CHAPTER 9

THE TEN COMMANDMENTS FOR ADVOCATES: HOW ADVOCATES CAN IMPROVE THE LABOR ARBITRATION PROCESS

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First, I want you to know that the exact title of this afternoon's subject was chosen not by me, but by the Program Committee Chair. I mention that because the first half of the title is delusive. It asserts that 10 is the sacred number of commandments for advocates and suggests that I am qualified to play God. There is also a satanic touch to putting this topic on the program at all, since the President and Program Committee Chair—Tony Sinicropi and Marvin Hill—have just treated it comprehensively in their recent excellent paper in Willamette Law Review.[1] Their article contains what Tony and Marvin call a "road map" for advocates. Not only do they both realize that I am incapable of improving on their product, but they have even added to my embarrassment by elevating the figure of speech from "road map" to "ten commandments." Unfortunately, I lack the divine spark.

In considering the two halves of the assigned topic, I concluded that I am required to set forth a generous number of do's and don'ts for advocates, and to offer comments of a more general nature. Initially we must recognize that the many varieties in arbitration may generate specific advocacy problems. Thus, the road map or the ten commandments might be somewhat different in lawyer and nonlawyer advocacy, in ad hoc and permanent umpire situations, in the private and public sectors, in interest and grievance cases, and even in particular industries or specific issues. For obvious reasons my remarks are pitched to

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[1]Hill & Sinicropi, *Improving the Arbitration Process: A Primer for Advocates*, 27 Willamette L. Rev. 463 (1991).

the lowest common denominator, but they do postulate an advocate who engages in arbitration advocacy on a regular basis.

First, I would suggest that today's generation of advocates needs a greater understanding of their role in a historic and economic context. Labor arbitration is a by-product of collective bargaining and began to come of age in the late 40s and early 50s. It is hard for me to realize that I am now an old-timer who began teaching labor law in 1953, got hooked on arbitration at Yale Law School in 1953 in Harry Shulman's incomparable seminar, and had my first case in March 1956. In those heady days collective bargaining was a vibrant institution, and we absorbed almost by osmosis the significance of arbitration to the success of collective bargaining. This was true of arbitrators and advocates alike. All of us, almost automatically, viewed our cases from a larger perspective and were thereby enhanced in the quality of our performance.

Today, unfortunately, collective bargaining and arbitration seem to have more of a past than a future. In moments of despair I feel as though our Annual Meetings are akin to giving a face lift to a patient dying of pernicious anemia. The immediate point, however, is that the new generation of advocates (and arbitrators), through no fault of their own, largely lack that valuable sense of historic context and perspective.

To overcome this deficiency, every arbitration advocate should read the *Trilogy*.[2] Those cases are still the best expression of what arbitration is all about, and only a little bit of Justice Douglas's language is extravagant and subject to discount. I also recommend the recently published ABA manual *Labor Arbitration: Practical Guide for Advocates*.[3] It contains 33 papers by seasoned practitioners, and it not only puts arbitration in historic and economic context but also sets forth several laundry lists of do's and don'ts. Finally, I recommend that you familiarize yourself as thoroughly as possible with the history of collective bargaining in the industries in which you serve as advocate and in the particular bargaining relationships from which your cases emerge. The broader your background, the better an advocate

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[2]*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).

[3]Zimny, Dolson, & Barreca, eds., Labor Arbitration: A Practical Guide for Advocates (BNA Books, 1990).

you will be in the particular case, and the better the process will be served.

Second, I think the new generation of advocates needs a better understanding of the nature of the collective bargaining agreement. While in legal contemplation that agreement is a contract, it is a very different kind of contract from, for example, a commercial contract for the sale and purchase of goods or services. Because it deals with so many different subjects and so many people in the context of a continuing relationship between the parties, the collective agreement has a complexity and dynamism not found in commercial contracts. The Supreme Court has noted the "peculiar status and functions of a collective bargaining agreement" and has stated that it "is not an ordinary contract."[4] Clyde Summers has made the witty observation that "[T]he collective agreement differs as much from a common contract as Humpty Dumpty differs from a common egg."[5]

Although the collective agreement is not the only source of standards governing arbitration, it is undeniably the first and most important one. Even so, the advocate should not consider the contract as Linus does his security blanket. The printed pages obscure the dynamics of the negotiations. The contract language does not reveal that it is the product of many compromises among many subjects, that it was written with specifics in mind by persons who could not foresee all the problems of the future, and that frequently it was forged under time constraints and even in fatigue.

Rather than a tidy, coherent, and consistent whole, the collective agreement is more likely to be, in Harry Shulman's words, "a compilation of diverse provisions: some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems for future consideration with an expression of hope and good faith."[6] The lesson for the advocate is that, while the contract language is the starting point of reference, it will not usually be the end of the inquiry.

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[4]*John Wiley & Sons v. Livington*, 376 U.S. 543, 550, 55 LRRM 2769 (1964).

[5]Summers, *Judicial Review of Labor Arbitration: Alice Through the Looking Glass*, 2 Buff. L. Rev. 1, ___ (1952).

[6]Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1005 (1955).

Advocates are unwise to assume that the entire body of contract law, developed judicially in disputes over other kinds of contracts, or other principles applicable in judicial proceedings are automatically transferable and applicable to arbitration. Advocates must realize that interpretation and application of the provisions of collective agreements should be made in light of their purposes in their own specialized environment, rather than by single-minded application of the rules for interpreting strictly "legal" documents. The Supreme Court endorsed this view, stating that in "the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve."[7]

The foregoing does not mean that all contract or other law is inapplicable. It does mean that your task as an advocate is to familiarize yourself with the problem, to be selective in a way that is sensitive to the special nature of the collective agreement, and to avoid shoehorning into arbitration legal principles and practices not appropriate to that special nature. Your approach to arbitration should be more labor relations-oriented and less law-oriented.

Third, advocates should bear in mind constantly that arbitrators, in performing their task, are totally dependent upon the advocates to provide the necessary information and arguments. Advocates who lose cases frequently criticize the arbitrator who just did not understand. They should ask themselves why. There is a clear correlation between good advocacy and good decisions. Advocates must perform well if arbitrators are to decide intelligently. But the sad truth is that the principal failure of advocates, one that subsumes a host of others, is lack of thorough preparation before the hearing. So at this point I offer the First Commandment for advocates: Follow the Boy Scout and safe-sex motto: Be prepared!

Before the Hearing

Thorough preparation requires that you understand what your task as an advocate is. Briefly put, your task is twofold: (1) to present the facts in such a way that the arbitrator will, in

[7]*Steelworkers v. American Mfg. Co., supra* note 2, at 567.

fairness and equity, want to decide the case in your favor, and (2) to provide the arbitrator with the rationale to support a favorable decision. Both are important, but the facts are more important. Without a sufficient factual basis, the rationale is not enough. But if you convince the arbitrator on the facts, you can be sure that the rationale will appear in the opinion, whether or not you presented it as cogently as you should have.

Now, bearing the decalogue in mind, for a little while I am going to offer, in somewhat staccato fashion, some do's and don'ts for advocates. Time permits only a selective listing of major items. As you hear them, you'll groan, mutter "old hat," and ask why am I wasting time with the obvious. I could just say that Marvin Hill told me to do it, but the overriding fact is that, as obvious as these admonitions are, they are regularly ignored by advocates, and not only by inexperienced ones. In this portion of the paper, I have benefited from the responses of many friends in the Academy whose advice I sought, and I now thank them for their help.

You must first learn everything you can about the case. If you have an interpretation issue, study the entire contract. This may suggest how a particular provision should be interpreted. Study all predecessor contracts to detect language changes over the years. Look for negotiation notes and bargaining proposals. Check previous arbitration decisions.

I once heard a case in which I decided a particular issue a certain way. About two years later the same parties called me back. One side was represented by the same law firm, but by a different lawyer. It soon developed that he was relying on the position I had previously rejected, and it was apparent he was unaware of my earlier decision. Rather than embarrass him in front of everyone, I asked him at the end of the hearing to look up my earlier decision and comment on it in his brief. I can imagine his consternation when he got back to his office.

In mastering the facts, do not rely on the version of your client or principal witness. Interview everyone who has any information on the grievance. If an incident in the workplace is involved, visit the workplace. This will broaden your understanding of the facts, perhaps suggest evidentiary approaches, and enable you to handle all witnesses, yours and theirs, more effectively.

