Chapter 11

DUE PROCESS IN EMPLOYMENT ARBITRATION

I. On the Evolution of the Due Process Protocol

Arnold M. Zack*

Ten years ago, when the Dunlop Commission came up with its fact-finding report on the future of labor-management relations, I was shocked by the draconian kinds of arbitration structures that employers had been creating for non-union employees under the authority of the *Gilmer* decision. I asked Dunlop if we should try to replicate, in the arena of employment arbitration, some of the negotiated standards of labor arbitration in order to develop fairness in the employment field. John challenged me to try it and so I did.

We, in the labor management field, do not fully realize how difficult a task it is to extend to employment arbitration the elements that are negotiated by union and management in the collective bargaining system that make it fair. Some of the things that help our labor-management system work include a balance of relative equality between union and management in both the creation of the system and in its administration; cost sharing in almost all cases; shared control in the arbitrator's selection; and the opportunity to vet an arbitrator's prior cases before making that selection. We wanted to try to extend these protections to the ADR field, but found it to be a daunting task when the employer unilaterally develops the system and often retains total control over its administration. Employees, under such employer-promulgated systems, have no ability to negotiate terms of the arbitration because, under the *Gilmer* decision, utilization of the arbitration system was made a condition precedent to gaining a job or retaining employment.

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I did the best I could. I would have loved to have seen employers create an ADR system that included mediation and arbitration; where the arbitrator was equally funded by both sides; where both sides had an opportunity to examine fully the backgrounds and prior decisions of the arbitrator and jointly shared in the selection; where the arbitrators were all professional neutrals; and where there was no appeal and the arbitrator's decision would be final and binding. It was with that tilt that we went into the next step of this task.

In August 1994, I was president of the Academy and I was invited to talk to the American Bar Association meeting in New Orleans. The basic idea that came out of the Labor and Employment Law Section (primarily proposed by Chris Barreca and Max Zimney) was that we should bring together the major players and try to develop a structure to meet some of these needs I just mentioned and try to overcome some of the bias problems inherent in the *Gilmer* decision. So they assembled a group of designees from the Labor and Employment Law Section of the American Bar Association, its Alternative Dispute Resolution Committee, the American Civil Liberties Union, the Society of Professionals in Dispute Resolution (SPIDR), the AAA, the FMCS, and National Employment Lawyers Association (NELA). I represented the NAA. The goal was to involve all the major players in the ADR field to craft a set of acceptable standards. Under the auspices of the American Arbitration Association, we met monthly in New York City and hammered out an agreement. On May 5, 1995, we agreed upon the Due Process Protocol, which you can find on the Web pages of the Academy, the ABA, and the AAA.

We could not agree on everything. Although we reached agreement on fairness once the arbitration began, we could not agree on the triggering event. Was arbitration to be voluntary or mandatory, or committed to prior to or after the dispute? NELA and the ACLU wanted it voluntary and post-dispute but the others would not agree. However, we all agreed that it was important to have the standards set forth in some document. Accordingly, there was agreement on the content of the Protocol without agreement on the triggering event and whether it would be pre- or post-dispute. After we signed the Protocol as designees of the signatory groups, we went back to the organizations for approval or disapproval. All the organizations said that they liked it but wanted some changes. However, we gave everybody the choice of a voting only up or down and all the organizations thereafter endorsed the Protocol. We

thought we were doing something that would become a guide to employers for their use in promulgating internal systems rather than something that would have any life outside the employer's own structure.

The American Arbitration Association endorsed the Protocol and then set about changing its own rules to meet its requirements. Prior to the Protocol, the AAA's standard in employment cases was related to its traditional role of implementing any agreement between signatories to arbitrate their dispute, rather than evaluating the content of that agreement to arbitrate. The only area in which they did not implement prior to the Protocol was where the employer's system denied the right of representation for the employee. The AAA fully endorsed our efforts and came out with the policy of implementing only those employment arbitration agreements that were consistent with Due Process Protocol. JAMS and the National Mediation Board followed the AAA and, as a result, the Protocol got a much wider range of acceptability than we had ever contemplated. Bob Mead, Vice-President of the AAA, told me a few months ago that there are probably six million employees covered today by employer promulgated arbitration systems that are consistent with the Due Process Protocol. People from JAMS have suggested that there are probably a million or more under their systems. I have seen the figure that there are as many people covered by the Due Process Protocol as are covered by collective bargaining agreements. That may not be a happy comparator but that may be the reality. The system has been created, the courts have made reference to it, and it has gained some notability and some notoriety.

