, so ERISA left arbitral immunity intact.⁷⁶ Although the court said that it was not deciding whether arbitrators are fiduciaries, its refusal to apply ERISA's bonding requirements to them strongly implies that they are not.⁷⁷

Extension of arbitral immunity to ERISA and MPPAA would be fully consistent with decisions in cases brought under other statutes. The policy bases of the immunity doctrine—finality, independence, and recruitment—also weigh powerfully against liability. Moreover, the plaintiff loses nothing by the extension of immunity because other defendants, the real adversaries, remain subject to suit.⁷⁸

The Exception

Every good legal rule has its exception. Arbitral immunity's exception is the nonperforming arbitrator, one guilty of nonfeasance rather than misfeasance. In three significant cases, courts have refused to protect arbitrators who failed to render any

⁷³*Id.* at 84 (footnote omitted).

⁷⁴Scheinoltz and Miscimarra, *supra* note 65, at 65.

⁷⁵*Supra* note 54.

⁷⁶*Id.* at 1187, citing *Pierson v. Ray*, *supra* note 6.

⁷⁷*Id.* at 1187–88.

⁷⁸Dobranski, *supra* note 69, at 86–87.

award. The earliest of these was *E.C. Ernst, Inc. v. Manhattan Construction Co. of Texas*,⁷⁹ decided by the Fifth Circuit in 1977. As in many construction contracts, the owner's architect had certain quasi-arbitral functions such as evaluation of equipment for compliance with contractual specifications. Because architects are immune from liability for their actions in an arbitral capacity, the plaintiff in this case sued the architectural firm, McCauley Associates, for failure to act—that is, for serious delays in performing its tasks—and included in its complaint both contract and tort causes of action. The district court found for the plaintiff without indicating whether it accepted the contract theory, the tort theory, or both.⁸⁰ The court of appeals found the arbitrator liable for negligence, but did not decide whether a contract theory was also viable.⁸¹ The Fifth Circuit properly focused on functional comparability as the critical factor in evaluating an immunity defense and concluded that nonfeasance is not a function comparable to a judge's:

where his action, or inaction, can fairly be characterized as delay or failure to decide rather than timely decision-making (good or bad), he loses his claim to immunity because he loses his resemblance to a judge.⁸²

The second decision on nonfeasance was the *Standard Register* case just discussed. For all its confusion, the *Standard Register* court clearly assumed that the arbitrator was liable under some contract for the harm he caused by his nonperformance.

The clearest and most recent case involving an arbitrator's inaction is *Baar v. Tigerman*.⁸³ Tigerman was engaged as an arbitrator through the American Arbitration Association to resolve a dispute under a limited partnership agreement. From 1976 to 1980 he held 53 days of hearings. The parties submitted final briefs by July 18, 1980, and under AAA rules the award was due 30 days later. The month passed without an award, and the parties gave Tigerman an extension until November 30, 1980. When he failed to produce his award several months after the new deadline, the parties revoked his authority and sued Tiger-

⁷⁹387 F. Supp. 1001 (S.D. Ala. 1974), remanded on other grounds, 551 F.2d 1026, reh'g granted in part, 559 F.2d 268 (5th Cir. 1977), cert. denied, 434 U.S. 1067 (1978).

⁸⁰*Id.*, 387 F. Supp. at 1028, 1033.

⁸¹*Id.*, 551 F.2d at 1031-32. The court of appeals remanded for further proceedings. On remand the district court entered judgment against the architect. Letter from Louis E. Braswell, counsel for the plaintiff, to Dennis R. Nolan (Sept. 16, 1985).

⁸²*Id.*, at 1033.

⁸³140 Cal.App.3d 979, 211 Cal. Rptr. 426, hearing before the Supreme Court denied (1983).

man and the AAA for negligence and breach of contract (apparently the contract for arbitral services between the parties to the dispute on one side and the arbitrator and the AAA on the other). The trial court dismissed the complaints because of arbitral immunity, but the court of appeals reversed.

The appellate court observed that cases establishing arbitral immunity concerned "*alleged misconduct in arriving at a decision*" and thus did not control a case involving "*failure to make an award*."⁸⁴ The court emphasized the contractual basis of arbitration and stated that it had to uphold the arbitrator's contractual obligations while protecting an arbitrator who acted in a quasi-judicial capacity. Arbitration is preferable to litigation because of its speed and certainty, said the court, but granting immunity for failure to make an award would run "directly counter to these policy considerations."⁸⁵ It therefore reversed the trial court's ruling and remanded for further proceedings.⁸⁶ The court did not expressly say so, but its analysis suggests that it viewed inaction as something other than a quasi-judicial action.