Now you must develop what boilerplate calls a "theory of the case." This means accurate identification of the issues, organization of your evidence and development of a game plan for its

presentation (witnesses and exhibit selection), articulation of your rationale or arguments, and the propriety of the remedy you are seeking. Once you have done that for your side of the case, you should try to anticipate the game plan of your opposition.

After you are on top of your case, you should explore with the advocate on the other side the final possibility of settlement. You may have uncovered something not considered in the grievance procedure which may now settle the case. Although we arbitrators drink a toast to unsettled grievances, we know that it is generally better for parties to settle than to arbitrate. If you cannot settle, try to stipulate as much as you can—issue(s), exhibits, and as many facts as possible. This will save time at the hearing.

Now that you have prepared yourself, you should prepare your witnesses. Educate them about the dynamics of a hearing, and go over their testimony carefully. Prepare them not only for direct but also for cross-examination. Just as with advocates, there are many do's and don'ts for witnesses if they are to be effective. I heartily recommend Herbert Segal's excellent paper on this topic in the ABA manual I mentioned.[8]

As to exhibits, do not confine yourself to conventional documents. Remember that a picture is worth a thousand words. Be resourceful in creating exhibits. Photographs, diagrams, flow charts, and the like can make a powerful impression. But whatever your exhibits are, be sure you have enough copies to go around at the hearing and that you can locate them immediately when needed. Failure in this regard is really inexcusable, and yet it happens frequently.

Typically, the arbitrator begins the hearing with no knowledge of the case. It would be desirable if, in advance of the hearing, the parties would send the arbitrator a copy of the contract, the grievance papers, and any exhibits they can agree on. That would save some time at the hearing. For some reason, however, parties seem reluctant to do this even when I suggest it. So the advocate must remember that the ad hoc arbitrator, no matter how experienced, at the beginning knows nothing about

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[8]Segal, *Selection, Preparation, and Examination of Witnesses in an Arbitration Case*, in Labor Arbitration: A Practical Guide for Advocates, eds. Zimny, Dolson, & Barreca, *supra* note 3, at 149.

the case—your contract, your operation, or the dispute which is about to unfold.

At the Hearing

When I ask at the beginning of the hearing about opening statements, some advocates say no, I'll just go on with the witnesses. More often, the advocate makes a short statement, which leaves me about as uninformed as before. Some opening statements are unorganized and merely leave me confused. These are all missed opportunities. The opening statement should never be waived, but it should never be given without adequate preparation. A good opening statement should parallel the game plan I mentioned earlier. It is the advocate's opportunity to present the case at the outset in its most favorable light. This will enable the arbitrator to receive your evidence with more understanding. If you are a good extemporaneous speaker, you can give your opening statement from an outline. Some advocates prepare their opening statements in writing. Whatever you do, do not waive it but do not wing it.

During the progress of the hearing, never forget, whether you are a lawyer or not, that as an advocate you are engaged in a professional performance and you should conduct yourself in a professional manner. Even though you and the arbitrator may be friends of long standing, in an ad hoc case do not carry an air of familiarity into the hearing room or call the arbitrator by a first name. Maintain your demeanor and decorum on a civilized and courteous basis. This is not inconsistent with vigorous and determined advocacy. Do not adopt an antagonistic style. Avoid personal aspersions, belittling or sarcastic statements, or suggestions of dishonesty, treachery, or lying. This applies both to the opposing advocate and to adverse witnesses. Most arbitrators understand and are tolerant of a certain amount of theatrics for the benefit of your constituency. Just do not overdo it. The arbitrator is not a jury, and trial-type posturing will not advance the merits of your case.

The examination of witnesses is a subject all its own with its own long list of do's and don'ts. Again, I refer you to Herb Segal's paper. My own pet peeves are having a witness read at length from the contract or some other exhibit, presenting purely cumulative testimony, insisting in TV-attorney style on a yes-or-no answer, and cross-examination which only recapitu-

lates the direct and thus not only wastes everybody's time but is also self-defeating.

Many cases turn on the credibility of witnesses, and one of the more difficult tasks arbitrators have to perform is resolving credibility conflicts. Arbitrators can seldom know which witness is telling the truth, but they must decide what testimony they are willing to believe in order to decide the case. The factors that arbitrators and other decisionmakers use in determining credibility have been set down in many places (the Hill-Sinicropi article contains a partial list). You should become familiar with those factors, and then in your direct and cross-examination touch as many of those bases as you can. My impression is that many advocates do not understand the credibility problem from the arbitrator's point of view or how arbitrators attempt to solve it.

Many advocates ask for frequent breaks in order to confer with client or witness. Except for unexpected events, this should not be necessary if you have prepared your case thoroughly in advance. Frequent requests for recesses not only delay the hearing but make the arbitrator wonder if you really know what you are doing. Make every effort to honor the arbitrator's time instructions, not only starting time but break and lunch periods. Failure to do so cheapens the process and puts the arbitrator in an embarrassing position. In a hearing once I set 1:15 as start-up time after lunch. One side was there, ready to go. At 2:00 p.m. the other advocate and client walked in, with no explanation or apology. You will never believe me when I tell you that was not the reason they lost the case.

Advocates frequently overlook the advantage to be gained, in terms of the arbitrator's understanding of the case, of a site visit. When the nature of the case calls for it, I strongly recommend that advocates give the arbitrator a site visit and permit whatever questions are deemed necessary. I think this is not done often enough. One caution—do not try to make an ex parte pitch to the arbitrator outside the earshot of the other side.

Advocates frequently introduce "surprise" evidence at the hearing, something which was learned after the grievance procedure ended. If the evidence is discovered far enough in advance, ideally it should be disclosed to the other side before the hearing. If it is important enough, it may produce a settlement. If the evidence is saved as a surprise at the hearing, it is sure to engender procedural problems, such as argument over

admissibility and request for delay or even adjournment to formulate a response. The point for advocates is that the arbitrator will not permit your surprise to unfairly disadvantage the other side and, even though your evidence will probably be admitted, delay and acrimony are inevitable.

In almost all cases the arbitrator will not need a transcript of the hearing. Neither will you, unless you intend to file a posthearing brief, and in almost all cases the arbitrator does not need that either. In my practice I sense that economic reasons are reducing the number of transcripts, but the use of briefs is not declining. In almost all cases a closing argument is sufficient. In some cases a brief is helpful, but I cannot recall a case in which the brief was decisive. But attorneys, especially outside counsel, are attuned by tradition and billable hours to the filing of briefs. Frequently, union advocates feel compelled to file a brief merely because the employer is doing so. In my judgment any advocate who wishes to file a brief has that right, and I do not proffer my view unless asked. But I have the conviction that the process would be greatly improved if the filing of briefs were confined to the few cases of exceptional complexity or difficulty. I also believe this will not happen. One final observation: Do not expect to win your case by arguments in your brief based on elaborate discussion of quantums, burdens, and standards of proof.

I spoke earlier about the advocate's decorum as a matter of professional performance. Let me broaden the point and emphasize one more time something which has been said many times before at these meetings, something which all advocates know but frequently ignore. Your arbitration case is an episode in a continuing relationship between the parties. Whoever wins, they must continue to live with each other. The advocate normally will not be personally affected in the same way as the parties. The advocate should try to conduct the hearing in a manner which will not permanently impair the relationship after the case is over. It is important to win, but sometimes the ultimate price can be too high if your performance leaves a legacy of distrust and bad feelings. The best discussion of this vital point that I know of is Ralph Seward's paper at the Academy's 32nd Annual Meeting.[9] That paper should be required

[9]Seward, *The Quality of Adversary Presentation in Arbitration: A Critical View*, in Arbitration of Subcontracting and Wage Incentive Disputes, Proceedings of the 32nd Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books, 1980), 14.

reading for all advocates.

In closing the Ten Commandments portion of my talk, I simply must remind you of Lew Gill's delightful luncheon address at the 15th Annual Meeting.[10] His subject was "Gamesmanship in Labor Arbitration," and his very funny paper includes 10 rules, described as "sound and tested methods for becoming a truly inept advocate." If you have not read it, you really should.

