

CHAPTER 6

JUDGING ARBITRATION

I. OVERVIEW

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Introduction

Traditionally, arbitrators in the United States could assume that either the parties whose cases they were deciding understood fully the consequences of arbitrating their disputes or that the parties were represented well by lawyer-agents who understood these consequences. Business decisionmakers typically chose arbitration over litigation because they preferred to select the third party who would decide their dispute, often someone with relevant expertise, rather than have a court randomly assign a generalist judge to their case; they preferred resolutions based on commercial norms rather than on legal standards that might be less appropriate to the dispute; they preferred finality to the possibility of multiple appeals; and they anticipated that resolution by arbitration would be quicker and cheaper than a court resolution. Labor unions and management included arbitration provisions in collective bargaining agreements in order to minimize industrial conflict over worker grievances. In the first instance, the contracting parties believed that disputes that inevitably arise in the normal course of commerce would be better resolved in arbitration than in a courtroom. In the second instance, the contracting parties believed that disputes that inevitably arise in the normal course of employment would be better resolved in arbitration under the umbrella of collective bargaining than on the streets.

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Over the past several decades, as a result of a remarkable bit of lawmaking by federal and state appellate courts, the profile of arbitration has changed dramatically.¹ Long-established statutory claims, such as those brought under the securities² and antitrust acts,³ and long-sought and hard-fought disputes over civil rights, apparently including claims of race, gender, age, and disability discrimination, may now be arbitrated, as long as the contract that includes an arbitration provision meets minimal standards of contract law.⁴ Whereas once the typical signatories to arbitration contracts were sophisticated agents, it is now common for one of the signatories (but not the other) to be an unsophisticated, unrepresented⁵ individual who is offered the contract on a take-it-or-leave-it basis. By statutory and case law, the contract must indicate that by signing the contract the parties are waiving their rights to litigate in a court of law some or all disputes that might arise under the contract in the future. But precisely what the parties will get instead of litigation—for example, who the decisionmakers will be, how they will be selected, and how they will be paid—need not be specified in the contract.⁶ Nor must the parties be informed at the time of contracting that courts have held that the arbitrator's decision need not conform to substantive law or be factually grounded.⁷

The courts' breathtaking arbitration jurisprudence rests on two important assumptions: (1) the parties who agree to arbitrate are making equally well-considered and equally knowledgeable decisions to trade one known set of forum characteristics for another known set; and (2) by agreeing to arbitrate, both parties are simply deciding in favor of one procedure over another.⁸

¹As Justice Stevens wrote in his recent dissent in *Circuit City Stores, Inc. v. Adams*, 121 S.Ct. 1302, 85 FEP Cases 266 (2001), "there is little doubt that the Court's interpretation of the [FAA] has given it a scope far beyond the expectations of the Congress that enacted it." *Id.* at 1318.

²*Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332 (1987); *Rodríguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S.Ct. 1917 (1989).

³*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346 (1985).

⁴*Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 24 WH Cases 1284 (1981); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 55 FEP Cases 1116 (1991); *Circuit City*, 121 S.Ct. 1302.

⁵That is, unrepresented at the time of contracting. Most candidates for employment do not take lawyers along to employment interviews, and most consumers do not take lawyers along to their banks and insurance agents' offices.

⁶*Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 84 FEP Cases 769 (2000).

⁷In *Green Tree*, the U.S. Supreme Court upheld an arbitration agreement that did not even specify the rules under which the arbitration would be conducted.

⁸By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution via an arbitral, rather than a

Neither of these assumptions is well supported. In consumer and employment contracts between individuals and corporations, one party—the corporation—will almost always be more knowledgeable than the other. Indeed, there is no evidence to suggest that the majority of American consumers and employees who enter into arbitration agreements understand what the benefit or cost of their bargain is.⁹ Nor is it likely that the majority of well-counseled corporate executives who choose to make arbitration a condition of employment or consumer transactions believes that this procedural choice has no substantive consequences.¹⁰

The courts' cheerful view that arbitrating an employment, consumer, or other dispute rather than litigating it in a court of law will make no substantive difference for disputes between unequal parties flies in the face of common sense. Corporations usually make self-interested decisions,¹¹ and they are in a better position than their employees or consumers to understand their self-interest with regard to the choice between arbitration and litigation. In addition, more powerful parties often attempt to impose their will on less powerful parties—hence the earlier jurisprudential distrust of organizations' motives for including arbitration provisions in contracts of adhesion.¹²

Recent arbitration jurisprudence also discounts a rich vein of psychological data that tells us that human beings often use their

judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346 (1985); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 55 FEP Cases 1116 (1991) (citing *Mitsubishi*); *Circuit City Stores, Inc. v. Adams*, 121 S.Ct. 1302, 85 FEP Cases 266 (2001) (citing *Mitsubishi*). But see *Armendariz v. Foundation Health Psychcare Servs.*, 24 Cal. 4th 83, 6 P.3d 669 (2000) (discussing how procedural features of arbitration may affect disputants' rights).

⁹In casual conversations I have discovered business executives, who have presumably been advised by corporate or outside counsel, who are confident that they can appeal an arbitrator's decision and take their case to court. And, at the beginning of the semester, I always find at least a few students in my law school class on alternative dispute resolution who cannot properly distinguish mediation from arbitration.

¹⁰If this were the case, it is unlikely that these knowledgeable parties would prefer state law that prohibits the award of punitive damages in arbitration. Nor is it likely that we would observe—as we do—explicit waivers of the right to be a member of a class in consumer arbitration agreements. By requiring consumers to waive their rights to participate in a class action, corporations can effectively prevent class actions by "private attorneys general" that allege small losses to individual consumers resulting from unlawful corporate practices.

¹¹Indeed, officials of publicly traded corporations must make decisions that are in the interests of their shareholders (rather than, for example, their employees).

¹²For an incisive discussion of the problems of forum choice in adhesive contracts, see Carrington, *Regulating Dispute Resolution Provisions in Adhesion Contracts*, 35 Harv. J. on Legis. 225 (1998).

observations of the procedural characteristics of dispute resolution to assess the fairness of dispute resolution outcomes. Put another way, when individuals are not certain how to judge whether they have gotten a “fair shake” with regard to a decisional outcome, they rely on their intuitions about what constitutes a fair process to judge their experience. When individuals believe a process was fair, they are more likely to accord legitimacy to it than when they believe it was unfair, even if they wish they had received a better outcome. Laypeople understand what some judges who have decided cases challenging arbitration appear to forget: the process matters.

