

CHAPTER 11

THE ARBITRATION HEARING

PART I. ABUSE CASES: MENTALLY ILL AND OTHER "PROBLEM" WITNESSES

CAROL WITTENBERG*

In a paper presented at the Academy's 1979 Annual Meeting, Richard Mittenhal set forth the standards which arbitrators use in determining the credibility of witnesses, in general.¹ These standards are especially relevant in cases turning on the credibility of witnesses who present different and conflicting accounts of an incident. They include: (1) demeanor; (2) character of the testimony (whether it is forthright or evasive); (3) perception, recollection, and communication (memory); (4) consistency of the testimony; (5) supporting facts; (6) probability of the witness's story; (7) bias or motive to fabricate; (8) character (reputation for honesty and veracity); and (9) admissions of untruthfulness. Mittenhal warned that credibility determinations involve subjective judgments in which the intuition of the arbitrator is important.

Credibility determinations are difficult enough in ordinary disciplinary and discharge cases. Where there is a potential problem as to the competency of a witness, credibility decisions are more complex. I have defined "problem" witnesses for purposes of this paper as (1) mentally ill, (2) mentally retarded, or (3) minor children. This paper examines these credibility problems in discharge or discipline cases involving allegations of abuse, specifically charges or mental, physical, or sexual abuse of patients or children by employees charged with their care.

*Member, National Academy of Arbitrators, Chappaque, New York.

¹Mittenhal, *The Search for Truth: II. Credibility—A Will-o'-the-Wisp*, in *Truth, Lie Detectors, and Other Problems in Labor Arbitration*, Proceedings of the 31st Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books, 1979), 61.

In preparing for this paper, I read more than 200 arbitration decisions. Many cases were drawn from special panels involving the state of New York and its public-sector unions, dealing with patient abuse and teacher tenure. I reviewed published decisions as well as those sent to me by Academy colleagues. I was struck by the fact that arbitrators rarely discuss their credibility determinations in detail. The cases I have chosen to discuss are generally of two types: (1) decisions I have rendered, or (2) decisions of colleagues who serve on patient abuse and/or teacher tenure panels and who, like me, have heard numerous abuse or corporal punishment cases.

Cases of abuse are both difficult and disturbing. They are troubling because they involve allegations of abuse by the powerful over the powerless, the adult versus the minor child. Some institutionalized victims cannot defend themselves or articulate what occurred. If patients or children can testify against an employee, they are placed in the unenviable position of speaking against a person who may be returned to the position of custodial caretaker at the conclusion of the proceeding. The employee, on the other hand, is often responsible for the care of individuals who not only are impaired but also may be aggressive or violent. It is not unusual for institutions to be short staffed, placing additional burdens on employees suffering from stress, overwork, or burnout. Although understaffing and stress do not excuse employee misconduct or patient abuse, they explain in part some of the things that occur in facilities for the mentally ill or mentally retarded and in overcrowded, violent schools.

Where there is an allegation of abuse, the employer generally acts quickly to issue disciplinary charges against the employee for several reasons. *First*, the employer wants to protect patients against further abuse. New York State, for example, may suspend an employee without pay during the pendency of disciplinary proceedings if there is "probable cause to believe that the employee's continued presence on the job represents a potential danger to persons or property or would severely interfere with operations."² If an arbitrator subsequently finds the employee innocent of all charges, however, the employee is awarded back pay for the entire suspension period, even if there was cause for the emergency suspension. *Second*, since anyone can report abuse and trigger an

²Agreement between the State of New York and the Civil Service Employees Ass'n, 1988-1991, art. 33.3(g)(1).

investigation, an employer wants to act first to confront the problem. *Third*, an employer is liable for any harm that befalls a person under its custodial care. In effect, the employer is the defender of public policy by seeking to protect those for whom it cares and who are unable to care for themselves. Having determined through an investigation the likelihood that an employee was responsible for abuse, the employer generally seeks termination.

These public policy issues are put squarely before the arbitrator. The employer not only argues the seriousness of the charges, but asks the arbitrator to give special credence to the testimony of patients or children, claiming that public policy demands that they be protected from harm. The union, on the other hand, demands substantial proof, sometimes beyond a reasonable doubt, that the employee has committed an act of abuse because the result not only deprives the employee of a job but stigmatizes the person as an abuser. The union may argue that the employee should be credited over the alleged victim, particularly in cases involving allegations against a professional, such as a teacher or nurse.