In asking what advocates can do to improve the arbitration process, we must recognize that the process is not the same as it was 40 or even 20 years ago. Let me make clear that I am not talking about the demise of the Taylor mediation approach and the acceptance of the Braden adjudication model.[11] I fully agree that arbitration is a form of adjudication. What I am talking about is the change which has taken place in arbitration as adjudication.

As early as the 1950s, speakers at these meetings began warning of the perils of "creeping" legalism. As time went on, the creep became a gallop. The commentary increased accordingly, and most of us have discussed the phenomenon in detail pro and con, mostly con. Today the fact is that the arbitration process in many bargaining relationships has become judicialized, and the arbitration forum is more like a courtroom. A short answer to the program question would be that advocates can improve the arbitration process by taking it back to the informality it used to have. But that would be naive. The change appears to be irreversible. The new generation of advocates and arbitrators has entered the field under the new regime and accepts it. Oldtimers must live with the reality that, just as Canute could not roll back the waves, in arbitration we can never go back to "the way we were."

Admissibility of Evidence

I am not going to indulge in regretful nostalgia, but I do want to discuss briefly one aspect of the new regime where I think

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[10]Gill, *Gamesmanship in Labor Arbitration*, in Collective Bargaining and the Arbitrator's Role, Proceedings of the 15th Annual Meeting, National Academy of Arbitrators, ed. Kahn (BNA Books, 1962), 148.

[11]For an extensive discussion of the two models, see Mittenthal, *Whither Arbitration?* in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books, 1992), 35.

advocates could substantially improve the process. That is the matter of free admissibility of testimony and other evidence. This is a characteristic of arbitration as originally conceived and practiced, within the adjudication model, which has been undermined by the increasing resort by advocates to the exclusionary rules of evidence borrowed from the judicial process. In my judgment, this is a deplorable development.

In that Yale seminar in 1953 under Harry Shulman, I was taught that in labor arbitration the rules of evidence did not apply. It was just that pat. They simply did not apply. A few months later, just before his death, Shulman delivered the Holmes lecture at Harvard, entitled "Reason, Contract and Law in Labor Relations," which I commend fervently to new-generation advocates and arbitrators. In that seminal lecture Shulman said:

> Ideally, the arbitrator should be informed as fully as possible about the dispute which he is asked to resolve. He should hear all the contentions with respect to it which either party desires to make. For a party can hardly be satisfied that his case has been fully considered if he is not permitted to advance reasons which to him seem relevant and important. The more serious danger is not that the arbitrator will hear too much irrelevancy, but rather that he will not hear enough of the relevant. Indeed, one advantage, frequently reaped from wide latitude to the parties to talk about their case is that the apparent rambling frequently discloses very helpful information which would otherwise not be brought out.[12]

In a paper in 1957,[13] Ben Aaron decried "the use of legal mumbo-jumbo: the monotonous objections to the introduction of evidence on grounds that it is 'incompetent, irrelevant, and immaterial'." He noted that "procedural rules designed to exclude evidence are, with few exceptions, inimical to the purpose of arbitration."

Sound reasons support the rule of free admissibility. First, the exclusionary rules were developed principally in the context of jury trials, to prevent lay jurors from being misled. An arbitrator does not need this protective insulation. A second and broader consideration is how the exclusion of evidence may affect the perception of the employees and supervisors who are not familiar with legal technicalities. They want to tell the arbitrator what *they* think is important. If they are denied the opportunity to do

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[12]Shulman, *supra* note 6, at 1017.
[13]Aaron, *Some Procedural Problems in Arbitration*, 10 Vand. L. Rev. 733, 743 (1957).

so and are then on the losing side, they will feel that they were denied a fair hearing. Even losers should believe that they were treated fairly. The credibility of the process should not be undermined with the very people for whom it was designed, and this, I think, is done by the exclusion of evidence that *they* think is important.

A third consideration is that the arbitrator who is asked to exclude evidence as irrelevant or immaterial is not in a very good position to make an intelligent ruling. A trial judge has the benefit of pleadings, pretrial conferences, and frequently pretrial briefs. This familiarity enables the judge to make informed rulings on admissibility. The arbitrator clearly is not in the same position, and will usually not know, until the hearing is over and the case is studied, what is relevant and what is not. There is a substantial danger that exclusionary rulings made at the hearing will be wrong and thus unfair. When sitting without a jury trial judges do not normally observe the exclusionary rules. Why should arbitrators be more demanding?

The free admissibility of evidence is supported by our Academy Code, which states: "An arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument."[14] At least since the mid-50s and until recently Rule 28 of the AAA Voluntary Labor Arbitration Rules provided: "The parties may offer such evidence as they desire. . . . The arbitrator shall be the judge of the relevance and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary."[15] As part of a series of rule changes effective January 1, 1992, Rule 28 was partially changed to read: "The parties may offer such evidence as is relevant and material to the dispute. . ." The rest of what I just quoted is the same. Although the change in Rule 28 does not undermine the validity of my argument for free admissibility, I think it is a mischievous change which will encourage advocates to make objections. It is disappointing that the AAA revised its rules without notice to the Academy's Designating Agency Liaison Committee, chaired by Mickey McDermott.

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[14]Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, §5(A)(1) (1985).

[15]American Arbitration Association, Voluntary Labor Arbitration Rules (as amended 1988).

I emphasize that I am talking about admissibility of evidence, not its weight or probative value in the decision of the case. What the parties think is important may turn out not to be so in the judgment of the arbitrator. Frequently at hearings when objections are first made, I make a short statement to this effect: I am admitting the evidence because I am not in a position to know whether it is relevant or not; the party offering the evidence has the burden of showing me that it is relevant; I have enough experience to know the difference between probative and nonprobative evidence; the parties are free to "object" to let me know they consider evidence nonprobative, but objections to admissibility will not be sustained, and the evidence will be admitted. But in overruling objections, I do sometimes suggest to counsel that the evidence is getting a bit far afield.

Opponents of the rule of free admissibility of evidence have shrewdly created a catch phrase, which they have with considerable success turned into a weapon of disparagement and ridicule—"letting it in for whatever it's worth." This clever word play obscures the fact that all evidence, including that which is admitted without objection, comes in only for whatever it is worth, as determined later by the arbitrator.

But, say the exclusionists, if it is admitted for what it is worth, the objecting party will be forced to respond to it, and that will only lengthen the hearing. Not true. Advocates constantly make selective tactical decisions on whether to respond, even to evidence admitted without objection. If the evidence is really as irrelevant as the objecting party claims, then it can safely be ignored. Arbitrators are not dummies.

Mickey McDermott, in his presidential address at the 33rd Annual Meeting,[16] and Tom Roberts, in a presentation at the 40th Annual Meeting,[17] engaged in two dialectical exercises with each other on free versus restricted admissibility, exploring the topic more fully than I can today. Mickey took the free and Tom took the restricted view. Each wrote the entire script for his own presentation, which means that each was a straight man for

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[16]McDermott, *The Presidential Address: An Exercise in Dialectic: Should Arbitration Behave as Does Litigation?* in Decisional Thinking of Arbitrators and Judges, Proceedings of the 33rd Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books, 1981), 1.

[17]Roberts, *Evidence: Taking It For What It's Worth*, in Arbitration 1987: The Academy at Forty, Proceedings of the 40th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books, 1988), 112.

the other. So, in all fairness, you should read both papers. It is perhaps not surprising that law-trained advocates should seek to carry the exclusionary rules into arbitration, but it is surprising and disappointing when arbitrators defend it. Tom Roberts is a prominent arbitrator, and one of my closest and dearest friends in this Academy, but I must say that in his paper he has it all wrong. He writes as though arbitration were solely for the advocates and the arbitrator and fails to recognize that it is primarily for the people in the workplace.

Interestingly Tom concedes that "if the question of relevance is close in a particular situation, the arbitrator should lean toward admittance." He says he only wants to exclude talk of "ships and sails and sealing wax—of cabbages and kings." Actually, the phrase is "shoes and ships and sealing wax." Tom even got his quote from Lewis Carroll wrong. I do not know the parties Tom arbitrates for, but in my experience advocates never offer any such Alice in Wonderland evidence which is obviously and clearly irrelevant. Indeed, in many cases the objection is made not because advocates honestly believe that the evidence is irrelevant but because they know that it is relevant and would be harmful if admitted.