For arbitrators and arbitration organizations, the courts’ end-of-millennium arbitration jurisprudence poses both an opportunity and a threat. Unless peace breaks out all over or mediators succeed in resolving all disputes, more and more cases of greater and greater variety are likely to arrive on arbitrators’ doorsteps. But if arbitrators fail to recognize the differences posed by arbitrating disputes between sophisticated, more or less equal, and truly willing parties and arbitrating disputes between unsophisticated parties facing much more powerful parties with whom they have been compelled to arbitrate and against whom they have been compelled to waive statutory rights, the result may be a backlash against arbitration that will erode if not wipe out the progress that arbitration has made in supplementing dispute resolution provided by the courts. In the new world of arbitration there will be laypeople watching the procedure (or, if they are excluded from the process, imagining what it is like) and making judgments about the legitimacy of the process accordingly. Over the long run, if these citizens conclude that arbitration is unfair, that it is a process that tilts the playing field in favor of corporations and other powerful entities, legislators will act to rein in or overturn the courts’ arbitration jurisprudence.

In this paper I briefly review what social psychologists have learned about how people form judgments of procedural fairness and discuss the implications of this research for judging arbitration.

Research on Procedural Justice

What has come to be called procedural justice research began in a laboratory in the mid 1970s when social psychologist John Thibaut and lawyer Lawrence Walker teamed up to study indi-

vidual preferences for different forms of dispute resolution.¹³ Initially, Thibaut and Walker focused on preferences for different styles of adjudication. Using conventional psychological experimentation methods and student research subjects, they investigated whether individuals preferred an American-style adversarial process or an inquisitorial process similar to that used in many European courts for deciding criminal cases.¹⁴ They found that subjects who were assigned the roles of defendants were more satisfied with the adversarial procedure, which they perceived as more fair than a more inquisitorial approach.¹⁵ This finding held true whether the “defendants” were judged innocent or guilty in the simulated procedure. Thibaut and Walker interpreted these results as indicating that individuals preferred procedures that allowed them to control the process through adversarial presentation of evidence to procedures in which process control was ceded to a third party, as in an inquisitorial procedure.

In follow-up research, Thibaut, Walker, and their associates broadened their investigation to include preferences regarding decision control and discovered that although individuals preferred procedures that allowed them to maintain process control—in other words, adversarial procedures—within this set of procedures they preferred those that gave decisionmaking power to a neutral third party. Individuals tended to view such procedures as more fair than procedures offering other combinations of process and decision control.¹⁶ The researchers reasoned that

¹³Most of the publications that resulted from this research were co-authored by Thibaut, Walker, and their students. By convention, the research is usually attributed to the former, even when they do not appear as lead authors. I follow this convention.

¹⁴Walker, LaTour, Lind, & Thibaut, *Reactions of Participants and Observers to Modes of Adjudication*, 4 J. Applied Soc. Psych. 295 (1974). In the experimental manipulation, the adversarial procedure allowed student subjects who were playing the role of criminal defendants to choose their attorneys (played by law students), who then presented evidence on their behalf to a “judge.” In the inquisitorial procedure, a single attorney was assigned to present both prosecutorial and defense evidence to the “judge.” *Id.* at 300.

¹⁵The researchers noted that the results might have reflected cultural expectations of American students whose observations of adjudication (e.g., through the media) would likely have been limited to adversarial proceedings. But they cited unpublished data from a French study that found similar preferences for adversarial procedure among Parisian students to controvert the cultural hypothesis. *Id.* at 309. Later procedural justice research has found remarkably little variation in results across cultures.

¹⁶Houlden, LaTour, Walker, & Thibaut, *Preferences for Modes of Dispute Resolution as a Function of Process and Decision Control*, 14 J. Exper. Soc. Psych. 13 (1978). In this line of experiments, the researchers investigated subjects’ preferences in a civil dispute for bilateral bargaining, mediation, the “moot” (which requires decision by consensus), arbitration, and an autocratic procedure in which a third party controlled the process and outcome. *Id.* at 14.

these preferences reflected the individuals' belief that controlling the process accorded them the best opportunity to present evidence favoring their position, whereas ceding control over the outcome offered the best opportunity to resolve the conflict with an outcome that reflected the relative weight of the evidence on each participant's side.¹⁷

Thibaut and Walker's research suggests that individuals are attentive to procedural characteristics and form judgments about procedural fairness based on the amount of control over process and outcomes that different procedures afford them. But how much do individuals involved in disputes really care about these procedural characteristics? Most judges and lawyers seem to believe that people caught up in a conflict—and certainly those involved in a legal dispute—care mainly about whether they win or lose. If a person wins a case, the judges and lawyers reason, he or she will be happy; if a person loses, he or she will be unhappy. Moreover, some judges and lawyers seem to think that litigants who lose their cases inevitably will view the court system that produced this outcome as unfair or illegitimate.

A second generation of procedural justice scholars, led by social psychologists Allan Lind (who studied under Thibaut) and Tom Tyler, have intensively investigated this question.¹⁸ Contrary to the views of many judges and lawyers, Lind and Tyler have consistently found that individuals' satisfaction with the legal process is a function of their perceptions of procedural fairness as well as their assessment of the favorability of the outcome. Moreover, when individuals view processes as fair, they are more likely to accept and comply with the outcomes of authoritative decisionmaking and to view decisionmakers as legitimate, even when they believe the outcome was unfair.¹⁹ The findings that process matters and that satisfaction is linked to process as well as to outcome assessment are not limited to laboratory experiments. They have been replicated numerous times in studies of actual criminal defendants²⁰ and

¹⁷*Id.* at 16–17.

¹⁸For a review of this long line of research through the 1980s, see Lind & Tyler, *The Social Psychology of Procedural Justice* (Plenum 1988). More recent research is reviewed in Tyler & Lind, *Procedural Justice*, in Sanders & Hamilton, eds., *Handbook of Justice Research in Law* (Kluwer/Plenum 2001) [hereinafter Tyler & Lind, 2001].

¹⁹Tyler & Lind, 2001, *supra* note 18, at 68–69.

²⁰See, e.g., Casper, Tyler, & Fisher, *Procedural Justice in Felony Cases*, 22 *Law & Soc. Rev.* 483 (1988); Tyler, *Why People Obey the Law* (New Haven: Yale University Press 1990).

actual plaintiffs and defendants in civil disputes,²¹ as well as in studies of participants in bureaucratic transactions of various types.²² The findings also are not limited to the United States, but have been replicated in studies in Asia and Europe.²³

Procedural justice researchers have devoted considerable effort over the past decade to trying to explain why individuals care so much about process.²⁴ Laboratory and field research suggest several hypotheses:

1. *Process control or "voice" hypothesis*: The nature of a dispute resolution or other transactional process determines whether disputants have an opportunity to voice their needs and opinions. Greater opportunity for voice enhances the likelihood of obtaining a satisfactory outcome.
2. *"Relational" or "dignitary value" hypothesis*: The nature of the process indicates the standing or relationship of the individual to the social group and authority. When fair procedures are accorded the individual, this indicates that his or her relation to the larger group is positive and that his or her standing in society is secure.
3. *"Fairness heuristic" hypothesis*: Individuals understand that they may be exploited by the social group or authoritative decisionmakers but lack the information or ability to assess whether such exploitation is occurring. As a shortcut or heuristic for determining whether they should be concerned about such exploitation, they rely on their evaluations of the fairness of the process.