As ominous as any breach in immunity may appear to arbitrators, even in such a clear-cut case as *Baar*, it is hard to construct an argument for protecting the nonperforming arbitrator. Nonfeasance is the only type of claim which justifies a departure from arbitral immunity because it is the only situation in which the functional comparability test does not work. Litigants have some remedies when a judge fails to act, such as the administrative authority of the chief judge of the court⁸⁷ or a writ of mandamus from a higher court.⁸⁸ Parties to an arbitration lack these remedies and thus may have more need for a tort or contract action against the nonperforming arbitrator. Because of the extreme harm caused by nonfeasance and the relatively small interference with arbitration that such suits would cause, the parties' interests may in a few cases outweigh the concerns behind arbitral immunity.

Why then should an arbitrator expect to be immune from liability for failure to perform? Immunity exists for the parties and the public, not for the arbitrator. Surely the parties would

⁸⁴*Id.* at 983, 211 Cal. Rptr. at 428 (emphasis in original).

⁸⁵*Id.* at 985, 211 Cal. Rptr. at 430.

⁸⁶The parties settled before trial. Letter from Timothy D. McCollum, counsel for one of the plaintiffs, to Dennis R. Nolan (September 18, 1985).

⁸⁷*Cf.* 28 U.S.C. §137 (1982).

⁸⁸*Cf.* Fed. R. Civ. P. 23; *Linning v. Duncan*, 169 So.2d 862 (Fla. App. 1964), *reh'g denied*, (1965) (writ of mandamus proper for judge's failure to perform ministerial tasks).

not benefit from extending immunity to such arbitrators. It would do nothing to enhance the arbitration system or the independence of arbitrators. If liability for nonperformance would deter recruitment of arbitrators (and there is no evidence that it would), only those who would not perform would be deterred, and they would not be missed. An immunity is by definition an exception to the general rule of liability and all such exceptions should be soundly based. The nonperforming arbitrator hardly provides a sound basis for this exception. As long as liability is limited to nonfeasance and is not extended to misfeasance, few arbitrators (or potential arbitrators) will be in any danger. The real fear for arbitrators is that they will be sued by a party upset with a decision: that they might fail to render *any* decision, and be sued for that failure, would not enter their heads.

The distinction between misfeasance and nonfeasance might require different results in *E.C. Ernst* and *Baar*, however. Although the reported decisions do not clearly state the details of the pleadings, it appears that *E.C. Ernst* involved only delays in making decisions while *Baar* involved a complete failure to perform. Delay is a form of misfeasance of which any arbitrator might some day be guilty. It is no more serious than (and should stand on the same legal footing as) doing one's job poorly. Immunity should extend to tardy arbitrators just as to those who are otherwise negligent; it should not protect arbitrators who completely fail to do their job. If the facts in those cases were as we interpret them, a tort or contract remedy against the arbitrator might be justified in *Baar* but not in *E.C. Ernst*.

Courts should be cautious about interpreting a missed deadline as nonfeasance, of course. Liability would be appropriate only if the delay is so long as to demonstrate convincingly that performance is unlikely.

*The Special Problem of Subpoenas and Depositions*⁸⁹

As a strict matter of terminology arbitrators are not "immune" from subpoenas. They must accept and respond to subpoenas just as every other citizen must. They do possess a "testimonial privilege" to refrain from testifying about certain matters, how-

⁸⁹In the interest of full disclosure, we should note that Professor Nolan was the successful respondent in *Liggett Group v. Bakery, Confectionery & Tobacco Workers Local 176-T*, No. M-85-2-68-(MJP) (D.S.C. Apr. 14, 1986), discussed in this section.

ever, and since that privilege usually makes it pointless to subpoena the arbitrator, it has much the same effect as, and may properly be regarded as an aspect of, arbitral immunity.

Some unguarded language in a 1980 Supreme Court opinion threw this privilege into doubt, from which it has fortunately emerged unscathed. In *Dennis v. Sparks*⁹⁰ the Supreme Court rejected the argument of certain defendants that a Section 1983 action against them should be dismissed, lest the judge with whom they allegedly conspired be forced to testify about and defend his conduct. The Court said in dicta that it was not aware of any rule exempting a judge from testifying in a criminal or civil proceeding, citing *United States v. Nixon*.⁹¹ In other words, if the President of the United States is not protected from a subpoena, then a judge is not. Nor, we might conclude, is an arbitrator.