My opposition to objections to relevance extends also to the best evidence rule, the parol evidence rule, hearsay, cross-examination beyond the scope of the direct, and all the other evidentiary rules. Let me wrap this up by saying that labor arbitration is best served by free admissibility. If the party offering the evidence believes, albeit incorrectly in the long run, that it is important to the case, the evidence should be admitted and the arbitrator should not be a party to its exclusion. This general rule has only a few exceptions, such as contractually excluded evidence or settlement offers which are obviously irrelevant to the merits of the grievance and which, if admitted, would discourage the parties from making such offers. So my final bit of advice to advocates on how to improve the process is: Come on, fellows and gals, knock off the objections.

Mercifully for the audience, all speeches must end, and I now come to the end of this one. No one is more aware than I that everything I have said today has been said before and better by others many times. But basics require repeating, for if they are not repeated they may cease to be basics.

In 36 years as an arbitrator, I cannot honestly say I never met an advocate I did not like, but I can say that I can count them on

one hand. With few exceptions, they have been persons of competence and integrity, and I consider it a real privilege to have worked in cooperative fashion with so many of them over the years. My remarks today are offered in that spirit.

My final word is for those advocates who are just beginning their careers. I can confidently predict that you will find advocacy in arbitration a fascinating and rewarding activity. No two cases are exactly alike; new situations arise regularly, and even with humdrum, routine cases each has a little something all its own. If I may borrow a phrase from Shakespeare, I would say of labor arbitration that age cannot wither nor custom stale its infinite variety.

MANAGEMENT PERSPECTIVE

ROBERT J. BERGHEL*

I was somewhat apprehensive when first asked to comment on the advocate's role in the arbitration process. Although I have been an advocate for over 30 years, I was not sure that my comments could be objective or would add anything to what has been said previously. Indeed, as Bill Murphy points out, Sinicropi and Hill have prepared an excellent dissertation on what advocates should be and do in their recent article "Improving the Arbitration Process: A Primer For Advocates."[1]

My apprehension level rose moderately when I first began reading the paper to which I was responding. As Murphy acknowledges, his advice to advocates is not necessarily original. I certainly cannot take issue with his recommendations that advocates review and understand the collective bargaining agreement and thoroughly prepare the case and witnesses. Nor do I recommend that advocates appear late at hearings. Nor do I dispute that some advocates regularly ignore these basic rules.

As I continued through the paper, however, my anxiety was relieved. As I reached the more substantial issues and comments, my competitive spirit rose to the surface, and I knew that my comments were not only appropriate but necessary.

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[1]Sinicropi & Hill, *Improving the Arbitration Process: A Primer for Advocates*, 27 Williamette L. Rev. 463 (1991).

Historical Perspective

Before getting into the substance of my comments, it would be helpful to review the historic arbitration process and the advocate's role in that process.

The Arbitration Process

Arbitration as we know it began during World War II under President Roosevelt's War Labor Board. By the mid-1940s it was a widely accepted mechanism for peacefully settling disputes between labor and management. Today approximately 98 percent of all American collective bargaining agreements contain procedures for settling disputes through arbitration.[2] Although I do not have any statistics supporting my assertion, I would estimate that 98.2 percent of the arbitrations tried in the last 50 years involved single discharges, various forms of discipline, and contract interpretations, none of which individually would exceed $50,000 in value. Since the typical arbitration involved a single disciplinary matter or dispute over contract interpretation, the scope of the arbitration was relatively narrow. The outcome, with few exceptions, did not affect the viability of the enterprise. While the loser was dissatisfied, the business or representation was not destroyed.

Many arbitrators, without confessing that they were in fact dispensing their own brand of industrial justice, will concede that they felt it their "duty" to make decisions that suited their own personal sense of fairness. To make such decisions might require arbitrators to hold that the employer imposed too harsh a discipline or that strictly construing a contract term would harm the bargaining unit beyond what the arbitrator felt should have been the intention of the negotiators. In discharge cases arbitrators invented due process standards when there were none in the agreement. This was done, I suppose, out of some compelling inner need to protect the worker from the onerous and exploitative employer.

These ideas expressed in awards may have made the employee feel better about the arbitration process (a feeling that Murphy seems to believe is the ultimate goal of arbitration), but they did substantial damage to the integrity of the negotiated

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[2]*See* Basic Patterns in Union Contracts, 12th ed. (BNA Books, 1989), 37.

contract. As the years rolled on, however, people recognized what was happening in the name of arbitration. Parties became much more careful in drafting arbitration language. They imposed restrictions on what the arbitrator could and could not do and on the arbitrator's jurisdiction. When these restrictions were carefully articulated, courts have been more likely to keep the arbitrator within the four corners of the contract.[3]

The Advocate

Because the scope of the arbitration was relatively narrow, the role of the advocate was limited. The advocate's job was to investigate the grievance, to determine the merits, to advise the client whether proceeding to arbitration was reasonable, and ultimately to present the case in its most favorable light, making sure that all the significant facts favoring the client were presented in the arbitration. Unfortunately some arbitrators looked at the advocate's role with disdain, perhaps because they did not recognize the soundness the advocates brought to the process. I believe it fair to say that, without advocates on each side, facts would tend to be distorted and disorganized in the presentation. Relevant facts would not be discovered and presented. Since the arbitrator depends solely upon the parties for an understanding of the facts, the inevitable result of the disorganization would be poorly reasoned awards that did not serve justice or the long-term interests of the parties.

The advocate's role is not, however, solely that of factfinder. In those cases where the law is not clear or where several aspects of the law come into play at once, it is the advocate who calls attention to applicable theories and precedent. Many well-accepted arbitration principles would not have surfaced had it not been for the advocate's convincing presentation and innovative assertions not only of what the law is, but also of what it should be.

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[3]Some employers are leaning away from arbitration as an alternative dispute-resolution method because of perceptions that they will not receive fair treatment by arbitrators. While a Business Week/Harris Poll of top executives found that 97% favor making greater use of alternative dispute-resolution methods to settle differences (*GUILTY! Too Many Lawyers and Too Much Litigation*, Bus. Wk. (Apr. 13, 1991), 60–66), another survey by the American Bar Association revealed that employers are reluctant to embrace arbitration for employment-related disputes because of concerns about the process itself and what they perceive as a pro-labor bias of arbitrators (*Focus on . . . Alternative Dispute Resolution*, Individual Employment Rights 7(8):4 (BNA, May 5, 1992).

Regardless of our feeling about the success of labor laws over the past 50 years, we must recognize that the industrial workplace is changing. Parties have become much more sophisticated in dealing with one another and are better able to set forth their intentions in a contract. Because of this increased sophistication, more disputes are resolved by union representatives and management working together. We see fewer and fewer union-management disputes brought before arbitrators. Those union representatives who have not awakened to the changing relationship between labor and management are finding membership decreasing in record numbers. Bashing the employer is passé. Thus, traditional labor arbitration may become even less of a factor in resolving workplace disputes in the coming decades.

Looking to the Future

Contrary to the image painted by Murphy of arbitration as the sinking Titanic, arbitration is not only afloat, but about to embark for Shangri-La, although over some previously uncharted waters. Many of the old ideas of arbitration are, however, sinking fast. As the arbitration process evolves and develops, so must the arbitrator and the advocate evolve with it.

On May 13, 1991, the Supreme Court handed down the long-awaited decision in *Gilmer v. Interstate/Johnson Lane Corp.*[4] The Court ruled that parties may apply a compulsory arbitration agreement to claims brought pursuant to the Age Discrimination in Employment Act.[5] The decision represented a striking departure from the long-standing position of the courts that federal civil rights actions are not subject to compulsory arbitration under the Supreme Court's decision in *Alexander v. Gardner-Denver Co.*[6]

As a result of decisions like *Gilmer* and the ever-increasing cost of litigation in the courts, arbitration is becoming more and more accepted as a means of resolving disputes. According to the Bureau of National Affairs, last year the American Arbitration Association handled 562 cases between employers and individual employees. The issues presented in those cases included

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[4]111 S.Ct. 1647, 55 FEP Cases 1116 (1991).
[5]29 U.S.C. §§621–634, as amended (1988).
[6]415 U.S. 36, 7 FEP Cases 81 (1974).

severance pay, wrongful discharge, fraud, sexual harassment, breach of contract, and age discrimination. These cases involved $152 million in claims and $17 million in counterclaims.[7]

These new arbitrations present a different role for arbitrators. While they need not be lawyers, they will have to recognize the basic tenets upon which these new arbitrations are based. This recognition must include an understanding of the rationale underlying the rules of evidence. In order for arbitration to be viable as an alternative to litigation, the results, on the whole, must be similar to those that would be obtained in court. If not, the process will soon fall into disfavor.