There are two basic issues I wish to focus on today: first, what would be an ideal system; and, second, if there were an ideal system how could we put it into place? Interestingly enough, the SPIDR representative on the Task Force urged that the Protocol include mediation, which was almost included as an afterthought, but which has in fact become the prevalent system for resolving far more disputes than we anticipated. Last year Max Zimney, Chris Barreca, and I circulated the suggestion among the individuals who had been in the original Due Process Task Force that we reconvene and possibly redo the mediation aspects of the Protocol or develop guidelines for the implementation of the mediation component. Our problems were: (1) some of those individuals were no longer designees of their organizations that had endorsed the original Protocol; (2) at least in the case of the American Civil

Liberties Union, it was no longer active in the area of workplace disputes and was not interested in being a party to any redoing; and (3) most importantly, we figured that if we redid anything in the mediation area, we'd open the door to requests for our redoing the arbitration area where we would have the same structural problems. Ten years later, people would have differing views on what is an ideal system and whether it could be accepted as fair. So we have abandoned our efforts to redo the Protocol. If any of you can come up with any idea of how we can make it more effective, more acceptable, more widespread in its usefulness, and ensure endorsement of all the players, we would be delighted.

II. THE DUE PROCESS PROTOCOL: GOOD AS FAR AS IT GOES OR A SHIELD FOR EVIL?

JEAN STERNLIGHT*

I appreciate this opportunity to provide a retrospective look at the Due Process Protocol. After all the water that's gone under the bridge in the last nine years, the Protocol looks in many ways like a dated document. There are many things that are not addressed that would be addressed if Arnold were able to reconvene the developmental group today. My own position is this: I think that the Protocol is good as far as it goes but it has had some pernicious effects.

I'm going to speak about the direct impact the Protocol has had on providers, arbitrators, and companies; about the role of the courts; and about some unresolved issues. I'm not going to get to the questions Arnold posed about the elements in an ideal system and how we get there, but I am prepared to talk about some of that in the question period.

Impact on Providers

As Arnold has mentioned, the Protocol has been adopted by many organizations and some, such as the National Arbitration

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Forum, have developed their own Protocol. There still are a number of providers that have not adopted the Protocol and seem to be proud to market themselves to employers, either explicitly or implicitly, as non-Protocol organizations. And even among those providers who do have the Protocol, there's a real issue as to whether or not they actually abide by it.

I think that there's a real question as to whether providers always comply with the Protocol once they've adopted it. I have heard a number of stories from plaintiff's lawyers who report that even though a particular clause does not conform to the Protocol, the provider, e.g., the AAA, refuses to pull out of the process. I do not think this is a common occurrence, but it happens. I also think there's a real question about what individual arbitrators do when faced with an arbitration clause that doesn't comply with the Protocol. Certainly some arbitrators will refuse to take the case, but I am also sure there are arbitrators who, for financial or other reasons, take the case.

What recourse does somebody have if a provider or an arbitrator doesn't comply with the Protocol? Unfortunately there really isn't much of a recourse and the people who designed the Protocol had things in mind other than enforcement. Nonetheless, some people have tried to make the Protocol somewhat enforceable and there have been cases on the other side where people who wanted to get out of arbitration argued to a court they should not have to go to arbitration because the clause doesn't comply with the Protocol. There was one case where somebody sued AAA for fraud for not complying with the Protocol when claiming to be doing so. I haven't found any cases where those arguments went anywhere and the AAA case has not yet been decided. I haven't found any cases where anybody challenged an award saying the award is no good because it was based on a clause that violated the Protocol.

The other troublesome thing from the enforcement perspective comes about when the provider does pull out because the clause does not comply with the Protocol. However, it's an open issue about what happens next. The Third Circuit, a number of years ago, was faced with one of those situations and said that if AAA won't enforce the clause, you still have to go to arbitration—either before some other arbitrator or utilizing some other provider. In either event, the parties were denied both AAA services and the benefits of the Protocol. However, a California appellate court went the other way. It determined that if the arbitration clause

called for the AAA, and the AAA has refused to administer, you do not have to go to arbitration.

More fundamentally, what we've seen that the Protocol provides at least the possibility, and in some cases the existence of, a race to the bottom, where the good providers and the good arbitrators abide by the Protocol but the more financially desperate providers or arbitrators are willing to do things that aren't as kind to the employees. And they are going to get some business because there are always a few employers looking for an advantage.