²¹Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of their Experiences in the Civil Justice System*, 24 Law & Soc. Rev. 953 (1990) [hereinafter Lind et al., 1990]; Lind et al., *Individual and Corporate Dispute Resolution Using Procedural Fairness as a Decision Heuristic*, 38 Admin. Sci. Q. 224 (1993) [hereinafter Lind et al., 1993].

²²See, e.g., Bies & Moag, *Interactional Justice: Communication Criteria of Fairness*, in Lewicki, Bazerman, & Sheppard, eds., *Research on Negotiation in Organizations*, Vol. I (JAI 1986); Lind et al., *The Winding Road From Employee to Complainant*, 45 Admin. Sci. Q. 557 (2000). See also Lane, *Procedural Goods in a Democracy: How One Is Treated vs. What One Gets*, 2 Soc. Just. Res. 177 (1988).

²³Lind, *Procedural Justice and Culture: Evidence for Ubiquitous Process Concerns*, 15 Zeitschrift für Rechtssoziologie 24 (1994).

²⁴Their interest perhaps has been spurred by a concern that attention to process might lead individuals to ignore situations in which unfair outcomes are imposed on them—what Marxists term "false consciousness." See, e.g., Lind et al., *The Perception of Justice: Tort Litigants' Views of Trials, Court-Annexed Arbitration, & Judicial Settlement* (Rand 1989) [hereinafter Lind et al., 1989].

The process control or “voice” hypothesis derives directly from Thibaut and Walker’s original research, which pointed to the importance of control over process and suggested to Thibaut and Walker that individuals have an instrumental interest in process control—that is, that individuals care about process because they believe it shapes outcomes. This hypothesis was disputed by later findings that suggest that individuals care about process even when they have direct control over the outcome—that is, when they can reject the outcome of a dispute resolution procedure, as in mediation.²⁵ Moreover, in one of the more peculiar (and most troubling) results of procedural justice research, Lind and associates found that individuals preferred procedures that permitted them to voice their opinions, even when they were told that their opinions would have no effect at all on the outcome.²⁶

Lind and Tyler developed the “relational” or “dignitary values” hypothesis as a substitute for the voice hypothesis. If individuals’ concern about process is not driven solely or primarily by a desire to ensure a favorable outcome, Lind and Tyler reason that it might instead be a result of a more fundamental concern about their standing in society. This hypothesis seems consistent with the observation that individuals prefer dispute resolution procedures in which they and other disputants have an equal opportunity to present their case, in which the decisionmaker appears to give equal consideration to all such presentations, and in which the proceeding is conducted with at least a modest degree of decorum. To Lind and Tyler, giving due process to individuals’ disputes was equivalent to recognizing their individual dignity as members of society.

More recently, Lind has returned to a more instrumental explanation of individuals’ concern about process. Drawing on the work of cognitive scientists, he argues that individuals frequently use intellectual shortcuts or “heuristics” to make judgments that would otherwise require unreasonable or unattainable factual investigations. In many instances, Lind argues, individuals have no basis for assessing the fairness or appropriateness of dispute outcomes. Hence, they use process characteristics—which they are comfort-

²⁵Tyler & Lind, 2001, *supra* note 18, at 75.

²⁶Lind, Kanfer, & Early, *Voice, Control and Procedural Justice*, 59 *J. Personality & Soc. Psych.* 952 (1990). I find the results troubling because they suggest that individuals’ acceptance of outcomes and of outcome-generating authoritative institutions may be manipulated by providing individuals with “voice” but no real control over process.

able assessing for themselves—as a pragmatic basis for assessing the outcome and deciding whether to comply with it.²⁷ The justice heuristic hypothesis is consistent with laboratory research that suggests that when individuals are given information for assessing the fairness of outcomes before a procedure, they use that information, rather than process information, as a basis for assessing the fairness of the ultimate outcome.²⁸

Whichever of these explanations—or any other that might yet appear—is correct, the fact that process matters is well established. Moreover, it is how individuals assess the fairness of process (rather than, for example, its cost) that appears to matter most in determining satisfaction with dispute resolution procedures.²⁹ But how do individuals—especially lay citizens—assess the fairness of legal dispute resolution?

In answering this question, Lind, Tyler, and their associates look to the theories I have reviewed earlier. But although these theories may explain the deep underpinnings of procedural justice concerns, they do not focus on pragmatic aspects of procedure—that is, the features that can be shaped by institutions and third-party neutrals. It is the pragmatic aspects of procedure and their relationship to procedural fairness assessments that concern us here.

The relationship between procedural features and perceived procedural fairness is perhaps not best explored in experimental research where, for analytic reasons, only one or a few variables are manipulated at a time, while others are held constant. Such manipulation may encourage research participants to give more attention to specific procedural features than they would in the richer and more ambiguous real-world environment.

In my research with Lind and others,³⁰ we compared tort litigants' descriptions and evaluations of three common court-based procedures: trial; judicial settlement conferences; and court-annexed arbitration, a form of nonbinding arbitration in which

²⁷Lind et al., 1993, *supra* note 21.

²⁸Van den Bos, Lind, Vermunt, & Wilke, *Procedural and Distributive Justice: What Is Fair Depends More on What Comes First Than on What Comes Next*, 72 J. Personality & Soc. Psych. 95 (1997).

²⁹Lind et al. investigated the relative effects of time to disposition, costs, and procedural fairness on tort litigants' satisfaction with dispute resolution and the courts. Contrary to the conventional wisdom, actual costs and time to disposition had little effect on satisfaction. *Perceived costs and delay*—whether the cost was worth the outcome and whether the time to disposition appeared reasonable—did affect outcome but were unrelated to actual costs and time to disposition. Lind et al., 1989, *supra* note 24.