In order to survive, the arbitration process must be responsive to the needs of the parties. It is, after all, a creature of the contract between the parties. With the recognition of that fact by arbitrators must come a better cognizance of literal contract meanings and a willingness to accept contract terms as definitive even though the arbitrator believes that the result is harsh. Arbitrators must follow the wishes of the parties or see the entire process denigrated into disuse.

The Supreme Court has suggested that some of the basic rules governing litigation in courts must be observed by arbitrators if arbitration is to be substituted for the courts. In *Gilmer*, the plaintiff attempted to argue that arbitration was an inadequate substitute for litigation in court because the discovery procedures were limited. In rejecting the plaintiff's argument, the Supreme Court noted that the procedures under which the arbitration would proceed allowed for document production, information requests, depositions, and subpoenas.[8] Thus, arbitrators must permit parties to engage in limited discovery even when none is expressly provided in the governing rules of procedure.

I realize that the possibility of discovery procedures raises a multitude of new issues, and I am not suggesting that discovery would substantially enhance the probability of a just result in arbitration. However, that view, expressed by the Supreme Court, is a distinct possibility for the future. Personally, I believe that once arbitration heads down the discovery path, it will provide little cost savings over traditional litigation. I much

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[7]*Focus on . . .*, *supra* note 3.
[8]*Gilmer v. Interstate/Johnson Lane Corp.*, *supra* note 4, 55 FEP Cases at 1121.

prefer the old style of arbitration that many of my colleagues call "trial by ambush."

In addition, burdens of proof will be part and parcel of discrimination arbitrations. Although Murphy proclaims freedom from burdens of proof, arbitrators cannot ignore the burdens placed on a claimant under the discrimination laws. The claimant in a discrimination case must establish a prima facie case before the employer need even begin to supply an independent defense.[9] Thus, the arbitrator will have to determine whether the claimant has met this burden before requiring the employer to go forward. In addition, the arbitrator must recognize that the burden of proving discrimination always remains with the claimant.[10]

The advocates will provide the greatest assistance for the arbitrator in sorting out the various aspects of these new, complex cases. They will also bear responsibility for finding the applicable law and presenting the relevant facts in the context of that law.

Although Murphy speaks disdainfully of hearing transcripts and posthearing briefs as though they were devices to take advantage of the adversary, thorough briefing in these new cases will be mandatory. Transcripts will be a necessity, not a luxury. These new arbitrations will involve a great many more legal issues for the arbitrator. The briefs will provide the advocate a way of calling the arbitrator's attention to the various rules that the facts of the case have brought into play. It will, of course, be up to the arbitrator to apply the legal rules advanced by the advocates.

Conclusion

Arbitrators of the 21st century will have to be equipped to deal with the myriad of labor and employment laws coming into play in the arbitration forum. They will have to recognize the interplay between laws of contract and laws of social expression in order to take the given facts and apply justice in a manner closely akin to that afforded by a U.S. district court.

The advocates will provide the arbitrator with the tools to render just and fair decisions. They must, therefore, research

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[9]*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 5 FEP Cases 965 (1973).
[10]*See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 25 FEP Cases 113 (1981).

and present to the arbitrator the appropriate and applicable law. They must know how to present the facts to sustain their constituents' burdens under those laws. Advocates must know the discovery devices available under applicable rules and use them effectively.

To the extent that advocates and arbitrators can bring about decisions resembling those which would have been received from the courts, the arbitration process will increasingly replace the court system as the forum of choice for parties in employment disputes. To the extent that arbitrators fail in this regard, however, they will have missed an opportunity that may not return again. Arbitrators may speak with loathing of advocates' attempts to "legalize" the arbitration process, but it is the advocates who will keep the process alive by pushing it to meet the changing needs of the parties.

LABOR PERSPECTIVE

DAVID ALEXANDER*
MARCUS WIDENOR**

Professor Murphy has provided us with a thoughtful overview of how a veteran arbitrator sees the process and the changes it has gone through over the years. He has also given us a useful list of commandments that all arbitration advocates should heed to be effective in presenting their cases. Our task is to respond by offering a sense of how the union advocate views the process and its strengths and shortcomings.

As labor educators teaching an intensive week-long arbitration institute, we have dealt directly with the frustrations that union advocates at all levels in local and international unions experience in this process. It is important to understand that union advocates face unique problems in grievance arbitration due to the peculiar institutional characteristics of labor organizations. The politicization of grievance arbitration within a democratic organization and the duty of fair representation

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responsibility are just two well-recognized examples. Some of these dynamics may also be present within management hierarchies, but not to the same degree as in a local union.

Our comments are based on our experiences as labor educators over the last 10 years, as well as on the results of a survey we conducted among our students. We find much to agree with in what Murphy has suggested, and the results of our survey further clarify where union advocates have problems in the arbitration process and how they would like to see it changed.

Prior Research on Arbitration Practices

Research on the arbitration process tends to concentrate on the behavior of arbitrators rather than on union or management advocates and their skills. One body of work addresses the general characteristics of the profession as a whole.[1] A second body of literature deals with workplace issues and how arbitrators approach particular types of contractual disputes.[2] Unfortunately, little has been written on the practices and preferences of union and management advocates in the process, and virtually nothing is available on the training of arbitration advocates—our special concern as labor educators.

From 1964 to 1992 five main articles have been written on arbitrator behavior and the preferences of union and management advocates relative to the arbitration process:

1. In 1964 the Jones and Smith pioneering study surveyed the attitudes of 306 management and 90 union advocates on their satisfaction with the arbitration process and their suggestions for improvements.[3]

2. In 1966 Shore examined the attitudes of 28 arbitrators, 40 unionists, and 33 management representatives in five "dimensions" of the arbitration process: adherence to prece-

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[1]*See* Bognanno & Coleman, eds., Labor Arbitration in America: The Profession and Practice (Praeger, 1992); Bognanno & Smith, *The Demographic and Professional Characteristics of Arbitrators in North America*, in Arbitration 1988: Emerging Issues for the 1990s, Proceedings of the 41st Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books, 1989); Herrick, *Labor Arbitration as Viewed by Labor Arbitrators*, 38 Arb. J. 39 (1983); McKelvey, *Survey of the Arbitration Profession*, in The Profession of Labor Arbitration, Selected Papers From the First Seven Annual Meetings, National Academy of Arbitrators, ed. McKelvey (BNA Books, 1957).

[2]The list of articles is too long to cite. *See* National Academy of Arbitrators, An Annotated Bibliography of Labor Arbitration (CCH, 1985) for a topical summary.

[3]Jones & Smith, *Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report With Comments*, 62 Mich. L. Rev. 1115 (1964).

dents, prophylactic orientation, liberality of interpretation, elicitation of facts, and procedural formality.[4]

3. In 1973 Davey compared the views of 26 management and 15 union advocates and prescribed a detailed list of changes in the arbitration process based on their comments. However, as Davey noted, his sample of advocates was very small and was based on his personal contacts in the field rather than on a randomly or scientifically drawn pool.[5]

4. In 1978 Graham, Heshizer, and Johnson examined the attitudes of a larger sample of 235 trade unionists.[6] However, their sample was dominated by union shop stewards, whose experience with arbitration is arguably more relevant to pre-arbitration levels of the grievance procedure rather than actual presentation of cases.

5. In 1992 Watkins looked at how 26 union and management advocates "rated" the attributes of 12 regional arbitrators. The study defined some important characteristics that union and management representatives seek in an arbitrator.[7] However, the respondents did not indicate whether they represented labor or management, making it impossible to distinguish preferences of the two groups. Nevertheless, Watkins's study is useful in reinforcing certain trends as well as in representing an initial attempt to find a more objective means for evaluation arbitrator performance.