What about from the Protocol from the company standpoint? Arnold just said that the original goal wasn't so much directed toward providers or arbitrators as it was to encourage companies to do the right thing. Here I do think the Protocol has had a positive impact. I've heard many good management lawyers give talks around the country to audiences of attorneys encouraging them to draft arbitration clauses that are fair and that abide by the Protocol.

On the other hand, there are still plenty of lawyers and plenty of companies doing things that are clearly in violation of the Protocol. We see the *Circuit City* case repeated over and over, even though the offenders keep getting spanked by various courts for their unconscionable clauses that violate the Protocol. And when they are spanked, they simply write another unconscionable clause. In another Third Circuit case, a company required AAA employment arbitration but also imposed a 30-day statute of limitations for employment discrimination claims, prohibited the employee from recovering attorneys' fees and costs, and required the employee to waive the right to file a charge of discrimination with the EEOC. That clause was upheld by the Third Circuit, but I don't know if the AAA is going to administer the case.

The Courts: Unconscionability and Evil

When the Protocol was first adopted, even though it wasn't mandatory, there was a question of whether the courts would use it to help develop their own law on things like unconscionability. With the help of a research assistant, I tried to find every case that's ever been decided that mentioned the Due Process Protocol—and I found that there are only about a dozen cases in which the Protocol was mentioned and in some of those, it was mentioned only in passing. What I found is disconcerting. My admittedly few cases gave me half of the title of my presentation, "The Shield for Evil."

A number of courts have looked at arbitration clauses that, to my mind at least, were unfair. In several of these cases, the courts also recognized that the clause was unfair but nevertheless upheld it because: (1) it did comply with the Protocol, while (2) not being unconscionable. How could that happen? Many things can be considered unfair that are not mentioned in the Due Process Protocol, such as prohibitions on employee class actions, high costs, very short statutes of limitations, failure to allow for the reimbursement of attorneys' fees, in addition to issues of about nonvoluntariness and impartiality. Because such issues are not mentioned in the Protocol, courts can and seem to ignore them if, in other respects, the arbitration clause comports with the Protocol.

Another problem with the issue of unconscionability, is the expense required in proving an unconscionability argument. The only cases where people seem to be able to mount successful unconscionability challenges are where they (1) can get a lawyer and (2) that lawyer can afford to build a really impressive factual case. To defeat these cases on unconscionability grounds requires more that a statement that the clause is egregiously unfair. You have to collect all sorts of evidence and the courts have been very demanding.

Are there any cases where the Protocol has proved useful? I think the Protocol has proved helpful in the *Hooters* case and the *Rosenberg* case. In both of these, the district courts struck down arbitration clauses as being unconscionable while using the Due Process Protocol as their touchstone.

Some Unresolved Problems

Finally, in my mind, these are some of the most important unresolved issues that relate to the Protocol. Can employers amend their clause after it has been put into place to fix whatever problems exist with respect to compliance with the Protocol? Courts are split on that important issue and I find that very troublesome because what it really does is give the employer multiple bites at the apple. An employer can write a really unfair clause that violates the Protocol and that will probably make it harder for that employee to find a lawyer to represent him or her because the lawyer's going to look at the clause and see that he or she if going to have a real uphill battle. If they actually are able to find a lawyer to challenge the clause and the court actually starts to

look askance, then the employer can fix it, so they are getting multiple bites at the apple.

A second important issue concerns who actually decides if an arbitration clause is unconscionable? Once everybody assumed that was an issue for the courts. But what we've seen is that a number of the federal circuit courts are deferring that decision to the arbitrator. That's a really fundamental issue of potentially great import and I think the Supreme Court's going to take that issue in the next few years.

Third, we have the questions about correcting arbitration clauses that do not comply with the Protocol. Do we just eliminate the problematic portion of the clause, do we rewrite that problematic portion of the clause, or do we say the clause as a whole is void? Courts are splitting all over the place on those issues.