The arbitrator must determine whether the "problem" witness is credible, whether the patient or child is worthy of belief, or whether the employee should be credited. In assessing the testimony of a problem witness, the role of the arbitrator differs from that of a court. A judge inquires about the competency of a witness before allowing testimony. A judge must ascertain whether the potential witness understands the purpose of the oath and has the capacity to observe, recollect, and communicate events. If the court deems the witness competent, it is then up to the jury to determine the witness's credibility. There is no precise age at which a minor child is competent to testify. A court determines competency based upon the child's capacity, intelligence, and ability to differentiate between truth and falsehood.

Unlike courts, arbitrators generally accept testimony from any witness called by the parties without ascertaining competency. In studying the record after the hearing, the arbitrator must decide whether the witnesses are credible and how much weight should be accorded their testimony. Arbitrators look to the same standards of credibility that they apply in all other cases, accommodating only for the witnesses' deficiencies.

Despite the fact that arbitrators may be less concerned with competency than the ultimate determination of credibility, parties often submit evidence to support arguments concerning the competency of a witness. For example, the employer may submit

the testimony of a psychiatrist to certify that a patient is competent to testify. The purpose is not to persuade the arbitrator to admit the testimony but to support the argument that the patient witness is competent and credible. Likewise, the union may subpoena the patient's records to show delusions, hallucinations, or other mental or emotional deficiencies which may call into question the witness's credibility.

For example, New York State is required, pursuant to subpoena, to produce a patient's records for the six-month period immediately preceding the incident giving rise to the discipline and for two weeks thereafter. The patient's records, including those of other patient witnesses, are produced for the arbitrator at the hearing for an *in camera* review. The arbitrator must decide which records are relevant to the charges and make those records available to both sides. Either party may submit patient records as part of the record of hearing. If neither side submits the records, however, the arbitrator may not rely upon the review of patient records to assess the witness's credibility. Patient records selected for submission generally include: (1) the most recent yearly assessment of the patient including a psychological, physiological, and medical evaluation; (2) the client's behavior plan; (3) daily reports of staff noting any unusual behaviors or circumstances; and (4) incident reports. A union may also subpoena a minor child's school records to ascertain a history of disciplinary or emotional problems. The accuser's background may be relevant to credibility.

Where the "Problem" Witness Does Not Testify

In many cases involving charges of abuse in institutions, the mentally ill or retarded patient does not testify. In some cases the patient may not be competent to do so. In others the employer chooses not to adduce testimony from a patient, either because there is concern for the patient's well-being or because the patient is too delusional to be credible. Where mentally retarded patients do not testify, it is because they are nonverbal or not sufficiently verbal to communicate effectively. In these cases the institution relies upon one of three factors: (1) medical evidence of abuse, (2) evidence placing the grievant at the scene or in charge of the client at the time the abuse occurred, and (3) testimony of nonpatient witnesses, co-workers or nonemployees, who were present at the time of the incident.

It is not uncommon for a new employee, trainee, or intern to make an allegation of patient abuse against a fellow employee. This person may report an incident which is contrary to the practice and policy of the institution relating to treatment of patients. Employees are instructed during orientation that it is their responsibility to report abuse or face discipline for failure to do so.

Many experienced employees recognize a “code of silence” in supporting coworkers accused of abuse. A coworker may refuse to testify or, if testifying, state that the incident did not take place. At other times a coworker may deny seeing the grievant at the time of the alleged incident. Although this code of silence may be an expression of worker solidarity, it also has a practical purpose. Patients can be violent, and employees must rely upon one another for physical protection. Therefore, reliance upon coworkers to “cover one’s back” is a reality of life. The employee who turns in or testifies against a coworker runs the risk of losing assistance when needed. Reluctance to testify is also based on unwillingness to be a party to another employee’s discharge.