The Survey

Our research differs from previous work in the field because it looks at a larger group of union advocates and attempts to analyze the problems they face vis-a-vis our education program and its effectiveness. The survey was designed to look at two questions: (1) How do union advocates view the arbitration process, and (2) how effective was our educational program in preparing them as advocates? Our discussion here deals mainly with the first question, but we will also make some remarks about the evaluating of arbitration education programs. We believe

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[4]Shore, *Conceptions of the Arbitrator's Role*, 50 J. Applied Psychol. 172 (1966).

[5]Davey, *What's Right and What's Wrong With Grievance Arbitration: The Practitioners Air Their Views*, 28 Arb. J. 209 (1973).

[6]Graham, Heshizer, & Johnson, *Grievance Arbitration: Labor Officials' Attitudes*, 33 Arb. J. 21 (1978).

[7]Watkins, *Assessing Arbitrator Competence: A Preliminary Regional Survey*, 47 Arb. J. 43 (1992).

this is crucial to improving the process. As Hill and Sinicropi remarked in a recent monograph, one reason the arbitration process is misused stems from a lack of adequate education at the supervisory and steward level of the grievance procedure.[8]

The survey was mailed to 675 past participants in our "Arbitration: Preparation and Presentation" seminar from 1985 to 1990.[9] While not a scientifically drawn sample, it does represent a good cross-section of AFL-CIO unionists preparing and presenting arbitration cases in the United States. The original mailing went to representatives from 54 international unions. Seventy questionnaires were returned undeliverable, leaving an active sample group of 605. We received 158 responses, a return rate of 26 percent.[10] Although this is not an overwhelming return rate, the responses were reasonably representative, coming from 37 international unions, including all the largest AFL-CIO affiliates. We identified 59 percent primarily in private-sector and 41 percent in public-sector jurisdictions (including federal and postal unions). The largest group was in the U.S. Postal Service, 20 percent from the letter carriers, postal workers, and mailhandlers unions.

Our survey asked 57 questions in four basic areas: (1) background of respondents, (2) aspects of the arbitration process causing difficulty, (3) evaluation of arbitrator behavior during the hearing and in decision writing, and (4) evaluation of the Meany Center arbitration curriculum. Respondents were asked to react to statements by using a five-point scale of approval (from very high to very low, and from strongly agree to strongly disagree). They were also given an opportunity to add narrative comments.

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[8]Hill & Sinicropi, *Improving the Arbitration Process: A Primer for Advocates*, 27 Willamette L. Rev. 463, 474 (1991).

[9]The survey and a summary of aggregate results are available from the authors.

[10]The limitations of the return rate may be due in part to the transiency of union officeholders and the changes in assignments that many international union staff receive over time. However, previous studies also contained very limited samples of respondents. Davey, *supra* note 5, and Shore, *supra* note 4, both used very small groups of union advocates, who were self-selected for the studies. Graham, Heshizer, & Johnson, *supra* note 6, received 235 responses for a return rate of 47% on their survey. However, nearly all the respondents were union stewards, rather than the officials or staffers most likely to make presentations in arbitration hearings. Their survey also represented a smaller profile of unions—19 unions as compared with our sample of 37. Jones & Smith's, *supra* note 3, study attained a return rate of 31%, drawn from a regional (Michigan) sample of union advocates. Our group was drawn from across the United States.

General Characteristics of the Respondents

In the past our arbitration program typically attracted new or relatively inexperienced union staff representatives. However, we have noticed some changes in attendance over the past 10 years. Whereas the program formerly was dominated by full-time local, regional, and international union staffers, now many more local officers and stewards attend the program. More than half (60 percent) of the respondents were local union officers and staffers rather than international union staff. We think this is due to an effort by some international unions to push the preparation aspects of arbitration lower into the local organizations. Whether because of high legal costs or small union treasuries, the effect is to create a larger pool of local advocates involved in preparation (although not necessarily presentation) of arbitration cases. Many unions, including American Postal Workers Union (APWU), Amalgamated Transit Union (ATU), and Bakery, Confectionery and Tobacco Workers International Union, have consciously sought to increase the arbitration skills of their lower level officers in order to strengthen the solidarity of the local membership by involving them more in the process.

Before attending the arbitration program, those surveyed had presented an average of 4 arbitration cases. In the survey the mean had risen to 27 cases, indicating a much greater experience level. This is an indication that our sample group has had ample opportunity to develop skill as arbitration advocates. While most arbitration activity was confined to preparation and presentation of cases, 49 percent had also written posthearing briefs, a task which creates a certain amount of anxiety for union advocates, as we will discuss later.

Evaluation of Arbitrators and Arbitration

We were quite surprised that our respondents exhibited very little cynicism about arbitrators or the arbitration process. The declining strength of the labor movement and the aggressive posture of management in many collective bargaining relationships have led to anecdotal criticism of the process in our classes. We even encourage a bit of cathartic arbitrator bashing at the beginning of our seminar to allow people to get it off their chests (e.g., "Did you know that the middle word of arbitrator is 'traitor'?").

Our respondents remain believers in the effectiveness of arbitration as a tool for resolving workplace disputes, although they would like to see some alternative mechanisms. An overwhelming 90 percent of the respondents believe that arbitrators show fairness to both sides in the process and allow advocates to put on cases to the best of their ability.[11] Although the cliche is still popular, most union advocates did not think that arbitrators "split the baby" in order to avoid alienating either party; 56 percent believed that arbitrators make decisions based on the information received at the hearing rather than splitting the award to appease both sides.[12]

On numerous occasions we hear union advocates remark that they believe lawyers have an advantage over nonlawyers in the arbitration process. While our group concurred with the opinion that the arbitration process is becoming over-judicialized (more on this later), they agreed by a margin of three to one that nonlawyers are treated as fairly as attorneys by arbitrators in the process. However, they were evenly divided over whether lawyers had an advantage over nonlawyer union advocates in brief writing; 36 percent agreed that brief writing unfairly favored attorneys, 38 percent disagreed, and 26 percent were uncertain. Our experience in having union advocates develop opening statements and briefs in our advanced seminar confirms the existence of a great variation in writing proficiency, certainly more variation than among attorneys, who spend three years in law school honing this skill.

Difficulties in the Arbitration Process

We asked our union advocates to rate their difficulties with various parts of the arbitration process. Their responses confirm much of what Murphy has suggested and give some ideas as to how arbitrators and educators can facilitate education of labor advocates. Aspects of the arbitration process that gave our group the least amount of trouble include investigating the case, direct examination of witnesses, presentation of opening statements, presentation of closing arguments, and development of a "theory of the case" (more on this later). Following are the issues

[11]This high level of support is consistent with what Jones & Smith, *supra* note 3, at 1116 found in their study.

[12]Jones & Smith found a perception by both union and management advocates that neutrals tend to split the baby.

most frequently cited as difficult or very difficult, with the addition of our own commentary on the possible sources of those difficulties:

1. Preparation for the Hearing. The biggest difficulty noted by our group lies not with the hearing or the decision but with preparation for the hearing. Murphy is correct to cite preparation as the crucial ingredient to a successful presentation, and we have always emphasized this in our classes. Among our respondents, 53 percent said that obtaining relevant information from the employer during the investigation of the case was of high or very high difficulty.

Short of greater subpoena authority for arbitrators to request documents and witnesses, or a full-blown discovery process, arbitrators can do little to affect this problem. As labor educators we stress that it is crucial for unions to establish effective steward systems to ensure an adequate investigation prior to an arbitration hearing. And steward training remains the core of the labor education curriculum offered by most universities and international union education departments in the United States. However, shop-floor representation varies widely, and often there is no well-established, reliable system for collecting information necessary for effective grievance handling.

We hear more and more complaints about employers who are unwilling to provide unions with commonplace grievance-related information, which should be available under the provisions of the NLRA or state collective bargaining statutes. Requiring more shop-floor union advocates to attend arbitration training programs and to assist in preparing cases would certainly improve the union's ability to collect this information. However, our respondents were uncertain as to whether better trained union activists would stop management from forcing frivolous cases to arbitration. While we did not ask this question in our survey, unionists regularly remark that prolonging the grievance-resolution process through arbitration is merely one battle in the war of attrition against the union. For example, in the postal sector it seems to be a way of life.