Zack: When I mentioned the number of employees that are covered by these employer promulgated systems, I did not mention that there are also, as Jean suggests, a paucity of arbitration cases coming out of the system and very few going to the courts. About 2,000 cases a year are processed by the American Arbitration Association, and probably 10 to 15 percent involve statutory issues, which was our target when we drew up the Protocol. A handful get tested in court. Our view was that if those employees were to be denied access to the court in cases involving statutory issues, whatever substitute venue given them should track and respect those statutory rights. But the reality is that the disputes involve issues other than statutes and are settled prior to arbitration. I think the other reason for the very low number of court cases is that the circuit courts have, in large measure, followed *Gilmer* and they do not see very many employer promulgated systems that they don't like. They rarely turn to the Protocol as a standard and they usually endorse the system.

III. Is the Protocol a Shield for Evil or a Sword for Fundamental Fairness?

Susan Mackenzie*

I will pick up on Jean's title, but from my perspective as an arbitrator who is very interested in arbitration as a profession

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rather than as an industry. I believe that the Protocol has been a sword for fundamental fairness and not a shield for evil. One of the questions posed for this panel was whether the Due Process Protocol has accomplished its goals. I think it has, largely because of the broad-based support the Protocol has received. The Protocol has put the issue of fundamental fairness on the table for the designers and administrators of in-house ADR systems and the providers of arbitration services. The value of that contribution is immeasurable.

Further, I think that the Protocol has had a perhaps unanticipated impact in the arbitration of nonstatutory claims, where the tendency is to apply the Protocol procedures as well, providing a more broad-based system of fairness. Elizabeth Hill recently completed a review of 200 employment arbitration cases administered by the American Arbitration Association, involving the fairness of the process to employees in low paying positions.[1] Only 7 of the 200 cases involved statutory claims, suggesting that the use of the Protocol has extended beyond its original target of statutorily-based cases. And any extension of fundamental fairness in dispute resolution is always welcome.

But, would I like to see the Protocol codified? I don't think so, for reasons I will touch on later.

The Arbitrator's Perspective

From an arbitrator's perspective, certain important issues are not resolved by the Protocol. The first is lack of input in vetting internal ADR programs. I think that many of us who hear employment cases do care about the nature of the ADR system under which the claim arises. Arbitrators have an independent responsibility to vet an internal program in its entirety and to decline an appointment where Protocol standards are not met. I think that arbitrators do vet programs and I think it is necessary for them to do so and to look beyond the arbitration clause. I know that the AAA has reacted well if an arbitrator points out a Protocol-compliance problem with a program it is administering. The AAA has taken complaints "under advisement," sometimes asking for a program change and sometimes refusing to administer the case

[1]Hill, *Due Process at Law Cost*, 18 Ohio St. J. on Disp. Resol. 777 (2003).

unless changes are made that make the system commensurate with due process standards.

I had one case where the arbitration clause looked "fine," but it was part of a multi-step program that included mandatory mediation. If mediation failed to produce a settlement, the mediator's recommendation was binding on the company but not necessarily on the employee. If the employee rejected the mediator's recommendation, he or she had the option of taking the case to arbitration, but if the employee did so and lost, the employee would be responsible for all costs and fees of the employer. I think that's fairly draconian, and I declined the appointment. But an arbitrator who restricted the examination of a program to its arbitration clause could easily conclude that it was "fine."

Fees and Cost Splitting

In a context such as the labor-management arena, where there is equality of bargaining power, usually there is some parity in resources. Cost splitting makes sense in that context, but it doesn't make sense, and it can't make sense, in a system where one of the participants is an employee who has virtually no resources, particularly if he or she has been terminated and is finding it difficult to get another job. Can a system be fair if one of the participants lacks resources and is required to participate in the payment of the arbitrator and the arbitration fees? I think not! If we are taking the responsibility for resolving statutory claims out of the public domain and turning this process over to private individuals, it may be that the cost of that process is something that should be borne by the party promoting the change. As an arbitrator, I feel very comfortable with one-party payor systems, with a caveat, and that gets to the next issue of disclosure.

Disclosure

I have no problem disclosing to a claimant, for example, that I have heard two or three cases with the same employer sitting across the table. I think it is important, however, to put that in a context. My relationship with that employer may represent 0.5 percent of my income, but what if those fees from that employer represented 80 percent or 90 percent of my income? Is it an issue that an arbitrator derives a significant part of his or her compensation from one employer, whether or not that income is in the employment or union context? That may be a disclosure issue that we haven't discussed very much.

Arbitrator Activism

And is there a need for arbitrators to become more active in terms of the kinds of issues that Jean Sternlight raises? For example, the notion of punitive damages has been something that we, in the labor-management arena, deal with infrequently and apparently there is a feeling that labor-management arbitrators are unlikely to award punitive damages. But if we are a substitute forum, we must. Such change may "tip" the balance back to the "good old days" and perhaps mandatory arbitration awards, like jury awards, should be subject to review.