Where coworkers volunteer to testify or testify pursuant to a subpoena, their testimony may demonstrate reluctance to support charges of abuse. For example, where an employee assigned to another unit testified that the grievant punched a client in the face and attempted to kick him in the head while being restrained on the floor, several of the grievant’s coworkers testified otherwise. Although all coworkers reported seeing an attempted punch and kick, none observed the grievant’s fist or foot connect with the client’s face or head. They claimed that they were facing away from the patient when the alleged punch or kick took place. When the medical evidence showed that the client suffered injuries, it was not plausible that none of the coworkers had observed any physical contact between the grievant and the patient. More likely, they refused to provide corroborating evidence of abuse. The arbitrator sustained the charges against the grievant on the basis of the testimony of the one employee witness, coupled with the medical evidence.³

Although coworkers may be reluctant to testify to an incident of abuse, they are forthcoming concerning an institution’s rules and regulations or other patient information pertinent to the

³Unless otherwise noted, the cases cited in this paper are based on unpublished decisions of the author.

arbitrator's analysis. For example, where an employee was accused of failing to take adequate care of a client by forcing him to walk after sustaining a fall and injuring his hip, a coworker testified that he did not observe any part of the incident despite his presence in the area. He was completely forthcoming, however, about the rule that an employee's first responsibility, when a client falls, is to assume a medical problem and conduct a medical assessment for injury. The witness also denied that the client had a history of throwing himself on the ground to avoid following orders, the basis of the grievant's defense.

Where patients are injured in institutional settings, the employee is not always responsible for the abuse. Some institutionalized persons are self-abusive. Some may attack or abuse other patients. Even where the employees are not the abusers, they may be charged with neglect of duty where a patient or child is injured. The arbitrator must decide whether the employee reasonably could have prevented the incident. For example, the arbitrator dismissed all charges for neglect of duty where a child disappeared from the institution when the employee turned to leave the room at the end of his shift. The arbitrator found that it was impossible for him to face in two directions simultaneously, thereby keeping the children in view at all times. The employee was reinstated with full back pay.⁴ On the other hand, where patients are designated "one-on-one," requiring the staff member to keep the person within eyeshot and arm's reach at all times, and the patient is either injured or inflicts injuries on others, the employee may be held responsible for failing to fulfill required duties.

Take the case of an employee discharged for failure to perform her duties when during her evening shift a patient severely beat and bit another patient in the ward. While neither patient was verbal, both were able to make grunting noises. The employee was the only person on duty. The medical evidence indicated that the injuries occurred sometime during the grievant's shift and were discovered at the change of shifts the next morning. The employee testified that she was awake and performing her duties during her entire shift. She stated, however, that she heard nothing and noticed no bruises on the patient while conducting her rounds once every 30 minutes throughout the evening. Yet, there was evidence of blood on the patient's bed clothes as well as bruises and bites on her body. While the charge of sleeping on the job was

⁴Unpublished decision of Arbitrator Jean McKelvey.

dismissed for lack of evidence, the arbitrator sustained the discharge on the basis of gross neglect of duty resulting in injuries to a client under the employee's care.

Where the employer has medical proof of abuse but cannot produce the patient to testify, the employer may add charges either to force employees to testify or to hold them culpable for failure to assist in the investigation of patient abuse. For example, four security officers employed in a psychiatric center were accused of compressing a patient's neck with force, causing his death. The arbitrator found that the patient died from asphyxia due to manual compression of the neck as determined by the medical examiner. Each grievant testified that he neither touched the patient's neck nor saw anyone else touch the patient's neck during an attempt to restrain the man. Yet, there was evidence of a struggle after the four grievants escorted the patient to a small room where agitated patients are brought to be calmed. Three to five minutes after a nurse observed the four grievants escort the patients, she was called to give the patient his medication. When she spoke to him, he failed to respond, indicating no pulse or respiration, and resuscitative efforts were unsuccessful. The arbitrator was unable to determine who caused the patient's death and dismissed all charges except that of giving false testimony during the course of an investigation, for which she sustained all four discharges.⁵

The arbitrator who can decide the case on the basis of medical evidence and/or the testimony of coworkers or other witnesses will do so. However, where the patient or child testifies and the arbitrator is faced with the one-on-one credibility of the victim versus the employee, the determination as to who is credible must be made by weighing and evaluating the credibility of the "problem" witness. Special arrangements may be made for the testimony of a mentally ill or retarded patient. For example, under a special arrangement between the state of New York and the Civil Service Employees Association, a patient may testify out of the presence of the grievant, where a psychiatrist certifies that the grievant's presence could be detrimental to the patient's emotional or psychological condition. As a result, the parties have established alternate procedures, allowing a patient to testify via videotape or by another screening device, with the grievant able to observe the patient's testimony, but protecting the patient from confronting

⁵Unpublished decision of Arbitrator Sheila Cole.

the alleged abuser. Counsel for the grievant is given ample time to consult with the grievant before conducting cross-examination.