The matter is not so simple. For one thing, the Court's statement is only dicta; it does not directly address or decide whether a judge (or an arbitrator) must testify about a decision. For another, it arose in a peculiar context, a civil action seeking a remedy for conduct which, if it actually occurred, would have been criminal. Thus, the Court found that the "not insubstantial" concerns about judicial involvement were outweighed only by the need for providing a remedy against the other conspirators.⁹² Finally, there is in fact a rule, an old and sound one, protecting judges from compelled testimony about their decisions.⁹³

The Court was surely right in concluding that the possible harm to a judge from testifying in a collateral proceeding was not "of the same order or magnitude" as the prospect of defending an action for damages, but the burden of compelled testimony should not be underestimated. While a subpoena may not at first glance seem to be a serious infringement of judicial or arbitral independence, further reflection reveals its dangers. First, deposing the decision maker would enable a dissatisfied party to fish for evidence with which to challenge the decision.

⁹⁰449 U.S. 24 (1980).

⁹¹418 U.S. 683, 705-07 (1974).

⁹²449 U.S. at 31-32.

⁹³*United States v. Dowdy*, 440 F. Supp. 894 (W.D. Va. 1977); cf., *Jade Square & Tower Ltd. v. C.I.T. Corp.*, 87 A.D.2d 564, 448 N.Y.S. 194 (1982) (denying motion to quash subpoena only because the acts in question were outside the judge's jurisdiction) and *State v. Donovan*, 30 A.2d 421 (N.J. 1943) (judge is not privileged from giving testimony but is under no obligation to give reasons for his official actions).

Many years ago, the Supreme Court itself said that permitting judges or jurors to testify about their decisions "would inaugurate a most pernicious practice,"⁹⁴ and the same is true of arbitrators. No decision would be final if a litigant could cross-examine the decision maker in the hope of finding imperfections in the decisional process. Second, responding to a subpoena imposes monetary and personal costs on the arbitrator. An arbitrator wishing to assert a privilege not to respond to some or all potential questions will need a lawyer, and lawyers do not come free. Moreover, depositions and trials take time, and an arbitrator's time is as valuable as anyone else's. Testimony also subjects the witness to harassment, as examiners and cross-examiners seek to defend their positions. The threat of such unpleasantness might keep some arbitrators from exercising complete independence and might deter others from serving at all.

As we have emphasized, arbitral immunity exists to guarantee decisional finality, to protect arbitral independence, and to facilitate the recruitment and retention of arbitrators. Compelling arbitrators to testify would in most circumstances interfere with each of those objectives. For these reasons, most courts have held that arbitrators may not be forced to testify in court or in a deposition. Many have gone further, holding an arbitrator's testimony, even completely voluntary testimony, to be inadmissible to impeach, support, or clarify an award.⁹⁵ The arbitrator's privilege, like other privileges, must be asserted. Failure to object to a subpoena constitutes a waiver of the privilege.

The first reported American case on point, *Shiver v. Ross*,⁹⁶ dates back almost two centuries. It involved a motion for leave to examine an arbitrator to explain and impeach an award. The

⁹⁴*Fayerweather v. Ritch*, 195 U.S. 276, 296 (1904).

⁹⁵*Fukaya Trading Co. v. Eastern Marine Corp.*, 322 F. Supp. 278 (E.D. La. 1971); *Grudem Bros. v. Great W. Piping Corp.*, 297 Minn. 313, 213 N.W.2d 920 (1973); *Giannapoulos v. Pappas*, 80 Utah 442, 15 P.2d 353 (1932). In the words of one judge, the practice of interviewing arbitrators after an award to find a flaw in the decision "is to be deplored both as an unwholesome practice and because the results of such endeavors have no efficacy as a matter of law." *Big-W Constr. Corp. v. Horowitz*, 24 Misc.2d 145, 156, 192 N.Y.S.2d 721, 733-34 (Sup. Ct. 1959), *aff'd*, 14 A.D.2d 817, 218 N.Y.S.2d 530 (1961). See generally Annotation, *Admissibility of Affidavit or Testimony of Arbitrator to Impeach or Explain Award*, 80 A.L.R.3d 155 (1977). On the ways in which an arbitrator's testimony may be used, see 5 Am. Juris. 2d, *Arbitration and Awards* §187 (1962).

The leading treatise on evidence says at one point that although "[i]t was at one time thought that an arbitrator had some such privilege . . . this notion was unfounded." 8 Wigmore, *Evidence* §2372(d)(4) (McNaughton rev. 1961). At another point, the same treatise recognizes the privilege with regard to some issues. *Id.*, §2358. Wigmore does not directly address policies or cases discussed in this paper and thus is of limited utility.