³⁰Lind et al., 1990, *supra* note 21; Lind et al., 1989, *supra* note 24.

neutral third parties conduct an evidentiary hearing and issue an advisory opinion. We contrasted litigants' views of these procedures with their views of the most common form of legal dispute resolution, negotiation conducted without the assistance of a third party. We conducted 30-minute telephone interviews with plaintiffs and defendants in tort cases that had been resolved in the preceding 12 months in three mid-Atlantic region suburban courts. In one court, if litigants could not negotiate a settlement of their case, it would be tried; in a second court, nonbinding arbitration was a precondition for securing a place on the trial calendar; in the third court, judicial settlement conferences were required 1 month before the trial date. In the first court, litigants could reach trial within 6 months of the case being declared ready by the attorneys, meaning that trial was a viable alternative to settlement, at least with regard to timing. In the second court, trial was also available within a short period of time, but arbitration had long been mandated as a more expeditious way to hear the case. Brief hearings were held in small jury deliberation rooms in the courthouse before panels of three arbitrators, who subsequently delivered their decision in writing without offering findings of fact or legal rulings. The third court had fairly serious congestion problems, meaning that it could take up to 3 years to reach trial. But judicial settlement conferences were scheduled for 1 month before trial, so parties who could not reach settlement were assured of a court appearance shortly thereafter.

Consistent with the procedural justice research I have reviewed, we found that litigants' satisfaction with the dispute resolution system and the court was strongly dependent on perceived procedural fairness. Regardless of how their cases were resolved, litigants felt more positive about the system when they believed the process had been fair. Litigants who were satisfied with the outcome and also believed the process was fair were the most satisfied. Perceptions of procedural fairness were highest for trial and nonbinding arbitration and lowest for judicial settlement conferences. Multivariate analysis of factors explaining perceptions of procedural fairness showed that the most important factors were the litigants' perception (1) of control over the process; (2) that the process was unbiased, which was related in turn to their belief that the decisionmakers were unbiased and paid equal attention to all parties; (3) that the process was careful and thorough; and (4) that they were treated in a dignified fashion.

Process characteristics that have received a good deal of attention in the dispute resolution literature, such as perceived formality versus informality and perceived privacy, were unrelated to perceptions of procedural fairness.

The study contradicted some of the conventional wisdom about civil dispute resolution. For example, the results indicated that litigants liked trials. Trial litigants gave the highest ratings of comprehensibility to the process, followed by litigants whose cases were arbitrated and those whose cases were assigned to judicial settlement conferences. Defendants were as comfortable when their cases were tried as when they were arbitrated, although plaintiffs were more comfortable with arbitration. Defendants were particularly pleased to be given an opportunity to vindicate themselves publicly at trial, even when they lost their cases. From the perspective of litigants, trials and arbitration seemed equally dignified. Litigants whose cases were tried gave somewhat higher ratings of formality to the process than litigants whose cases were arbitrated, but the degree of formality did not appear to be important to them, as long as the decisionmakers seemed to proceed with care.

In contrast, litigants had rather negative perceptions of the fairness of judicial settlement conferences, from which they were almost always excluded. Sitting outside the judge's chambers, they wondered what was going on behind closed doors and sometimes distrusted their lawyers' descriptions of the proceedings. Not surprisingly, they were more distrustful about these descriptions when they had less trust in their attorney overall. In this jurisdiction, as in many others, judicial settlement conferences offered no opportunity for the litigant to be heard and no opportunity to evaluate how much attention the judge was giving to one side relative to the other. There was little evidence that the litigant was regarded as an important member of society, or even an important participant in the dispute.

Taken together, the results of this study and others that have explored individuals' perceptions of actual dispute resolution procedure suggest that people carry a rough concept of due process in their heads and use this concept as a benchmark for assessing procedural fairness. They pay less attention to aspects of legal dispute resolution—such as judicial robes and formal courtroom accoutrements—that are intended to convey a sense of procedural importance and more attention to features that seem

to them to signal authentic consideration of their claims and equal treatment of parties.

Implications of Procedural Justice Research for Arbitration

I draw two main conclusions for arbitration from procedural justice research:

1. Employees, consumers, and other nonlawyers who are required to arbitrate, regardless of whether they are represented by attorneys, will assess the fairness of arbitration on the basis of procedural features rather than on whether they win or lose. Like disputants who remain in the litigation process, arbitration litigants will be satisfied with arbitration if they think the process is fair and will be dissatisfied if they think the process is unfair.
2. Arbitration litigants' assessments of procedural fairness will depend on whether they (a) are allowed to participate in or at least observe the process themselves, rather than learning about it from their attorneys; (b) believe the arbitrator is unbiased; (c) think the arbitrator gave fair consideration to their evidence; (d) believe the arbitrator treated all parties equally; and (e) believe they were treated in a dignified fashion.

To employees, consumers, and other individuals who are compelled to arbitrate, arbitration takes the place of trial, not negotiation. Citizens in this country know that trials are public events that are open to all. If a compelled arbitration hearing takes place behind closed doors in the absence of the disputant, no matter how correctly it is conducted or how great the time and cost savings, the disputant will likely wonder whether his or her case was given a fair hearing and will not always trust an attorney's affirmation that it was; if the arbitration is conducted on the paper record, without any hearing, the disputant will likely wonder all the more. If the arbitration is conducted in some venue that is practically inaccessible to the disputant, he or she will feel akin to those litigants who sit outside the judges' chambers, wondering what kind of deal is being cut in their absence.

Americans also know that judges are public servants who in most jurisdictions must stand for office. The judiciary subscribes to high standards of independence, even if individual judges do not always

meet these standards. If the arbitrator is selected and hired by a worker's employer or a business with whom a consumer is unhappy, or by an organization beholden to that employer or business, workers and consumers who are compelled to arbitrate will be likely to doubt the arbitrator's neutrality. If the arbitrator is selected by the employer or business without input from the worker or consumer, if the worker or consumer suspects that his or her own representative is at a disadvantage with regard to arbitrator selection, or if the worker or consumer is unrepresented and must select the arbitrator himself or herself, the worker or consumer will also likely doubt the arbitrator's neutrality. Individuals compelled to arbitrate rather than litigate may also distrust the fairness of a system that requires them to share the fees of the adjudicator, knowing the alternative that was denied them does not require litigants to pay judges for their time. But these individuals also may distrust the neutrality of an arbitrator paid wholly by their opponent.

If arbitration hearings appear decorous and thorough, devoted to understanding the facts of the dispute, and afford equal consideration to all parties, workers, consumers, and others compelled to arbitrate are likely to find the process fair. Regardless of whether they like the outcome, they will accept and comply with it and view it as legitimate.