Young children may also be allowed protection during their testimony at the discretion of the arbitrator. In a school case, for example, an attorney may request that the parent of a child witness be present during the hearing. It is not unusual for arbitrators to grant this request. Often parental approval for a child to testify is contingent upon the right of the parent to be present at the hearing. The parent may sit behind the child, out of view, so as not to coach or distract the child during the testimony.

The Mentally Ill Witness

The mentally ill patient may be completely capable of recollecting and relating a story with clarity and consistency, and may be forthright and persuasive. In comparing the witness's testimony at the hearing with prior statements given to staff or investigators shortly after the incident, the arbitrator may find consistency as to recollection. In addition, there may be physical evidence of abuse. In short, the patient's direct testimony and supporting facts may be strong evidence of the patient's credibility. Yet, in assessing the credibility of the mentally ill patient, an arbitrator faces other considerations. *First*, patient's records, if submitted, should be reviewed to determine whether the allegations constitute a pattern of unfounded accusations of abuse. *Second*, an arbitrator should determine whether the charge falls within the illness for which the patient is confined (e.g., delusions of sexual abuse). *Third*, an arbitrator must decide whether the patient's account is credible despite the illness, based upon the usual standards of credibility.

Where the arbitrator has doubts about the reliability of the patient's story, the testimony of other patients is helpful. This is particularly true where a medical witness testifies that the patients do not have the mental capacity to collude on a story of abuse or have not had an opportunity to speak before giving their version of events. For example, an employee was accused of making sexual advances to a 15-year-old patient. Specifically, he was accused of kissing her, hugging her, and telling her he wanted to have babies with her. The kissing incident was witnessed by another patient. Despite the fact that the 15-year-old patient had a reputation for lying, including allegations of sexual abuse, the arbitrator found her to be credible. *First*, her version of the kissing episode was corroborated by another patient who witnessed the incident and

was incapable of colluding with the patient to fabricate the story. *Second*, when the patient had lied in the past, she had been inconsistent in details. Here her account was consistent from first telling of the incident through the hearing. *Third*, whereas the patient had always recanted when making allegations of abuse in the past, she did not do so in this case. The arbitrator relied upon the standards of consistency, memory, and corroboration in crediting the patient's account.⁶

In another case an arbitrator credited a patient's story of abuse corroborated by other patients and supported by medical evidence. The employee was accused of physically abusing the patient by pushing him and grabbing him, resulting in abrasions on his neck. The discharge was sustained based upon the testimony of the victim as well as corroboration by another client witness. The arbitrator stated, "While the clients' testimony with regard to the details differed, they agreed on the critical common element—their identification of the grievant as the person who had his hands on the client's neck and who produced the scratches." Further, their testimony was supported by medical evidence as to the time the scratches occurred. The arbitrator found:

Further, the differences in their stories convince the arbitrator that their testimony was neither rehearsed nor fabricated. Neither had anything to gain by getting a staff member in trouble, and no motivation to fabricate has been demonstrated.⁷

Although faced with conflicts in the details of the incident, the arbitrator, in crediting the patient witnesses, relied upon the standards of corroboration, supporting facts, and lack of motive.

The Mentally Retarded Witness

The retarded patient typically has the mental capacity of a young child. Retarded witnesses experience difficulty with recall and detail; that is, they are often unable to recall surrounding aspects of the case such as spatial arrangements of objects or people. They have difficulty with aspects of time involving the sequence or frequency of events. They may hesitate or falter while relating a story. These limitations do not necessarily mean that the retarded person cannot remember the incident accurately or is not telling the truth.

⁶Unpublished decision of Arbitrator Homer LaRue.

⁷Unpublished decision of Arbitrator Bonnie Weinstock.

Arbitrators do not reject automatically the testimony of a retarded witness because of these flaws. For example, in assessing the credibility of a retarded girl, an arbitrator allowed for the girl's mental and emotional state to account for the inconsistencies of her testimony. The case involved a security monitor in a school who was accused of sending a note, described as lewd and lascivious, to a 21-year-old, mentally retarded female student. The note, suggesting that the two meet to engage in sexual activity, came to light when the young woman showed it to her brother. The arbitrator credited the woman's story despite the numerous inconsistencies in her account, including her insistence that she did not like and had no interest in the grievant, when the record showed that she had flirted with him and sent him notes in the past. In explaining this inconsistency, the arbitrator distinguished between the woman's factual testimony and her recollection of emotional feelings. He stated:

The change in her opinion about the grievant was emotional, and therefore her statement that she never liked him was nothing more than a product of her disability. While she demonstrated to me the power of factual recall, she also demonstrated to me an inability to retain an opinion in the face of the disagreement of others with that opinion.