We now have a system where the courts are saying that employment discrimination cases can go to private individuals for resolution, without court review of the resulting decisions. Although this may be anathema to the goal of finality, I'd rather not be in the position of deciding a statutory claim without the potential of court review, especially if I've decided a case in a way that is inconsistent with the law. I'm not sure that the courts are completely clear on this issue, as well. For example, if you look at the Second Circuit and its approach in *Halligan*,[2] I think you will see that the courts do look "behind" arbitration decisions that they think are wrong-headed, and I think they should. *Halligan* took the FAA "manifest disregard of the law" standard, but added a "wrinkle" and looked at the factual record.

Transparency

Another concern is the degree of "transparency" within the arbitration process and the need to emphasize the sharing of information. It is very troublesome when an arbitrator has to render a decision in a private system, that is supposedly fair and speedy, when there has been little or no discovery. At times, I find that in the statutory claims context I am increasingly directing more discovery. But that also makes arbitration more expensive, more cumbersome, and more of a "court look-alike" rather than an alternative to litigation. Where there has been little sharing of information, and most is in the hands of one of the parties, balancing interests of fairness and economy can be very difficult.

[2]Halligan v. Piper Jeffrey, Inc., 148 F.3d 197 (2d Cir. 1998).

Codification

Should we? No, because fundamental fairness is on the table. The Protocol standards are being applied in general and not just in statutorily based claims. We do not want to lose the value of an alternative to litigation across the board.

IV. PANEL DISCUSSION

Moderator: Arnold M. Zack, 1994 NAA President and member, Boston, Massachusetts
Panelists: Susan Mackenzie, NAA member, New York, New York
Professor Jean Sternlight, University of Nevada–Las Vegas Las Vegas, Nevada

Sternlight: One of the questions that Arnie Zack posed concerned how to fix the system. Should the Due Process Protocol should be turned into legislation? To the extent that the problems are enforcement problems, at least one way to deal with that would be turn the Protocol into a federal statute and say that if an employer is going to have a mandatory arbitration program, it has to look like X, Y, Z and so on. Senator Sessions of Alabama actually proposed legislation that would have essentially done that.

But I think it would be a bad idea to legislate the Protocol, mostly because to me the fundamental problem is with mandatory arbitration in the first place. My fear is that if you legislate the Protocol, that would take the wind out of the sails of any effort do something more fundamental, that is to get rid of mandatory arbitration. I don't know that there is much wind right now.

Zack: Are you talking legislation for a standard that would be under a mandatory system?

Sternlight: I'm talking about something like what Sessions had proposed: legislation that would allow mandatory arbitration but would say if you mandate arbitration it has to have features X, Y, Z, modeled on the Protocol. I'm talking about actually legislating the Protocol or some variant on it. I have two reasons for objecting to this proposal. One, I think it's bad is because it would take all the wind out of the sails of reform. Two, I think it's bad because I don't think you could ever, through legislation, stop all potential unfair-

ness that any employer or his or her lawyers could ever think up. Perhaps I am saying that the forces of evil may be infinitely creative. For everything you would outlaw, someone they would be able to think of something other unfairness that you hadn't considered to put on the list. That's why I don't think that that kind of legislation would be a good idea.

Zack: How would the playing field change if there were legislation prohibiting mandatory arbitration?

Sternlight: That would be great. Then you really don't need a Protocol. Once it becomes voluntary, an employee, who let's say has been fired, might have a discussion with the employer about what he or she is going to do about it. The employee might have a choice of either suing or going to arbitration and, if that arbitration system is unfair, no employee in their right mind would use it and they would go to litigation. Therefore, the employer would have an incentive to have a fair arbitration system, and that's why I've always been an advocate of voluntary arbitration. I think arbitration is wonderful but there are significant differences between arbitration in the collective bargaining setting and employment arbitration. In the collective bargaining setting, you have the two informed sides negotiating a system and, therefore, it's a fair system. Employees who aren't represented aren't in a position to do that.

Zack: Given the fact that so few employees are covered by collective bargaining agreements in our nation, does a mandatory system provide more people with more justice than they would have if they had to go to court?