Other questions about arbitration will, of course, occur to more sophisticated observers. Does the arbitration process diminish disputants' opportunity for discovery, and if so, do the limitations favor one side over the other? Does the process prohibit claimants from joining together to pursue litigation, as in a class action, thereby excluding certain types of claims altogether? To what extent do arbitration outcomes, freed of the strictures of law (or even of the requirement of factual accuracy)³¹ and not subject to appellate review, accord with the outcomes that employees, consumers, and others compelled to arbitrate would otherwise obtain in a court of law? To what extent does the distribution of arbitration outcomes reflect gender, race, ethnic, and other characteristics that advocates have struggled so long to eradicate from the courts? Although procedural fairness research suggests that disputants themselves will be insensitive to many such differences in

³¹*Moncharsh v. Heily & Blasé*, 3 Cal. 4th 1, 832 P.2d 899 (1992); *Moore v. First Bank of San Luis Obispo*, 80 Cal. Rptr. 2d 475 (Ct. App. 1998).

process and outcomes, justice requires that policymakers take heed of them.

Traditional legal procedures—expansive discovery, oral hearings, public process, and multiple opportunities for appeal—are intended to ensure that everyone in society has access to justice.³² These procedures have relatively high transaction costs, measured in time, money, and other economic consequences. Publicity may impede dispute resolution. Multiple opportunities for appeal and reconsideration add uncertainty as well as more costs. Rigorous application of legal standards restricts parties' ability to reach outcomes more to their liking. But although some jurists believe that the purpose of judicial institutions is simply to facilitate private dispute resolution,³³ others still believe that doing justice is the courts' primary aim. And justice, like other valuable commodities, is costly. If arbitration is to take the place of courts in our society, we need to ensure that the result is not less justice for all, and especially less justice for those who are least able to vindicate their rights. Taking seriously the appellate courts' notion that arbitration merely substitutes one decisionmaking forum for another without sacrificing substantive rights might, in the long run, have the effect of turning private arbitration into public adjudication with all its costs as well as its benefits. In the process, society would lose a valuable alternative to public adjudication. But that might be the price we have to pay to preserve justice within a regime of compelled arbitration.

II. UNION PERSPECTIVE

NORMAN J. SLAWSKY*

I want to acknowledge that I am filling some large shoes in making my comments. I am preceded by Harris Jacobs, who spoke to this gathering the last time the National Academy of Arbitrators

³²Ironically, as the United States appears poised to move away from these procedures, developing democracies are trading inquisitorial systems and decisions "on the record" for adversarial process and orality.

³³*Neary v. Regents of University of California*, 3 Cal. 4th 273, 834 P.2d 119, 10 Cal. Rptr. 2d 859 (1992). *But see Morrow v. Hood Communications*, 59 Cal. App. 4th 924, 69 Cal. Rptr. 2d 489 (Ct. App. 1997) (Kline, J., dissenting).

*Member, Jacobs, Slawsky & Barnett, Atlanta, Georgia.

convened in Atlanta. Harris passed away since he last spoke to you on May 30, 1992. He is a hard act to follow, especially with his knack for offering insightful comments. I listened to Harris from the rear of the room; I seem to remain on the perimeter, but I hope to live up to his standards.

Benito Juarez (1806–1872), a 19th-century Mexican leader, judge, and minister of justice, is reputed to have said, “For my friends—justice, for everyone else—the law.”

The comment relates well to Deborah Hensler’s presentation. The public perception is that judges, arbitrators, and others do not render justice but decide disputes sometimes in ways that are not understood. Often we say that a case has been resolved on a “technicality,” which is another way of saying that (1) we do not understand the way the case was decided, or (2) justice was not rendered.

Professor Hensler discussed the importance of procedural fairness, which is essential to the arbitral process. Most often, the parties to a dispute do not trust each other and must place their trust in an individual they often do not know. If they do know him or her, it is often merely by reputation. Procedural fairness can reinforce and reinvent a sense of community and trust. Procedural equity can also equalize the parties’ power. That important function must be a characteristic of arbitration, just as it is in the courts. Equalized power must be the perception and the reality. If the arbitral process does not perform that function, it cannot succeed.

In her presentation, Professor Hensler relied on multivariate analysis to identify several procedural elements that are important to disputants. The most important were (1) perceived control over the process, (2) the perception that the process was unbiased, (3) careful and thorough consideration of their positions, and (4) the perception that the parties were treated in a dignified fashion.

A fifth factor, but one that is part of the others, is economic fairness. Judge Harry T. Edwards¹ and others have emphasized that when an employer mandates resolution of employment disputes through arbitration, the employer should pay. For the cost of a filing fee, parties have access to the vast processes and experience of the court system. A party with a legitimate claim should not be deprived of pursuing it for want of the economic power to do so. If the process does not provide for such economic fairness, the

¹Chief Judge, United States Court of Appeals for the D.C. Circuit, Washington, D.C.

arbitrator should have the express authority to award expenses and costs of the arbitration proceeding, including attorneys' fees, to equalize economic power between the parties.

Of course, the process is subject to abuse. The procedural rules and the arbitrator should take that in to account. Just as the American rule that each party pays its own attorneys' fees and costs can be modified, arbitrators should have the authority to award fees and costs to the prevailing party.

Especially in light of the recent U.S. Supreme Court decision in *Circuit City Stores, Inc. v. Adams*,² arbitration has become a substitute for litigation. We must make sure that it is an effective and just substitute. Arbitrators, therefore, should consider the laws and facts that a reasonable person would consider and apply generally acceptable normative values. In addition, they must be willing to "do the right thing" under appropriate circumstances. In most cases, arbitrators can fashion awards for the parties' needs.

Procedural fairness includes applying substantive law to achieve a fair result. It includes specifying the remedy with precision to avoid further legal proceedings. Otherwise, justice delayed may be expensive to one party and worthless to the other. Arbitrators sometimes render opinions, then tell the parties to resolve their disputes on the basis of those opinions and to come back only in the event they are unable to do so. Arbitrators who take that approach are not doing their jobs. The parties and in some cases the courts have given arbitrators the authority to resolve disputes. When arbitrators throw the disputes back to the parties, they are not doing what they were hired to do.

Specification of a remedy is another essential part of procedural fairness. It minimizes the parties' uncertainty. In a contract interpretation case, for example, an arbitrator should not tell the parties to try and resolve the dispute after the arbitration hearing. Perhaps the arbitrator can take a break at the conclusion of the hearing and give the parties a chance to resolve their disputes. Once the arbitrator closes the record, a decision on the dispute should result. In a discipline case, the arbitrator should do more than specify a generic make-whole remedy. The parties should be required at the hearing to specify the exact remedy they believe might be appropriate. An employer often does not want to discuss

²121 S.Ct. 1302, 85 FEP Cases 266 (2001).

a remedy at the hearing, because doing so might be viewed as a tacit admission of contractual wrongdoing. The arbitrator, however, should tell the employer to offer necessary evidence concerning the remedy, which could include failure to mitigate back pay. Otherwise, the parties might be forced to return to the arbitrator for clarification. That extra step can be prevented by the arbitrator who takes the *functus officio* role seriously.