⁹⁶*Supra* note 24.

state district court denied the motion and the South Carolina Constitutional Court affirmed. A later decision, now the leading case on the question, *Gramling v. Food Machinery & Chemical Corp.*,⁹⁷ also involved a losing party's attempt to set aside an arbitration award. The defendant tendered the affidavits of two arbitrators and sought an order requiring all of them to testify in court. The district court denied the order and flatly refused to consider the proffered affidavits. Judge Wyche emphasized the damage forced testimony would do to the arbitration system:

In my opinion, it would be most unfair to the arbitrators to order them to come into court to be subjected to grueling examinations by the attorneys for the disappointed party and to afford the disappointed party a "fishing expedition" in an attempt to set aside the award. To do this would neutralize and negate the strong judicial admonitions that a party who has accepted this form of adjudication must be content with the results. . . .

I cannot, therefore, consider the affidavits of two of the Arbitrators tendered by defendant in support of its motion. I will not require the Arbitrators to appear for the purpose of testifying in regard to their deliberations.⁹⁸

Many other cases, both before and after *Gramling*, take the same position.⁹⁹ In short, and notwithstanding the Supreme Court's dicta in *Dennis v. Sparks*, both federal and state courts recognize that an arbitrator's quasi-judicial immunity provides a privilege not to testify about the award. The practical effect is that most courts will refuse to enforce a subpoena against an arbitrator.

Like other legal rules this one has its exceptions, but they are quite limited. Their common element is that arbitral testimony may be required to make viable some remedy for a dissatisfied party other than suit against the arbitrator. Requiring the arbitrator's testimony may, in other words, occasionally be a lesser evil than depriving an injured party of all recourse against the award or another person. A few exceptions will illustrate the point.

⁹⁷151 F. Supp. 853 (W.D.S.C. 1957).

⁹⁸*Id.* at 861.

⁹⁹See, among many others, *New York City Omnibus Corp. v. Quill*, 189 Misc. 892, 73 N.Y.S.2d 289, 20 LRRM 2532 (Sup. Ct.), modified on other grounds, 272 A.D. 1015, 74 N.Y.S.2d 925, 21 LRRM 2013 (1947), *aff'd*, 297 N.Y. 832, 78 N.E.2d 859 (1948); *Andros Co. Maritima v. Marc Rich & Co.*, 579 F.2d 691 (2d Cir. 1978); *Wood v. Teamsters Local 408*, 583 F. Supp. 1471, 1474, reconsideration denied, 101 F.R.D. 784 (W.D. Mich. 1984); *Brownko Int'l v. Ogden Steel Co.*, 585 F. Supp. 1432, 1435 (S.D.N.Y. 1983); *Sidarma Societa Italiana di Armamento Spa, Venice v. Holt Marine Indus.*, 515 F. Supp. 1302 (S.D.N.Y. 1981); *Reichman v. Creative Real Estate Consultants*, 476 F. Supp. 1276, 1286 (S.D.N.Y. 1979); *Fukaya Trading Co. v. Eastern Marine Corp.*, *supra* note 95.

1. A person seeking to vacate an arbitration award may be required to show the scope of the issue submitted to the arbitrator, and the arbitrator may be the only person able to provide that information. If so, providing it facilitates the plaintiff's remedy with no harm to the arbitrator, and the request should be granted.¹⁰⁰

2. If a court (or, in the federal sector, the Federal Labor Relations Authority) needs to examine the exhibits or the transcript in a case, there is no reason why the arbitrator should not provide them. Although the better practice would be for the plaintiff to obtain them from one of the parties, they do not belong to the arbitrator, who has no right to refuse a lawful demand for them. In contrast, the arbitrator's own notes or drafts belong to the arbitrator and relate to the decisional process: No court should require that they be turned over to a party.

3. If a prosecutor seeks evidence as to an incriminating statement made by a witness during an arbitration hearing, the arbitrator has no "confessional privilege" to refuse the information.¹⁰¹ The prosecutor's needs can be satisfied without trenching on the arbitrator's independence.

4. If, as in *Bliznik v. International Harvester, Co.*,¹⁰² a grievant sues the union for breach of its duty of fair representation because of the representative's conduct at the hearing, the arbitrator may be required to testify as to what the union did and did not do. As the *Bliznik* court stressed, such an inquiry presents no threat to the arbitrator's independence. Moreover, the arbitrator in that case possessed "directly relevant and probative evidence"¹⁰³ and was the only impartial witness to the union's conduct. If the arbitrator remained silent, the merits of the plaintiff's claim could never be resolved. To make sure that the deposition did not threaten the arbitrator, the court wisely and carefully limited the scope of the permitted questioning. The *Bliznik* decision is a reasonable balancing of interests in a case where no better alternative existed. Had the hearing been recorded or transcribed, however, the court should have used the better evidence of the proceedings rather than inconveniencing the arbitrator.¹⁰⁴

¹⁰⁰See generally 5 Am Juris. 2d §187 (1962); 8 Wigmore Evidence, §2358 (McNaughton rev. 1961).