Mackenzie: I agree with Jean that legislating the Protocol standards would be a mistake for some of the reasons indicated. But, whether the program is voluntary or nonvoluntary, the fundamental fairness standards found in the Protocol should be applicable. In fact, lots of other claims come up at the same time as a statutory claim. It's not clear-cut: if there is legislation for statutory claims cases, you might not be able to treat nonstatutory claims in the same manner or have due process protection in nonstatutory contexts. For many employees, even if its post-dispute election, access to a system that's going to be fair seems to me to be a good goal.

Sternlight: I think we ought to ask ourselves some basic questions about mandatory arbitration. If we're all honest, we're all going to say the system never was that great. We all know that employees have had serious problems and continue to have serious

problems getting access to the courts and I think we would all say there are some serious problems with mandatory arbitration because at least some employers do terribly unfair things. I've tried to think about what a better system might look like, looking at what some other countries have done for some starting points. We're the only country that has mandatory private arbitration. I haven't looked at every country but from the countries that I've looked at, which include a few other English speaking countries, they tend to all cycle through the same issues and experience the same problems. England has a system of Administrative Law Judges. They set that up for the same reasons that have frustrated our former litigation system—they said that employees can't afford to go to court, so, we need to give them a system of rough justice that's quicker and more informal. Lo and behold, what happens. The ALJs start to get bogged down and the system starts to get legalized and it starts to look more like litigation. People can't get lawyers and it isn't really fair. Other countries have gone more to conciliation or mediation and then to some degree that serves some of the needs but there are certain cases that need to go to court to establish precedent.

In this country, we have to balance multiple goals. There are private, personal goals of the employees—they need to get their job back, or they need some money, or they need to find out they don't have a claim and get on with their life. The employer wants to eliminate the morale problem, to get somebody in place and get the job done. Those are what I would call the private interests and they tend to favor a process like mediation that can be quick, informal, and serve all those interests.

On the other hand we have public interests expressed in our employment discrimination statutes and related laws. We have those statutes, in part, so that we can teach people in the society (1) what is discrimination; and (2) what you should and should not do about it. In my own mind, our perfect system needs more than one process. I don't think that any one process is the right process and that to me is one of the scariest things about mandatory arbitration. It has taken over, it's like kudzu in the southeast, it's going everywhere. What we really ought to have is a system that has mediation for many cases and litigation handled publicly, maybe by an agency like the EEOC, for those kinds of cases that need it.

Zack: In most of the countries following the Napoleonic Code (as opposed to those in the Anglo-Saxon tradition), labor courts

have responsibility for much more pervasive legislation and for handling disputes in many more fields than we have in the Anglo-Saxon tradition. Even in the Anglo-Saxon countries there are labor officers who have responsibility for resolving a lot of disputes without resort to litigation. Even in Canada, our NAA arbitrators have an ancillary role in the enforcement of the governmental system. In the United States, we are the Wild West, we do not have a labor court and we do not have many of the statutory protections afforded employees in most other countries.

Some of us have been working in South Africa, where the South African government has provided mediation and arbitration for every employee in the country for any termination issue. In the U.S. context, however, the employer's unfettered right to terminate employees is protected, with minimal restrictions in the collective bargaining area and in cases involving the deprivation of statutory rights, e.g., safety and discrimination. We are way behind the rest of the world, particularly in the non-unionized sector.

From the Floor: Professor Sternlight, here is a brief note of history. John Dunlop, at one of the major meetings on employment arbitration years ago, suggested that we ought to look to labor courts, but he said it will never happen in America. We also had a draft uniform termination of employment act with voluntary arbitration in it that was adopted only by the state of Montana. The numbers that you are using to demonstrate the great evil of mandatory arbitration actually demonstrate that 93 percent of the employees who are involved in arbitration would have no legal right to arbitrate except for the rights conveyed under the employer promulgated plans. In fact, the notion that an employer who was not fearful of a terrible court decision in a statutory case would offer the employee arbitration is just plain silly. The employers would tell the employees that if they didn't like it, they could go to court.

Sternlight: I don't think it's silly because you know what I believe—employers say that they like arbitration because it is quicker and cheaper for everyone. To the extent that that's really why they like it, why wouldn't they offer arbitration?

From the Floor: Because the employee has no rights. It's cheaper to say no!