The arbitrator credited the brother's explanation that the woman responded to pressure from those around her, trying to please and do what was expected of her. The arbitrator said:

She reacted as a child would react; all the testimony is consistent that mentally and emotionally she is a child and her negative reaction is therefore understandable and credible.

While she was initially flattered to receive a letter from a man, she changed her opinion of the grievant when her family reacted negatively to the letter's content. The arbitrator was persuaded that the woman did not understand the letter or its significance when she shared it with her brother.⁸

Another example is the case where a male employee was accused of placing a female client on his lap, touching her crotch and kissing her. The arbitrator credited the client, finding her testimony both cogent and consistent—and squaring with the account she had provided five months earlier on the date of the incident. She had a reputation for honesty among the staff, and no motive or bias against the grievant was demonstrated. Furthermore, the patient had no history of hallucinations, psychotic episodes, or

⁸Unpublished decision of Arbitrator Jeffrey Selcheck.

delusional behavior. A coworker observed the client sitting on the grievant's lap. There was no animosity between the two coworkers. The decision was based upon the patient's credibility as well as the grievant's failure to explain his behavior. The arbitrator stated: "In the absence of any plausible explanation for the client being seated on his lap, the Grievant provided no basis for the arbitrator to conclude that his behavior was anything other than improper."

In another case the grievant was accused of pulling a client's right arm, resulting in a separated shoulder. There were no witnesses to the incident. The arbitrator credited the client's testimony, finding implausible the grievant's version, to the effect that the client had caught his arm on the back of his wheelchair. The client admitted his own conduct, which was not entirely exemplary—spitting in the grievant's face, yelling and cursing at him, and punching him in the nose. Since the client had no history of striking staff members, the arbitrator credited his account that the client punched the grievant in the nose in retaliation for having his arm pulled. The arbitrator found the patient's version more plausible than that of the grievant.

The Child Witness

Cases involving corporal punishment traditionally stem from allegations by students against teachers. It is not unusual for an accusing student to be described as a disciplinary problem. Despite the student's history, the child who testifies at the hearing is often quiet, withdrawn, and shy. The child, who has a record of being sent to the principal or guidance counselor for speaking out in class or misbehaving in other ways, becomes the witness who speaks very softly at the hearing, almost becoming inaudible. In assessing the reliability of a student's testimony, the arbitrator must resolve this apparent discrepancy, to explain the student's demeanor at the hearing in contrast to the character reflected in school records. Arbitrators often look to aspects of demeanor, such as confidence and certainty, in judging credibility. Yet, children often do not appear either certain or confident when they testify. This may not indicate any lack of truthfulness but rather shyness or fear in an unfamiliar and threatening environment. Also, unlike adults, children are not used to sitting for long periods of time answering questions. They may show fatigue, hesitation, or frustration after either lengthy testimony or the repetition of questions.

Children may also experience difficulty placing events within time and space. For example, three students testified that a teacher caused a student to stand in a corner of the room behind a closet door. The disciplined student testified that he stood in the corner for 30 minutes. The student witnesses estimated the time as 5 and 60 minutes. From this testimony, the arbitrator had no basis for concluding how long the student had stood in the corner. All she could determine was that the child was placed in a corner behind a closet door. In the same case, the teacher was accused of grabbing a student by the neck, pulling him to a corner of the room, and pushing him behind a closet door. Several students testified to witnessing the incident. One recalled that the student was lifted in the air by his neck and carried across the room. Another observed the teacher grab the student by his shirt collar. Despite the variations in details of the incident, the arbitrator found that the incident had occurred, based upon the fact that all three students testified that the child was grabbed on or about the neck and pushed or pulled to the front of the room and placed in a corner behind a closet door. While there was no consistency of detail among the student witnesses, there was consistency with regard to the main event.