¹⁰¹Douglas, *The Scope of Arbitrator Immunity*, 36 Arb. J. 35 (June 1981).

¹⁰²87 F.R.D. 490 (N.D. Ill. 1980).

¹⁰³*Id.* at 491-92.

¹⁰⁴*Id.* at 492 (dicta); *Wood v. Teamsters Local 408*, 583 F. Supp. 1471, 1473 n.4 (W.D. Mich. 1984).

Most attempts to compel an arbitrator's testimony are not of these ancillary sorts, but rather seek to inquire into the basis of the decision. The appropriate distinction is between requests for information about the arbitrator's decisional process and those for information extraneous to that process. A litigant who seeks to find out why the arbitrator made the decision is really only fishing for evidence to attack it (or the arbitrator). Courts should deny such requests as soon as an objection is raised. With one exception to be discussed in a moment, this should be true even of requests seeking to explore an arbitrator's alleged misconduct because, if a bare allegation of misconduct could vitiate the arbitrator's immunity, anyone desiring to question an arbitrator would simply allege misconduct and pose the desired questions. The arbitrator would suffer all the inconvenience that immunity exists to prevent, even if the inquiring party is never able to prove the alleged misconduct. The harm, in other words, is in the questioning itself, regardless of the answers given—and thus the courts should refuse to compel the arbitrator's testimony.

One who wants to find out what someone else did, on the other hand, should be able to question the arbitrator—but only if the arbitrator is the sole source for the needed information. Questioning unrelated to the decisional process is occasionally appropriate, but courts should strive to avoid even that kind of questioning if a less obtrusive means of obtaining the information (such as a transcript) is available.

The one exception to the "decisional process" distinction concerns asserted arbitral misconduct. This exception was stated most carefully by the North Carolina Supreme Court in 1976 in *Carolina-Virginia Fashion Exhibitors v. Gunter*.¹⁰⁵ The arbitrators had on their own examined the premises that were the subject of the arbitration. The losing party learned of that ex parte conduct in the course of deposing the arbitrators; when it then sought to use the depositions in an action to vacate or correct the award, the prevailing party moved to suppress the depositions. The North Carolina Supreme Court recognized the important considerations behind the *Gramling* rule excluding an arbitrator's testimony, but held that those considerations did not prevent admission of arbitrators' depositions establishing their own misconduct. Its decision was qualified in an extremely important fashion, however: "[a]n arbitrator's deposition of mis-

¹⁰⁵291 N.C. 208, 230 S.E.2d 380 (1976).

conduct may be allowed in evidence *only when some objective basis exists for a reasonable belief that misconduct has occurred.*"¹⁰⁶ Later the court reiterated this qualification while summarizing its holding:

Accordingly, we hold that *where an objective basis exists for a reasonable belief that misconduct has occurred*, parties to the arbitration may depose the arbitrators relative to that misconduct; and such depositions are admissible in a proceeding . . . to vacate an award.¹⁰⁷

The North Carolina court clearly intended its "objective basis" requirement to filter out baseless charges and so to protect arbitrators from harassment and their awards from fishing expeditions. As one commentator explained shortly after the *Gunter* decision:

By demanding that an objective basis be shown, frivolous, unfounded claims of misconduct or fraud will not provide the claimant with grounds for deposing or cross-examining arbitrators. . . .

The objective basis test allows the court to delve into the mechanics of an openly defective arbitration award without having to disturb one which appears valid on its face. In this way the *Gunter* test protects arbitrators and their awards from attacks based upon grounds of fraud or misconduct when the disappointed party has no objective basis for his claim.¹⁰⁸

Many other courts have since recognized the arbitral misconduct exception to the arbitrator's normal immunity from subpoena, but each, like the North Carolina Supreme Court, required a prior showing of serious misconduct before enforcing the subpoena. When the moving party makes such a showing, testimony may be required;¹⁰⁹ when the moving party is unable or unwilling to make such a showing, testimony will not be required.¹¹⁰

¹⁰⁶*Id.* at 218, 230 S.E.2d at 387 (emphasis in original).

¹⁰⁷*Id.* at 219, 230 S.E.2d at 388 (emphasis added); cf. *Fukaya Trading Co. v. Eastern Marine Corp.*, *supra* note 95 (dicta).

¹⁰⁸Note, *Arbitration and Award—Admission of Arbitrator's Depositions and Testimony to Prove Misconduct or Fraud*, 13 Wake Forest L. Rev. 803, 810 (1977).