Professor Hensler has pointed out that giving the parties “a day in court” is an important element of procedural fairness. It allows them to tell their respective stories. But there is more to the process than telling stories. Arbitrators should end it by issuing a specific, final, and binding award. For the parties, the end of the case is often the remedy. This is especially true in employment cases where the parties may not have an ongoing relationship.

Arbitration is often an imprecise way to resolve disputes. Mediation or direct negotiation between the parties is frequently more precise, because the parties can fashion a remedy that, by definition, is suitable to them. A reasonable arbitrator tries to simulate the result that the parties would have reached had they been able to resolve the dispute on their own.

I would add to Professor Hensler’s most important factors that of informational equality. Informational equality may include, under appropriate circumstances, discovery. If arbitration is to be a substitute for litigation, then limited, structured, and directed discovery should be part of the process so the parties can understand each other’s cases. Such understanding can foster more effective case presentations. Although the primary purpose of discovery is to prepare for a hearing or trial, it is also designed to uncover information that may result in resolution of the dispute. Additional information obtained through discovery might help the parties understand their respective theories of the dispute and better evaluate the probability of their winning or losing. Informational fairness or equality, therefore, should be an important value or factor for the arbitral process.

Arbitration has its origins in equity, not in the law. That is because arbitration seeks to compel parties to act in contractually appropriate ways. If the arbitral process is to be successful and procedural fairness is of essential value, arbitrators should work toward the convergence of justice and the law, not toward the dichotomy that Benito Juarez pointed out more than 150 years ago.

III. EMPLOYER PERSPECTIVE

WILLIAM M. EARNEST*

I want to thank Professor Hensler for her excellent comments, for her research, and for her teaching directed at improving the arbitration process.

The arbitration process is truly a work in progress. It demands that we be ever vigilant in our quest for the informed, efficient, and acceptable justice reflected in the title of our presentation this afternoon.

Though Professor Hensler, Norm Slawsky, and I may perceive the process a little differently from time to time, I am sure that we are in accord on the necessity for informed, efficient, and acceptable justice. Justice that is not informed may be better termed "accidental justice," or maybe even no justice at all. Who can quibble with our search for the truth, the whole truth, and nothing but the truth?

Decisions that are predicated on misinformation or partial information will produce injustice, not justice. So being informed is a sine qua non for getting it right the first time.

Human nature causes people to have selective memories at certain times when they relate relevant facts to an arbitrator or other decisionmaker. To compensate for this tendency, we have an advocate system that brings relevant facts to light for review and consideration.

With informed justice as one of our goals, how do we improve the process? Professor Hensler has underwritten the long-term significance and importance of the arbitration procedure and has done that very well, but I would suggest that the preliminaries to the arbitration process are equally critical. If informed justice is one of our objectives, arbitrators need to require the parties early on to disclose the relevant facts to each other. This, of course, requires the parties to do an adequate preliminary investigation. When the facts are fresh and readily available, the grievance procedure can function efficiently and effectively. The grievance procedure should

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be a forum for open discussion of facts and positions, not a game of cat and mouse or hide and seek.

Too often grievances are filed regardless of their merits. They often are filed for political or ego-related reasons. Moreover, employers and unions sometimes give boilerplate responses without engaging in meaningful discussion to resolve the issues. This “rubber stamp” process does damage to the grievant’s or litigant’s view of the fairness of the system, a consideration appropriately raised by Professor Hensler. No one really listens, and no one really hears. “That’s my position and I’m sticking to it” might be a motto for this type of system.

Just last week I had a client who had been told by the union to write a simple denial; the union did not even want to meet with the employer at the second step. In another case it was apparent to me that the parties never really discussed the case or their different contentions. Each was too busy protecting its own turf, and, as expected, they wound up arbitrating issues that should have been resolved had they bothered to have open communication and disclosure of facts and positions.

So we get back to the question: What can arbitrators do? For starters, arbitrators can require the parties to follow their contract provisions and to do so in good faith. For instance, arbitrators can cause the parties to have frank and full discussions by sustaining objections to new evidence and arguments brought to light for the first time at the arbitration hearing. One exception, of course, would be when such evidence was unavailable during the grievance procedure and the party seeking it had done an earlier adequate but unsuccessful investigation to obtain it. Merely allowing some time to study the document or to interview the client about the new document or new argument is grossly inadequate. It does not lead to informed justice, but to what has been referred to many times as “trial by ambush.”

As Professor Hensler said, procedural justice is important. By their rulings, arbitrators should not reward parties who ignore or refuse to disclose requested facts and positions. Such early disclosures, especially during the grievance procedure, will promote earlier resolution of the parties’ disagreements and will result in more informed justice for them both.

I do not envision that we need to succumb to the dangers of commercial arbitration, which John Kagel has so eloquently de-

scribed.¹ But we need to admonish parties who abuse the arbitration process with gamesmanship that such abuse will not be tolerated—it is simply not in the best interest of continuing relationships that demand trust, integrity, and open communication. Arbitrators can do their part by issuing procedural rulings that preclude the parties from concealing facts and arguments until the 11th hour.

Another of our stated goals in the arbitration process is judicial efficiency. No one is proposing that we cut corners to approximate justice—our quality control must not be compromised. But we can work smarter. That includes holding the parties to their contractual grievance procedure and encouraging them to use their best and good faith efforts to resolve disputes at the earliest stage. Doing so would preclude the wasted effort of merely going through the motions at prearbitral steps, thereby saving effort and energy for more productive work. Disputes would be resolved sooner.

There are other efficiencies that can be achieved by good case management. With improved communication, the parties, with encouragement from their selected arbitrator, may be able to stipulate to all of the facts where the arbitration turns on the interpretation of contractual terms. Parties also may be able to stipulate to testimony of cumulative witnesses and agree to joint exhibits beyond merely the collective bargaining agreement and the grievance.

Another procedural efficiency device, and one that also will avoid surprise evidence and promote informed justice, is having the parties exchange all of their exhibits, except those that are to be used in cross-examination, several days before the hearing. Such an exchange would likely minimize arguments over authenticity of exhibits. It also would reduce if not eliminate surprise arguments.