In response to claims that student testimony was riddled with inconsistencies as to time and place, the arbitrator commented, "While the Panel found minor inconsistencies in their testimony, such as their inability to remember exact dates or to estimate time and measurement, it found these discrepancies not to affect their credibility, as these areas pose recall problems for witnesses in general." The teacher was also charged with placing his hands on the breasts of several students.⁹

A child's reaction to the statements or actions of adults is often interesting and surprising. In a case involving a teacher charged with doing and saying things that made his students fearful, all student witnesses testified that they were afraid after observing the teacher hit a student on the head with a book, expressing concern that the same thing could happen to them. Yet, the same students were not fearful of the teacher's threat to bring a friend's angry dog to class to bite them. One student stated the reason perfectly: "Everyone knows you aren't allowed to bring a dog into school."

In cases involving a direct conflict between a teacher and a student, the arbitrator may be faced with the argument that the

⁹Unpublished decision of Arbitrator Rosemary Townley.

word of the “professional” should be credited over that of the child. The union argues that a child cannot differentiate between truth and fantasy, claiming that the child’s account was suggested by parents or other adults, or that the child was coached, having no independent recollection of events. Arbitrators do not automatically credit the word of the professional over that of the child. In answer to an argument that a teacher’s word should be accepted over that of a student, an arbitrator commented: “I reject entirely the Grievant’s assertion that in a conflict of testimony between a five year old and a ‘professional’ the professional’s word, ipso facto, carries more weight.” The arbitrator credited the student’s claim that the teacher slapped her, and sustained the discipline.¹⁰

Conclusion

In judging the credibility of “problem” witnesses in abuse cases, the arbitrator faces a task similar to that involving credibility in general, using accepted standards as to whether a specific version of events should be credited. In most cases, this determination is based on a judgment as to whether the witness has sufficient memory to recollect and communicate independent impressions of events in a forthright, consistent, and plausible fashion. The witness’s account is then matched against supporting facts or corroborating evidence for compatibility. These standards of credibility accommodate the witness’s deficiencies on a case-by-case basis. Where the arbitrator is persuaded that the witness’s limitations can be explained, and where they do not attack the basic reliability of the account, the arbitrator will credit the version of the patient or child. In conducting this analysis, the focus is on the credibility of the witness, not the person’s basic competency or capacity. That inquiry is left for others. Arbitrators do not give special credence to the testimony of either the victim or the accused employee. Both are accorded the same rights as witnesses in other disciplinary cases, although a patient or child may be granted special protection in testifying at the hearing.

Obviously, if the arbitrator can decide the case on the basis of medical evidence and/or the testimony of neutral witnesses, that is the better course. However, where the case turns on credibility, the arbitrator must decide who is telling the truth, looking to available supporting evidence. In the end the employer must

¹⁰Unpublished decision of Arbitrator Susan Brown.

support the discipline with evidence sufficient to persuade the arbitrator, without relying on the inherent sympathy accorded a victimized patient or child, or on public policy grounds. In defending the employee, the union must do more than argue that the word of the employee should be credited over that of the patient or child. The union's argument that a mental deficiency per se—whether intellectual, emotional, or developmental—should render a witness less than credible will rarely carry the day.

What is different in hearing and deciding abuse cases is often the seriousness of the charges and the shocking details of the alleged abuse. Nevertheless, the arbitrator must approach decisionmaking in the same way other cases are decided. The credibility standards that Richard Mittenenthal set out for us remain as relevant and useful today as they did not when he presented them in 1979.

Comment

EDWARD P. ARCHER*

Carol Wittenberg's paper has significant both for abuse cases and for other cases in which her defined "problem" witnesses are called to testify. Since I have not had the misfortune of hearing significant numbers of abuse cases and with luck will continue to avoid these cases, I welcome her sharing of her expertise here today. Wittenberg's paper is very helpful in presenting abuse cases involving mentally disabled witnesses to illustrate the application of Richard Mittenenthal's¹ well thought out standards for addressing credibility for "problem" witnesses. I am reassured that application of those standards, with some commonsense adjustments based upon the nature of the witness's disability, will lead arbitrators to reasonable and defensible decisions regarding the crediting of those witnesses. Wittenberg's sharing of her insights specifically regarding abuse cases is also helpful, such as the more extreme code of silence in the caregiver industry and the compelling reasons for that code of silence.

I bring, if not expertise, an inquiring mind as to ways to address the crediting of "problem" witnesses. Those of us who do not

*Member, National Academy of Arbitrators; Professor of Law, Indiana University, Indianapolis, Indiana.

¹Mittenenthal, *The Search for Truth: II. Credibility—A Will-o'-the-Wisp*, in *Truth, Lie Detectors, and Other Problems in Labor Arbitration*, Proceedings of the 31st Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books, 1979), 61.