¹⁰⁹*Kauffman v. Haas*, 113 Mich.App. 816, 318 N.W.2d 572 (1982); *Matter of Davis & Eiskoff*, 105 Misc.2d 955, 430 N.Y.S.2d 208 (Sup. Ct. 1980).

¹¹⁰*Andros Co. Maritima v. Marc Rich & Co.*, *supra* note 99, at 702; *Sperry Int'l Trade v. Israel*, 602 F. Supp. 1440 (S.D.N.Y. 1985); *Sidarma Societa Italiana di Armamento Spa, Venice v. Holt Marine Indus.*, *supra* note 99 at 1309; *Reichman v. Creative Real Estate Consultants*, 476 F. Supp. 1276 (S.D.N.Y. 1979); *DeFrayne v. Miller Brewing Co.*, 444 F. Supp. 130 (E.D. Mich. 1978); *Temporary Comm'n of Investigation v. French*, 68 A.D.2d 681, 418 N.Y.S.2d 774 (1979); *Turner v. Nicholson Properties*, 80 N.C. App. 208, 341 S.E.2d 42, *petition for rev. denied*, 318 N.C. 287, 347 S.E.2d 457 (1986).

The impact of the "prior showing" requirement is apparent in one of the most recent cases on point, *Liggett Group v. Bakery, Confectionery, & Tobacco Workers Local 176-T*.¹¹¹ Liggett, the losing party to an arbitration,¹¹² filed suit to set aside the award. In addition to the usual charges that the award was in excess of the arbitrator's authority and failed to draw its essence from the collective bargaining agreement, Liggett charged that the award was obtained by "undue means." Liggett subpoenaed the arbitrator to appear at a deposition. The arbitrator challenged the subpoena, citing the company's failure to make the necessary prior showing of misconduct, and the district court denied Liggett's motion on precisely that ground.¹¹³

Recapitulation

This review of the scope and limits of arbitral immunity reveals that the doctrine is alive and well. The only limitations on immunity are these:

- Arbitrators, like all other citizens, are liable for any crimes they commit.
- Arbitrators are liable for negligence or breach of contract if they totally fail to fulfill their obligations.
- Arbitrators who violate a person's constitutional or civil rights, an unlikely event, might be subject to injunctive or declaratory relief.
- Arbitrators might be compelled to testify or to produce documents (1) when the request does not pertain to the arbitrator's decisional process (e.g., if it involves only formal information about the scope of the submission, the evidence introduced, or the conduct of other persons), or (2) when the request involves the arbitrator's own misconduct and the moving party has previously demonstrated an "objective basis" for a "reasonable belief" that the asserted misconduct actually occurred.

Responses to Suits and Subpoenas

As clear as the law of arbitral immunity is, parties continue to sue and subpoena arbitrators. How should we as arbitrators respond? There are just four options. The first is to surrender,

¹¹¹*Supra* note 89.

¹¹²*Liggett Group*, 85-1 ARB ¶8190 (Nolan, 1984).

¹¹³No. M-85-2-68-(MJP), slip op. at 8-10.

either by paying damages or by complying with subpoenas. As bad as this option is for the individual arbitrator, it is worse for the arbitration system. Like paying ransom, it only encourages more demands; in time it would become routine to sue the arbitrator, either to gain an immediate objective or to create an atmosphere for future gains. The arbitrator who chooses this option is well advised to buy malpractice insurance.

The second response is to seek legislative protection. The Section on Labor and Employment Law of the American Bar Association (ABA) recently considered whether to sponsor federal legislation on arbitral immunity but was unable to reach a consensus.¹¹⁴ The National Academy of Arbitrators' Board of Governors voted to support the concept of legislative immunity and to send Professor David Feller as a representative to an ABA committee meeting on the subject.¹¹⁵ Legislative action may seem to be the perfect answer to potential liability, but it is not. To the contrary, a statute is likely to add nothing to the common law protection; at worst, a statute (or a failed attempt to obtain one) might leave arbitrators with less protection than they enjoy under the common law.

In the wake of *Baar v. Tigerman*, for example, the California legislature in 1985 sought to protect arbitrators with a simple statute:

An arbitrator has the immunity of a judicial officer from civil liability when acting in the capacity of arbitrator under any statute or contract.

This section shall remain in effect only until January 1, 1991, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 1991, deletes or extends that date.¹¹⁶

The statute sounds comforting but is practically useless. It would protect neither Arbitrator Tigerman nor any other arbitrator not already protected by the common law. Even before the statute, arbitrators had the same immunity as judges, and *Baar v. Tigerman* involved a situation no judge would have to face, a suit for breach of contract. Thus, the law is, in Professor Reginald Alleyne's pithy phrase, "a zero effect statute."¹¹⁷

¹¹⁴Letter from Allan L. Bioff, Chairman of the ABA Labor and Employment Law Section, to William P. Murphy, President of the National Academy of Arbitrators, April 24, 1987.