Finally, I believe that arbitrators could greatly facilitate the scheduling of hearings by using computer Web sites that list dates available to the parties. The parties then could lock in specific hearing dates electronically. Computer software could confirm scheduled hearings electronically as well. And the parties them-

¹President, National Academy of Arbitrators, 2000–2001, Redwood City, California. See Chapter 1, *supra*.

selves would be responsible for posting the necessary information (e.g., names, addresses, e-mails, phone numbers, etc.). Even cancellation and rescheduling could be done via the computer. Invoices could be computer-generated, based on information that the parties enter. There could be penalties built in, if you will, for folks selecting certain days and subsequently not using them. I had one arbitrator recently tell me that nearly 50 percent of his time was spent scheduling and rescheduling hearings. I'm sure he would much rather be doing something else with that time.

Professor Hensler correctly notes that the grievant's perception of fairness is critical to the notion of acceptable justice. If the arbitration process is to survive and flourish, which it should, not only must there be justice in fact, but the parties must also believe that they have gotten a fair shake. A large part of the perception of getting a fair shake stems from our legal system's due process requirements. It is hard to imagine a procedural violation more basic than the denial of due process. People want to win, but, as Professor Hensler has pointed out, they want even more to be heard—they want to vent, they want to get things off their chest, they want to have their say. When that has been accomplished, and absent partiality or error on the arbitrator's part, the parties are willing to live with the decision.

Even when there are no due process concerns, arbitrators can affect the parties' perception of whether the arbitration process is satisfactory. For example, does the arbitrator in written communications seem to favor one party? Does the arbitrator provide balanced opportunities to both parties at the hearing, in the presence of the grievant? Is the arbitrator "chummy" with one of the advocates, kidding or referring to common friends or previous cases they have had together? During the hearing, does the arbitrator take over one party's case or ask questions that appear to favor one side or the other? All of this impinges on the arbitrator's appearance of impartiality—especially to a grievant who may never have attended an arbitration hearing before.

It is also important for arbitrators to address all of the parties' arguments in their written opinions. In one glaring situation, I received an award from an out-of-state arbitrator on the day following the mailing of my brief. Although the arbitrator gave lip service to "having considered all of the parties' arguments raised at the hearing and in their briefs," one of my main arguments in the brief was nowhere mentioned by the arbitrator. To put it mildly, we perceived that we had been denied due process.

The parties' acceptance of the arbitration process is more than just an emotional reaction. It is more than a mere perception. Professional advocates also expect adherence to basic standards. It is our duty to those we serve to protect basic tenets of fair play, stability, due process, professionalism, and honesty. We are officers of the court, with attendant obligations to the integrity of the arbitration system. We can continue to support and strengthen the arbitration process if we seek justice both in fact and in appearance.

In conclusion, I submit that more informed, efficient, and acceptable justice continues to be a work in progress. The improvements I have mentioned are dependent on arbitrators and advocates recognizing the importance of honesty and professionalism. Open communication between the parties is essential as well. Neither side should seek unfair advantage of the other. If we continue to follow this type of approach, the arbitration process will reach its full potential. Thank you so much.

IV. QUESTIONS

Norman Brand: Now we'd like to open it up for some questions. I'll exercise a moderator's prerogative and ask a question myself. How does it affect the participant's perception of fairness if summary judgment is received in an employment dispute or in a collective bargaining setting where the advocates stipulated to all the facts instead of calling the grievant and other witnesses?

Deborah Hensler: I'm reluctant to offer any opinion about the collective bargaining context because in that organizational setting the social dynamics are vastly different from those in the situations studied by scholars. I think it was Norman Slawsky who said that procedural fairness is partly substituting for the fact that we don't have a community. In a collective bargaining situation, there's more of a community, or at least the potential for one, than there is in an individual employment dispute.

When we see arbitration applied to situations outside the collective bargaining context, we see claimants who are starting not with a basic level of trust, but with a basic level of mistrust. This calls into question elements of procedural design. If it provides for summary judgment, for example, how might that affect the distrusting claimant's view of whether the overall process is fair and whether it can deliver a fair judgment?

Norman Slawsky: I'd like to address that. Professor Hensler talked about the party who is "sitting outside the door." That sounds like a metaphor for summary judgment. At least in a collective bargaining context, the grievant gets a "day in court." Each party gets to see and hear what the other party has to say. And don't forget that unions have a duty of fair representation. That duty includes a "day in court" for the grievant. So I think summary adjudication shortchanges both the grievant and the union. Sometimes it shortchanges the employer as well.

Unidentified Speaker: My question is for Professor Hensler. In view of your finding that parties look for involvement in and control of the process and the opportunity to vent—to state their side of the story—I am surprised that litigants, employees, and so forth are more satisfied with arbitration than mediation. I would have thought it would be the other way around, because there's less structure in mediation and typically a greater opportunity to introduce other issues that might be judged irrelevant in an arbitration proceeding.

Deborah Hensler: Good question. The early research that I cited found that arbitration procedures were in fact preferred to mediation procedures. The researchers argued that parties in conflict felt that although it was useful for each of them to be able to present their side of the story—the facts that supported their position, and so forth—they were skeptical about the ability to ever reach a resolution without some third-party intervention. If that third party were an authoritative decisionmaker, control over the process would be balanced. That was apparently a reasonable tradeoff for granting authority for the ultimate outcome to the neutral.

Those findings, which go back several decades, do fly in the face of conventional wisdom. Today we suspect that parties indeed prefer mediation over arbitration because of the control that mediation offers them. However, we have no contemporary research to tell us whether real parties in legal disputes outside of the laboratory do indeed prefer mediation as it is actually implemented. Most people in this room know that practice is not always in accord with rhetoric. Whether parties indeed do prefer mediation to arbitration or some other adjudicative process is an empirical matter that is open to question.

William Earnest: I would also say that although the grievance procedure itself is not mediation, it does permit the parties to have that interactive process, the hands-on opportunity to state their

case, hear the other side, and see if the matter can be settled. Like mediation, arbitration involves a third party to help that process along.

Norman Slawsky: I can't cite any empirical research, but in my own experience mediation done properly really works. It allows the parties themselves to fashion the outcome—especially when they have an ongoing relationship.

I might suggest that Professor Hensler and others study the procedure used by the U.S. Postal Service and the National Association of Letter Carriers. They have a mediator actually go on the shop floor to resolve disputes. It might be interesting to evaluate the level of the parties' satisfaction there as compared to the grievance and arbitration procedure.

Deborah Hensler: As all of our comments demonstrate, it is really important to think about the context in which any of these processes take place. Clearly, there's a difference between the situation in which there is an ongoing relationship to be preserved and an ad hoc dispute where the parties will never see each other again once it has been resolved. In the former, there is great value in working out a problem so the parties can continue in that relationship; in the latter, that issue is virtually nonexistent.