2. Making and Responding to Objections. Murphy's final admonishment to the arbitration advocate is to "knock off the objections" as a means of excluding evidence. Hill and Sinicropi make a related point when they criticize advocates for making objections which are improper or tend to detract from the merits of

the case.[13] In our survey, 47 percent felt that making and responding to objections was difficult or very difficult. This is not surprising since this aspect of advocacy improves only with extensive practice and can be very frustrating for a new advocate. It is also frustrating for the arbitrator who asks for the ground to support the objection only to hear in return: "I don't know why I object, but I do!" A hands-on exercise used in our advanced class provides some instruction, but this is no substitute for years of experience in the hearing process. We also videotape our mock arbitration hearings to review objections and talk about their form and substance.

3. Cross-Examination of Witnesses. Generations of arbitration advocates raised on "Perry Mason" and "L.A. Law" are infatuated with the fantasy of destroying the other side's case in cross-examination. We stress the fallacy of this notion and the danger of pursuing it at the expense of a well-prepared direct examination of union witnesses. However, union advocates continue to stumble in cross-examination. Not surprisingly, 38 percent of our respondents stated this as a difficulty. Often the problem comes in the form Murphy mentioned—where cross-examination endlessly recapitulates a witness's story. Not only does this drag out the hearing, but it also gives an adverse witness the opportunity to seem more credible in retelling the story. Some union advocates believe that if they keep asking the question often enough, the witness will miraculously change the story.

Union advocates may be prone to unnecessary cross-examination because they think that the grievant expects questioning of management witnesses, whether or not this helps the case. The right to cross-examine is so entwined with the principle of due process that the advocate pursues it even when it hurts the case. Cross-examination techniques, like making and responding to objections, are difficult to teach. Classroom exercises can rarely simulate the immediate nature of cross-examination or objection-making in the arbitration process. Advocates must think on their feet, and if they miss an opportunity it is usually lost forever. Unlike outlining a theory of the case or writing an opening statement, the cross-examination process rarely gives an advocate opportunity to review, analyze, and revise; it occurs in one moment and is gone. Thus, we emphasize "not doing it badly" rather than "mastering it."

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[13]Hill & Sinicropi, *supra* note 8, at 500.

4. Handling Evidentiary and Procedural Issues. One of Murphy's pet peeves is the advocate's use of the exclusionary rule in evidentiary and procedural questions. In this connection "legalization" of the arbitration process has become almost a cliche within arbitration circles.[14] Evidentiary and procedural issues present a good example of the over-legalization of the arbitration process. This was mentioned by 38 percent of our respondents as a difficult part of the advocate role. They feel at a disadvantage in presenting a case when the management attorney attempts to direct the proceeding by using motions or objections based on evidentiary or procedural considerations. Many union advocates in our education program share anecdotes about exclusion (or nonexclusion) of evidence and about other procedural matters they were unprepared to handle. Murphy seems to have surrendered to the judicialization of the arbitration process. He noted that "creeping legalism" became a "gallop" some time ago. We believe that his admonition to prevent further extension of the exclusionary rule is a good one.

On the other hand, our respondents were quite divided over whether the arbitration process as a whole was overrun with legalism. A plurality of 38 percent agreed that the process had become too legalistic, 30 percent disagreed, and 32 percent were neutral on this matter. However, a majority of postal union advocates representing APWU, NALC, and Mailhandlers Union disagreed that the arbitration process had become too legalistic; 40 percent of them believed that arbitrators should follow more formal rules of evidence. This discrepancy probably stems from the peculiar culture of postal industrial relations, which has become increasingly bureaucratic and litigious over the decade. Postal advocates seem to prefer an arbitrator whose hearing practices reflect the formality of their system.

We enthusiastically concur with Murphy's suggestions that advocates should be more creative in developing exhibits for

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[14]The debate on legalism in grievance arbitration is as old as the institution itself, although it has escalated since the *Steelworkers Trilogy* (*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)). A few examples representing differing positions are Tobias, *In Defense of Creeping Legalism in Arbitration*, 13 Indus. & Lab. Rel. Rev. 596 (1960); Bartlett, *Labor Arbitration: The Problem of Legalism*, 62 Or. L. Rev. 195 (1983); Kagel, *Legalism—and Some Comments on Illegalisms—in Arbitration*, in Arbitration 1985: Law and Practice, Proceedings of the 38th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books, 1986), 180; Andrews, *Legalism in Arbitration: II. A Management Attorney's View*, in Arbitration 1985, *id.*, at 191.

submission during hearings. We have often seen a theory of the case come alive when an advocate used a time line, drawing, chart, or other representation to supplement the testimony of witnesses or more conventional documents.

5. *Writing Posthearing Briefs.* The final aspect of the arbitration process considered particularly difficult by our respondents is the preparation of posthearing briefs, with 31 percent rating it as very difficult. Brief writing is perhaps the clearest example of how the norms of the legal profession have encroached on grievance arbitration, and the use of briefs has been widely discussed.[15] Unfortunately, union advocates always feel compelled to file a brief when management does so. The deluge of posthearing briefs is the source of many bitter complaints by union officials against the legal profession ("First, we kill all the lawyers!"). Union advocates are clearly at a disadvantage since their craft is based largely on personal relationships with members, beginning with an activist's first job as a union steward. Writing is not the main means of expressing ideas within the labor movement, whereas it is the most fundamental tool of the first-year law student.

Our group was unequivocal in the belief that briefs are unnecessary in a majority of cases. In one of the most lopsided margins of any question, 83 percent stated that an arbitrator did not need a brief to make a decision in most cases. This concurs with Murphy's observation that in very few cases is a decision rendered on the basis of argument in the brief. Earlier research[16] also indicated that although briefs are usually not necessary, they continue to proliferate, and, while union advocates do not usually consider briefs necessary, their management counterparts generally favor them. Hence, this issue is driven by the side with the most attorneys—management. Although brief writing was considered difficult, our former students were divided over whether it gave management an advantage in the arbitration process; 36 percent agreed, 38 percent disagreed, and 26 percent were neutral on this question.

One solution would be to negotiate expedited grievance-arbitration procedures excluding briefs under certain circumstances. Our union advocates were not opposed in principle to expedited arbitration; they did not believe, for instance, that

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[15]*See, e.g.*, Davey, *supra* note 5, at 215; Jones & Smith, *supra* note 3, at 1128.
[16]Davey, *supra* note 5, at 215.

expedited procedures would deny members due process rights. However, despite some good models for expedited arbitration, we have not seen the practice spread very quickly during the last 10 years.

6. Development of a Theory of the Case. Only 14 percent of our respondents had a high degree of difficulty with developing a theory of the case, but we consider this subject important and will therefore comment on it. Advocates rate this part of the process as insignificant probably because acknowledging its difficulty might call into question an advocate's competency. We have observed that many problems in arbitration begin with an inadequate theory of the case. This defect is compounded as the grievance procedure and finally the arbitration hearing proceed. Consequently, as Hill and Sinicropi remark, the arbitrator is left "wondering just what a party's 'theory' or 'blueprint' of the case was."[17]

Union advocates often can collect many facts concerning a workplace dispute but cannot weave those facts together as evidence of a contractual violation. Facts by themselves are not necessarily evidence, which may not be apparent to the new advocate. Our program features an exercise in which each participant writes and presents an opening statement, laying out the theory of the case. For many participants this is the most challenging part of the program.

Improving the Hearing

We also asked a number of questions regarding how the arbitrator conducts the hearing. The responses may help to improve the process. In line with union advocates' difficulty with evidentiary and procedural aspects of arbitration, 44 percent agreed with Murphy and opposed arbitrators' use of more formal rules of evidence in hearings. To keep the hearing moving, however, 40 percent believed that the arbitrator should be more activist, that is, "ask more questions of witnesses themselves in order to move the process along."

Both of these trends are in keeping with past research indicating a labor preference for less procedural formality but for more arbitrator activism in eliciting facts.[18] We believe that an activist

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[17]Hill & Sinicropi, *supra* note 8, at 510.
[18]Shore, *supra* note 4, at 177.

approach by the arbitrator is in the best interests of the process, although we know that many arbitrators (and legally trained advocates) are opposed to this approach.

Are arbitrators inclined to believe employer witnesses over union witnesses? A plurality of our sample did not think so, but 26 percent did feel that arbitrators are biased toward management witnesses. While the fairness of the arbitration process is not in question, we are concerned that so many union advocates held this view. We agreed with Hill and Sinicropi's observation that advocates do not always understand the concept of "credibility" and how such determinations are made by neutrals.[19] This may be caused partly by the failure of written opinions to explain credibility determinations.