Zack: I think the questioner is giving the answer to the question that I raised—does the system of mandatory arbitration extend rights to non-unionized employees that they would not have had otherwise? I wonder if there is an intimidation factor that keeps

people from taking cases to these employer-promulgated systems? They don't have union representation, they don't know what the process is, they're in a one-factory town, and they are not in much of a position to challenge what has happened. So I'm not sure there's an appreciable difference from what has happened historically to such employees prior to the Protocol or, indeed, prior to the *Gilmer* decision.

From the Floor: Jean, I think that you are correct when you say that a fair system would provide an incentive for employees to use arbitration, post-dispute. I think the problem is that if you agree that arbitration can be good and you agree that there are accessibility benefits or deterrence benefits, to use the academic jargon, I think you have to confront the question that Lewis Maltby, Ted St. Antoine, and some others have raised, particularly if the employee post-dispute wants to go to arbitration and the employer's motivation is to win, there is every incentive for the employer to just wait the employee out. So the argument is that without a pre-dispute mandatory arbitration system, you really wouldn't have a system.

Sternlight: Here's the answer to that—it's my next article—it's called, "In Defense of Mandatory Arbitration." It's a statute that would require the employer to go to arbitration if the employee wants it. I don't see why the companies get to have their cake and eat it too. They want to have the right to force arbitration on the employee before the fact because they are not willing to have it forced on them after the fact. I'm not accepting that deal.

From the Floor: I want to disagree with you on the enforcement of the Due Process Protocol. *Gilmer* created some fear among a lot of people but the courts basically took care of some of that by upsetting some employer processes that were terribly unfair. Starting with the *Cole*[3] case, Judge Edwards set out certain parameters that parallel, in many respects, the Due Process Protocol, and which provide an enforcement mechanism through the courts. With regard to the question that some people can't afford to challenge the process, I would say that a lot of the times those same people cannot get an attorney to present their case either in court or in arbitration. That individual can also go to a state human rights commission or the EEO which, other than in the Third Circuit, will hopefully refuse to abide by the promulgated procedure, or any

[3]Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997).

arbitration that results, when a case involves statutory issues because the process is so flawed. But that has been a rarity.

From the Floor: I'm finding that an employer's desire to comply with the minimal fairness of the Protocol is based on the resources of the employer and the type of the employee filing the claim. If the employee is highly educated and highly paid, the employer recognizes that and may go beyond the Protocol and pay for the claimant's attorney, for example. Halliburton and Pfizer are examples. But when these qualified claimants' attorneys enter the process, and some of them are union attorneys, the system starts to look like litigation.

From the Floor: I would like to talk about a subject that we haven't really covered, which seems to be basic to any bona fide system of arbitration. By this I mean the principal that we recognize so well in labor arbitration—having the cases decided by bona fide independent neutrals. In that regard, I have been increasingly troubled by the practice of the American Arbitration Association of putting increasing numbers of advocates on the panels. The attorney you see arbitrating your case this week may be representing an employer or individual employees next week. Does the Due Process Protocol speak to this problem? If it is not directly addressed by the Protocol should it be, and how should that larger issue be dealt with as we look at what a system ought to look like for the future?

Zack: When we got into the Due Process Protocol discussions, one of the things I wanted to establish was a roster of credible and established arbitrators. We had a lot of discussion and the consensus among those present was that the employment field was a new area. When labor-management arbitration started, advocates often served as arbitrators because there were so few professional, neutral, full-time arbitrators. But after a while, as parties continued to use previously partisan advocates, neutral, full-time arbitrators began to appear, and the neutral requirement came on the scene. The feel in those early Task Force discussions was that the arbitrators who were going to do employment cases would be focusing on statutory issues, unlike the arbitrators in the labor-management field where arbitrators developed the industrial law of the shop or our current industrial jurisprudence. Rather than creating an independent judgment of fairness, employment arbitrators would be following statutes. In that context it was thought better to have people who had experience in the advocacy of employment law who would make better legally based decisions and would indeed

make arbitration a substitute forum as the *Mitsubishi*[4] case expected. Ultimately a cadre of neutral arbitrators would evolve out of this. That was the original thinking. The result was a task force requirement for a roster of arbitrators, demographically diverse, which would be nominated by the stakeholders (who were the members of the task force). We hoped to provide the nominations to the AAA, which would become their roster. It didn't quite work out that way, but the roster of the AAA developed to include both neutrals and advocates.

Sternlight: I think that goes back to the mandatory issue. I think that we should remember that the system we have adopted is a kind of merger of the commercial system and the labor-management system. I think it's difficult for many advocates to serve as arbitrators. There are many conflict issues.