¹¹⁵Letters to Dennis R. Nolan from William P. Murphy, President of the National Academy of Arbitrators (Jan. 8, 1987) and from Professor David E. Feller (Dec. 1, 1986).

¹¹⁶Cal. Code of Civil Procedure §1280.1 (West 1986 Supp.).

¹¹⁷Letter from Reginald Alleyne to Dennis R. Nolan (Oct. 13, 1986).

Legislative action could even make matters worse. Suppose that a movement to gain an immunity statute failed (or that a statute like California's was not renewed). The strong message to the courts would be that the legislature chose not to grant (or renew) arbitral immunity—that is, that arbitrators should not be immune in that jurisdiction. Or suppose that during legislative debate critics of immunity cited real or hypothetical abuses of arbitral authority and obtained qualifications, for example, a grant of immunity “except for malicious actions.” The resulting law would expose arbitrators to more suits (and more potential liability) than they would face without the law. Finally, no law, however well drafted, can prevent a person from filing a suit. It would only provide a basis for dismissing the suit and that would still require the arbitrator to retain an attorney to seek dismissal, exactly the same burden the arbitrator faces under the common law.

One more problem with legislative action concerns the location of legislative protection. Action at the state level might undercut arbitral immunity in neighboring states without legislation. If a federal law is to be enacted, other questions arise. Should it be an amendment to Section 301? If so, it would not help arbitrators in nonlabor cases because Section 301 applies only to suits over labor contracts. Indeed, it might not even help labor arbitrators because the courts have already determined that arbitrators cannot be sued under Section 301. Should it be an amendment to the United States Arbitration Act?¹¹⁸ That might benefit commercial arbitrators, but, since that statute does not apply to “contracts of employment” of workers engaged in interstate commerce, it may not help the labor arbitrators who are the prime force behind the push for legislative protection.¹¹⁹ Indeed by protecting only commercial arbitrators, it might suggest that labor arbitrators have less protection.

In short, legislative action would be no panacea. On the contrary, arbitrators should be extremely cautious about endorsing an immunity statute until all of these problems have been considered and resolved.

The third option is to resist, to hire a lawyer and fight suits and subpoenas. As a matter of principle, arbitrators should resist incursions on their immunity. The Code of Professional

¹¹⁸9 U.S.C. §§1–14 (1982).

¹¹⁹*Id.*, 9 U.S.C. §1. On the question of whether the United States Arbitration Act applies to labor arbitration, see Nolan and Abrams, *American Labor Arbitration: The Early Years*, 35 U. Fla. L. Rev. 373, 416–17 (1983).

Responsibility almost commands resistance by stating that “[i]n view of the professional and confidential nature of the arbitrator relationship, an arbitrator should not voluntarily participate in legal enforcement proceedings.”¹²⁰ The law provides a sound basis for resisting these actions. Although trial courts may not initially respect the arbitrator’s immunity, the arbitrator may immediately appeal a negative decision, as Judge Alvin B. Rubin reminded this group last year.¹²¹ The trouble with standing on principle is that it has its costs—in this case, it results in time-consuming, emotionally draining, expensive litigation. The “hassle factor” cannot be avoided, but there are ways to minimize legal expenses. For example, the AAA provides advice and information to arbitrators and their attorneys in such cases, and the Academy’s Legal Representation Program and Fund will reimburse members for their attorney’s fees up to \$2,500.¹²² These are palliatives at best. The AAA ordinarily does not represent individual arbitrators in court; the Academy will reimburse only Academy members; and reimbursement may not cover all costs.

The last and best option for arbitrators, the one we recommend, is to take an aggressive defense. By this we mean that arbitrators should not only resist suits and subpoenas but should also seek sanctions against the moving party, including attorney’s fees and other expenses. Although the so-called “American rule” normally requires each litigant to bear its own costs, courts have long shifted the costs when a party has committed misconduct in the litigation.¹²³ Courts traditionally used this inherent power only against those who litigated in “bad faith,”¹²⁴ a subjective test that is notoriously difficult to prove. In 1983, however, several sections of the Federal Rules of Civil Procedure were amended to substitute an objective test much easier to meet. The amendments have made it possible for victims of unjustified suits or discovery motions to be compensated for their expenses, including their attorney’s fees.

¹²⁰Code of Professional Responsibility for Arbitrators of Labor-Management Disputes §6.E.2 (1974).