The Opinion

We asked another series of questions concerning the arbitrator's decision and written opinion. Beginning with an age-old pet peeve, over half of the respondents believed that arbitrators do not submit their decisions to the parties in a timely fashion. This difficulty may stem from failure to agree on a definition of timeliness. The parties rarely define it, unless the contract requires the decision within a certain period of time. This is one area where labor and management probably agree but do not exercise their joint responsibility to inform the arbitrator. It also raises the question of whether a timely decision should be a "condition of employment" for hiring the arbitrator. The problem of "justice delayed is justice denied" is caused not only by neutrals, however. A third of our respondents agreed that the parties are willing to delay a hearing to wait for a "well-known" experienced arbitrator, rather than permit someone less experienced to hear the case sooner. In our classes we stress that with a little more investigation unions can find skilled, competent neutrals who may not be as well known.

When asked for whom the arbitrator's decision should be written, over half of the respondents chose the grievant, while 44 percent stated that it should be written for union and management advocates. These results are somewhat at odds with earlier studies, which showed a preference by union and management representatives for opinions composed for the benefit

[19]Hill & Sinicropi, *supra* note 8, at 495.

of the parties, rather than for individual grievants.[20] The politicized environment of the local union may be one reason that our respondents preferred this approach. More aggressive management and declining union strength may also lead union advocates to prefer opinions that speak directly to the aggrieved worker, taking the pressure off them to "interpret" the award.

Over a third of our group believed that arbitration decisions are too long and stray from the central facts and arguments presented by the parties at the hearing. Only 20 percent stated that opinions are too short. More union advocates realize that arbitration is where they discover the real weaknesses of their contract language. But the written decision will not help the general industrial relations climate if it does not clearly tell one side why it won and the other side why it lost.

Summary and Conclusions

A striking aspect of our survey results was the wide range of opinions. On most questions responses were divided almost evenly between "disagree," "agree," and "neutral." Furthermore, cross-tabulations by economic sector, organizational level, and number of cases presented revealed consistency among all groups (with the exception of the postal unions already mentioned). This divergence of responses reinforces the notion that attitudes toward arbitration are very much the creature of the particular bargaining and industrial relations climate experienced by individual advocates. While the survey acknowledges that there is no typical arbitrator, union advocates do have some preferences concerning the neutral's approach to the hearing process.

In the last 10 years over 1,500 union advocates have attended the five-day "Arbitration: Preparation and Presentation" institute at the George Meany Center for Labor Studies in Silver Spring, Maryland, or at the Universities of Oregon, Colorado, and Illinois. Among our 5-year sample group, 65 percent felt that, as a result of this training, their unions took stronger cases to arbitration and avoided frivolous ones; 97 percent believed that the program made them better able to represent the union in dealing with the employer.

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[20]Peterson & Rezler, *Arbitration Decision Writing: Selected Criteria*, 38 Arb. J. 26 (1983).

While many trade unionists believe that the arbitration process is a valuable tool and helps increase the solidarity of the local union, there is a prevailing cynicism among many union officers, staff, and members. This view holds that arbitration has increasingly become a means for management to wage war against the local union by pushing frivolous and already decided issues through the process. Our conclusions speak to this attitude and attempt to identify how arbitrators can improve the process. In the spirit of Murphy's comments, we offer four broad commandments, which summarize the chief concerns of union advocates as well as our own priorities as labor educators. The common thread that runs through them is the desire for increased participation of arbitrators in all phases of the process.

1. Arbitrators should encourage and participate in alternative dispute resolution (ADR) mechanisms. While the arbitration process received widespread support in our survey, 55% of the respondents believed there should be some type of alternative to arbitration for resolving workplace problems. Of those favoring an alternative, over three-quarters preferred mediation prior to arbitration. Over the years we have received more and more requests for training in the area of grievance mediation or med/arb. Some international unions, like NALC in their UMPS program, have institutionalized steps to mediate grievances short of arbitration. Training materials that discuss this option are now available to trade unionists.[21]

The community of third party neutrals should encourage and facilitate the development of ADR mechanisms to ensure that the issues ultimately going to arbitration really belong there. How many times have you asked yourselves, "Why is this case before me?" Union officials will acknowledge and research shows that a number of grievances reaching arbitration do so for political reasons.[22] However, many more are not settled prior to arbitration because there simply is no mechanism for doing so. Encouragement of pre-arb mediation would create new work opportunities for arbitrators, and serving as mediators at the pre-arb stage may be good training for new arbitrators.

Unions also should be more active in offering options to streamline the dispute-resolution processes. They should treat

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[21]Gall, Grievance Mediation: A Union Member's Guide (Pa. State Univ., 1991).

[22]Peterson, *Why Unions Go to Arbitration: Politics and Strategy vs. Merit*, 48 Personnel 44 (1971). We take exception to Peterson's generalization that almost 25% of union grievances are politically motivated.

grievance arbitration as a high priority item at the bargaining table. Too often the only way a union assesses whether the system works is by counting up the win/loss record in the grievance procedure and arbitration without looking at the structure and mechanics of the process itself. "If it ain't broke, don't fix it" becomes a rationalization for never revisiting the dynamics of dispute resolution in a changing workplace. A more pro-active approach to modify the system would be in the spirit of Murphy's recommendation that advocates try to understand their role in the broader context of industrial relations as a whole.

2. *Arbitrators should pursue the "activist" role of third party neutral.* Our study indicates that union advocates prefer an active arbitrator over a passive one. We believe that activism helps speed up the process. Some neutrals may resent this suggestion as an attempt to get the arbitrator to do the work of the advocates, but our experience shows that justice can be lost in the confusion during a hearing, whereas a simple clarifying question or statement of preference by the arbitrator might get the proceedings back on track. Many union advocates would appreciate hearing a statement of a neutral's ground-rules and preferences at the beginning of the hearing to impress upon the parties that they must show respect for the process if they want it to continue to serve their needs.

3. *Arbitrators should discourage the further encroachment of legalism in the process.* Killing all the attorneys will not really help here. Sometimes union advocates have been equally to blame for overlegalizing the arbitration process. However, Murphy's points on objections and evidentiary exclusion might be pursued by the active arbitrator to educate the parties and avoid judicialization. For example, the arbitrator should simply tell the parties at the time of the hearing, "I've heard your case and I don't need posthearing briefs." Sometimes arbitrators may be afraid to offend the parties by stating their preferences, but many union advocates believe that arbitrators allow briefs to drive up the cost of the arbitration and to add another 60–90 day delay in making a decision which could have been completed without briefs. It would be a great benefit to labor educators if arbitrators would occasionally give us ammunition to help fight this attitude.

4. *Arbitrators should be more involved in the training of advocates.* An important benefit of our program is the active participation of arbitrators in classroom sessions and in conducting mock

arbitration hearings. This gives the participants an opportunity to speak directly to the people who make the decisions in their cases. The value to a new union advocate is immeasurable and should outweigh any fears that the arbitrator will be "tainted" by such participation. We might go even further and say it is an arbitrator's duty to participate in training programs offered for union or management advocates. For example, the comments made by Murphy, in stating his commandments for advocates, would carry significant weight in a union training class because of his lengthy tenure and stature in the profession. Advocates need to hear from arbitrators outside as well as inside the hearing room.

It is indeed a difficult time for the American labor movement. In our more pessimistic moments we share Murphy's opinion that arbitration seems to have more of a past than a future. But we find training union advocates an exciting educational challenge. Arbitration preparation and presentation develops leadership and advocacy skills that transfer well to many other facets of the labor movement. Our survey reflects that the respondents share our enthusiasm for the arbitration system. For most of them it provides a chance to serve their members in a useful and constructive way. It also guarantees that unions have an effective means of addressing contract administration problems short of job action or costly and lengthy litigation. We would like to think that most unionized employers in the United States also see this benefit, although sometimes we wonder.

We hope that this body will continue to contribute to the success of the arbitration process by helping to educate advocates who participate in it, and by guaranteeing that it remains an accessible arena for the resolution of workplace disputes. Employer advocates and arbitrators should consider how workers might express their discontent without a forum that provides true due process. Arbitration needs the support and encouragement of all parties involved because we all have a strong interest in its survival.