I would also argue that there is uniqueness in the context where, if mediation doesn't produce a voluntary settlement, the parties have recourse to an adjudicatory procedure, such as final and binding arbitration. In the so-called mandatory mediation that I study, which is typically court connected, the parties are told explicitly by their attorneys, by the mediator, and by court officials that if they can't resolve the case in mediation, their only recourse is to go on a trial calendar. The parties know it will take them years to get to trial, and that it will be very expensive. And so I think mediation works differently depending on the alternatives available if it does not produce a settlement.

Unidentified Speaker: We're frequently faced with motions to sequester witnesses. And even if they're granted, the grievant stays in the hearing. I wonder if research has shown any impact on participants' perception of fairness when those motions are granted. It seems to me that the process might not be perceived as fair when we open the hearing, and then our first official act is to kick 90 percent of the people out of the room.

Deborah Hensler: I don't know of research that is specific to that point, but I agree with the inference that you drew at the end of your question.

Mark Kahn: We all agree that a healthy, productive, constructive grievance procedure certainly makes everything better. I just want to observe that the grievance procedure is often neglected during collective bargaining negotiations. They've got other priorities. The parties will rarely take the time in negotiations to review the operation of their grievance procedure, eliminate unnecessary steps, identify other ways of approaching things, and so forth. I would like to see advocates, where they see a grievance procedure that is not very constructive or productive, urge the parties to examine it, not at contract expiration time but in between.

Just one more side point: Even though it's costly, the last prearbitral step of the grievance procedure should be attended by the advocates who will present the case in arbitration. They should not be yanked in at the last minute with a mission to win it at any cost.

Norman Brand: Thank you. Other questions?

Chet Brisco: My question is addressed to the advocates. Unions generally close their arguments by asking that the grievance be sustained and the grievant be made whole. The arbitral award never makes the grievant whole—it merely awards back pay and benefits. Do you think the arbitration process would be improved if interest on back pay were routinely awarded? And if you buy that, do you think the process should also include contemplation of the whole panoply of consequential damages?

Norman Slawsky: I have asked for and addressed consequential damages and other sundry things in arbitrations where I thought the employer's conduct was egregious. In fact, just yesterday I was involved in filing a proof of claim against an employer who filed bankruptcy. I had gotten a judgment for \$450,000, whereupon the employer filed for bankruptcy. Those are things arbitrators don't hear about. In other words, sometimes the awards that may become judgments are just not collectible.

Where there is an ongoing relationship, you really have to think about that. Remember, too, that I represent unions. In certain egregious circumstances, large monetary remedies are justified, and I urge arbitrators to award them. But you really have to look at the ongoing relationship between the parties, and often a union advocate may be reluctant to seek large monetary remedies for that reason.

Some of our limitations on remedies, such as not usually providing interest, may have been predicated on a situation where the grievance procedure operated very rapidly and any interest due

would have been trivial. But where the grievance procedure has gotten a whole lot slower and more legalistic, the time value of the money involved becomes more important, particularly to a worker who is depending on every paycheck.

Unidentified Speaker: I'd like to talk more about this aspect of procedural fairness. Procedural fairness in my mind depends on what the parties expect of the procedure itself. One very experienced union representative recently told me that he used to have union members who were raised on competitive games like Monopoly. Now he has a Mortal Combat generation. So he has trouble managing the grievants' expectations in hearings. Grievants today think that unless the union is intensely competitive with the employer during hearings, it is not adequately representing them. I've heard the same thing from management advocates—their clients are looking for a combative approach to the process too, and civility suffers. Maybe that reflects a growing societal preference for litigation, but managing client expectations may shape this perception of procedural fairness. Could I just get some comments?

Norman Slawsky: My style is usually to understate the projected results rather than overstate them. And I agree that client expectations may be a bigger problem on the union side than it is on the management side. And the problem highlights the need for open communication between the grievant and the union.

William Earnest: I agree. The need to manage client expectations is probably greater on the union side, with a first-time grievant, than it is on the management side, where the clients usually have participated in the arbitration process before. On the other hand, I run into human resources people who have not been through an arbitration proceeding. I sit down and describe the procedure to them. Doing so gives them a sense of comfort, a sense of fairness. It also helps them accept the fact that you can't win all of them. Clients form their own opinions about how evidence is presented, how arbitrators conduct themselves, and how the parties interact with each other.

Deborah Hensler: Empirical research suggests generally that litigants have higher expectations of how they will do than how they eventually do. They attribute those expectations to what the lawyer told them. Unfortunately, the research doesn't sort out whether it is, in fact, what the lawyer told them or simply what they wanted to believe. In some instances lawyers tell clients only about the good things they will be able to do for them. Another stream of empirical

research in the litigation context reveals that plaintiffs and defendants have very little interaction with their attorneys, who do a relatively poor job of telling them what to expect of the process. So you set up this situation where litigants may have unreasonable expectations as to how attractive the outcome will be. I'm hearing increasingly from attorneys that, at least in the litigation context, mediation helps to manage their clients' expectations.

Norman Slawsky: Let's talk about arbitrators' expectations. Why not tell the parties at the outset of the hearing what they are? In other words, if you have certain procedures that work, certain things that you find useful at a hearing, tell the parties. Send them a form letter saying that this is the procedure that I use for the arbitration hearing. If you have any suggestions about it, please tell me, but this is what I expect you to do at the hearing.

William Earnest: I would agree with that. I don't think the parties would find that objectionable. They just need to know what arbitrators expect, whether they are permanent umpires or ad hoc decisionmakers. Also, arbitrators, by the way that they rule, can require the parties to cooperate with each other and to sit down and discuss the case before the hearing.

Norman Slawsky: The American Arbitration Association has prehearing procedures and a mandatory prehearing conference with the arbitrator. And there's a form that the arbitrator is supposed to fill out.

Edward Krinsky: Not in labor arbitration cases.

Norman Slawsky: That's true—it's only in employment arbitration. But even in the labor relations context, the arbitrator should ask the parties what they want. Doing so might eliminate a supplemental award.

Unidentified Speaker: I am a company advocate in a long-term industrial relationship, and I can tell you that in my early years I used to think it was pretty terrific to win an arbitration case. As I've learned over the years, it's sort of like winning an argument with your spouse. You win it by thought. We do have the mediation process, and one of the arbitrators here does that for us at a few of our operations. It is really, really terrific. He'll take eight cases in a couple of days and resolve them to everybody's satisfaction. People walk away feeling good about each other, feeling good about the result.

Norman Brand: Thank you. I'd like to thank our panel for their time and effort, and our audience for its robust participation. The session is adjourned.