¹²¹Rubin, *supra* note 1, at 23.

¹²²National Academy of Arbitrators, *Legal Representation Program and Fund Policy Statement Adopted by the Board of Governors* (May 22, 1984).

¹²³See Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 Duke L.J. 435, especially 441-44.

¹²⁴See *Roadway Express v. Piper*, 447 U.S. 752, 764-67 (1980).

Amended Rule 11 requires attorneys to certify on every "pleading, motion, and other paper" presented to a court that they believe, after reasonable inquiry, that it is "well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, reversal of existing law" and is not filed for any improper purpose. If a paper is signed in violation of the rule, the court "shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred . . . including a reasonable attorney's fee." Rule 26(g) contains virtually identical language applying to discovery requests, responses, and objections. Rule 37(a)(4) provides the most help to the subpoenaed arbitrator. It specifies that, if a court denies a motion for an order compelling discovery (e.g., if an arbitrator successfully asserts arbitral immunity in resisting a subpoena), the party opposing the motion is entitled to its expenses, including attorney's fees, unless the court finds that the motion was "substantially justified" or that "other circumstances" would make an award of expenses "unjust." Finally, Rule 38 of the Federal Rules of Appellate Procedure provides for an award of "just damages and single or double costs" to one harmed by a frivolous appeal.

Few arbitrators (and perhaps few parties) appreciate how common it has become for courts to impose sanctions in arbitration cases.¹²⁵ Rule 11 has virtually abolished any remaining judicial hesitation to award sanctions. Some courts, notably the Court of Appeals for the Seventh Circuit, now award them with a vengeance. In *Dreis & Krump Mfg. Co. v. Machinists District 8*,¹²⁶ Judge Posner (who is becoming one of labor arbitration's strongest advocates on the federal bench) awarded sanctions against a company that filed an untimely and frivolous action to set aside an arbitration award. Rules to discourage groundless litigation, he warned, "are being and will continue to be enforced in this circuit to the hilt. . . . Lawyers practicing in the Seventh Circuit, take heed!"¹²⁷

¹²⁵The cases not relying on the amended Federal Rules are collected in Annotation, *Labor Arbitration: Recoverability of Attorney's Fees in Action to Compel Arbitration or to Enforce or Vacate Award*, 80 A.L.R. Fed. 302 (1986).

¹²⁶802 F.2d 247, 123 LRRM 2654 (7th Cir. 1986).

¹²⁷*Id.* at 255-56. See also *Bonds v. Coca Cola Co.*, 806 F.2d 1324, 123 LRRM 3284, 3286 (7th Cir. 1986); *Plumbers Local 32 v. Lockheed Shipbuilding Co.*, 124 LRRM 2552 (W.D. Wash. 1986).

Although the leading cases imposing sanctions in arbitration arose in federal courts, the same principles apply to state court actions.¹²⁸ Although the successful claimants in the leading cases awarding sanctions were unions and employers, the same principles apply to arbitrators and make possible the aggressive defense we urge. By way of illustration, let me return to the subpoena with which I began this talk. After hearing oral argument and receiving lengthy briefs on the company's motion to enforce its subpoena, Judge Matthew Perry of the District Court for the District of South Carolina relied on arbitral immunity, denied the company's motion to enforce its subpoena, and found that the motion was not "substantially justified" as required by Rule 37(a)(4); he therefore awarded me my attorney's fees¹²⁹ which, after a bit more legal jousting, amounted to \$5,000.

Conclusion

We can close this topic on an optimistic note. Arbitral immunity is alive and well in the state and federal courts. Arbitrators who perform their job need have no fear of damages and need not even testify except in the rarest cases. Better yet, it is now quite possible to shift the costs of litigating these cases onto those attempting to breach arbitral immunity, which is where those costs belong.

¹²⁸Georgia, for example, has a new statute providing for recovery of attorney's fees and expenses incurred because of abusive or frivolous conduct. O.C.G.A. §9-15-14 (Cum. Supp. 1986). The Georgia Supreme Court has recognized the right to recover damages for the new tort of "abusive litigation," *Yost v. Torok*, 256 Ga. 92 (1986). See also *Northern Cal. Dist. Council of Laborers v. Robles Concrete Co.*, 100 ALC ¶10,943 (Cal. App. 1984).

¹²⁹*Liggett Group v. Bakery, Confectionery & Tobacco Workers Local 176-T*, *supra* note 113, slip op. at 10-13. A few months after this decision another federal court awarded arbitrator Stephen Goldberg attorney's fees in similar circumstances. *Dugger v. National Elevator Indus.*, No. 86 C 740 (N.D. Ill., Jan. 6, 1987).