From the Floor: The AAA started by saying that it had to use advocate arbitrators because they were the only ones who knew the statutes. There are plenty of neutral arbitrators who call me regularly to ask why they cannot get on the AAA employment panel and they are obviously well-qualified.

Zack: The question was asked about the Task Force view of the potential roster. The participants in the task force who were advocates moved to get advocates included. As I indicated, the AAA's original roster was not what I, and several other members of the Task Force, wanted to happen.

From the Floor: Part of the reason is that the plaintiff's attorneys and the respondent attorneys picked each other—they were scratching each other's back. Let me add, in the early days of labor-management arbitration, we had advocates serving as arbitrators who did an honorably good job. But the impression left by the presence of non-neutral arbitrators is simply wrong

Zack: There are neutrals on the roster as well.

From the Floor: I guess I can claim to be the only one here who was more or less present at the creation. This whole employment arbitration started in Northern California. It started with a meeting between several arbitrators and Dave Weinberg, at the time from AAA. When the first panel was picked, AAA was following their old model: you get people in the industry on the panel. John Kagel insisted that neutrals should be on the panel too. So the very first panel from AAA simply mirrored what their practice had been.

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[4]Mitsubishi Motors Corp. v. Solar Chrysler Plymouth, Inc., 423 U.S. 614 (1985).

Zack: That was before the Protocol. I pushed for a neutral roster, but I could not sell the idea because we didn't have as many neutral arbitrators experienced in statutory matters as we thought would be needed. A lot of people wanted to restrict the panel to lawyers because of the statutory focus, but they did not prevail. However, most of them wanted to have advocates on the panel, in the thought that ultimately they would become professional neutrals, as in the labor field.

From the Floor: It is possible to craft a panel of arbitrators in employment cases who have been far removed from advocacy. I was once Chair of the National Arbitration and Mediation Committee of the National Association of Securities Dealers. One of the issues was whether we should have people sitting on employment cases in the securities industry who were not very far removed from a position where they represented the industry. We put in a 10-year separation guideline: panel members could not have any connection with the industry for a period of 10 years, providing a sanitizing process. I don't think the AAA has considered that in devising their panel and maybe that should be the answer.

Zack: (Addressed to Frank Zotto of the AAA) What is the breakdown of the employment panel between neutrals and advocates?

Zotto: I'm not sure of the breakdown, but we certainly have a lot of neutrals. We do look to the industries to get our arbitrators and certainly in employment we did that initially. Some of our industries, such as construction, do not want someone as an arbitrator who has been out of the industry for 10 years because they're not up on the standards of construction practice. I think everybody would like to see the panel of neutrals like the labor panel and I think we're working toward that.

Zack: I think the general feeling is that the neutral arbitrators are selected more often than are the advocate arbitrators.

From the Floor: I'm a full time neutral. I've got a little story that will reinforce Jean's point. I do a lot of AAA cases and last month I had an AAA mediation with a pro se employee. I found out that the company would not give the employee his personnel file and the HR person said that it was not required in that state. I had some problems with this and forced the issue and got the file. The whole concept is that you're going to try to be fair and disclose the most basic documents, such as the personnel file. The question is what does the mediator do when you see a gross violation of what you think is fairness?

Zack: As an arbitrator or as a mediator?

Response: Isn't the role of the mediator to enforce the Due Process Protocol?

Zack: Mediators can't enforce it. As a mediator, you haven't got any authority to make the decisions but you can make suggestions or suggest adverse inferences. If you're an arbitrator you just draw an adverse inference from a failure to provide information you ask for. That doesn't work for mediators.

Zack: One final comment. John Dunlop and I did a book on the Due Process Protocol[5] where we examined probably 20 truly draconian employer-promulgated systems that had sprung up after *Gilmer* and before the Protocol. After the AAA endorsed the Protocol, however, all of these employers changed their systems because the AAA said that it would only administer cases that met Protocol standards. The AAA's stand has taken away from the employer its ability to claim that its draconian system had to be clean because it was administered by the AAA. Suddenly, with the requirement that their client systems conform to the Protocol, the employers who wanted the benefit of an AAA administration had to clean up their previously unfair systems to meet Protocol standards. To that extent we did accomplish our goal of introducing greater fairness into employer-promulgated ADR systems.

[5]Dunlop and Zack, Mediation and Arbitration of Employment Disputes, Jossey Bass 1997.