Chapter 12

HANDLING THE COMPLEX ARBITRATION: THE ENTERTAINMENT INDUSTRY: A CASE STUDY

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I. Panel Discussion

Knowlton: Often a grievance is filed where there are either many employers or perhaps a group of unions joined together in filing a single claim. That might be a way that you first identify that you have a complex case. Today we propose to discuss some of the issues that come up in these complex cases in the entertainment industry and some of the solutions and ideas for resolving those issues. What we discuss may be applied to other settings, but we leave it to you to draw your own conclusions about what might translate to your next complex case. We're going to start with the pre-hearing process. What do you do, David, in setting the case up and getting ready for arbitration?

Adelstein: Many of our cases, especially in the entertainment industry, involve multiple employers, perhaps a number of studios in the Los Angeles area, and my fellow panelist, Bill Cole, frequently represents them. We often have cases that involve multiple unions—the Screen Actors, Directors, and Writers Guilds. One of the first things that happens behind the scenes, and the arbitrator may never see this, is that there are frequently discussions that go on between the Guilds in terms of the nature of the issues and whether they are same for all three Guilds. When they are the same, the Guilds are usually willing to proceed to arbitration on a consolidated basis. This does not mean that the companies are

willing to do that, and if the companies are, this does not imply agreement on how the case will be pitched. For example, will all three Guilds agree on one law firm to represent them? Is the case going to be handled in such a way that the three Guilds will select one employer as a respondent to tee up the issue?

Frequently these considerations lead to complicated discussions. In certain areas the collective bargaining agreements that the three Guilds have are very conducive to this. A number of the cases that both Bill and I deal with are cases that involve residuals. An actor, director, or writer who works on a motion picture shown in theaters receives additional income if that picture is later released on free television, pay television, and the videocassette market. Because all three Guild agreements have virtually identical language on that point, there is an interest among the Guilds to coordinate a case and try to put on only one arbitration. This may have begun with a case that Bill and I handled that was spread over a number of years, with multiple parties, and Bill and I had three studio or Guild lawyers looking over our shoulders as we tried the case. If you want to feel intimidated, put on a case when not only do you have a very experienced and knowledgeable arbitrator watching what you do but when your clients are essentially three very good labor lawyers looking over your shoulder and able to criticize on a minute-by-minute basis exactly what you're doing and whether they would have done it differently.

Knowlton: There are actually only a few rooms in the Los Angeles entertainment bar area in which these kinds of cases can be held because there are so many lawyers in attendance.

Adelstein: One of the things that we do at the very start of such a case is to decide both its format and whether it's going to work on a consolidated basis.

Cole: On the management side, we have a similar situation, maybe slightly easier. The major studios, and now the major networks as well, negotiate their collective bargaining agreements together. Some of them are multi-employer agreements and some are done through coordinated bargaining. But, as a group they tend to sit in the same room. Often the issue affects everyone. However, we go through the same process that David just mentioned. When we canvas the companies, we often discover that they frequently apply specific provisions differently. Sometimes these differences are appropriate. In a case that David mentioned (I think Rich Bloch was the arbitrator), we had a situation where three of the studios did things one way and the other three followed

the practices that the Guilds were advocating. Probably half the time, these industrywide claims are generated through the multi-employer bargaining group—the Alliance of Motion Picture and Television Producers—and the members of this group play a big role in helping to answer questions about bargaining history and past practice. That probably makes my job a little easier than David's.

Knowlton: Dixon and Sara, you get the notice for arbitration and there are a lot of companies listed and there are a couple of unions, what do you do?

Adler: It's fairly easy for the arbitrator. While there may be huge numbers of parties on both sides, there's usually only one representative, almost always a lawyer, and that lawyer typically comes from a small group of attorneys in the entertainment industry. Over time, you get to know them all. But more important than that is that they get to know each other and most of the pre-hearing stuff is worked out by the time they show up at the arbitration.

Dern: I have to digress into a non-labor case to answer your question. I was asked to mediate the first *Spiderman* cases. There were at least six or seven parties that kept changing every year as the case went up the ladder. I made the fatal mistake of asking each party attorney to be sure they had a principal with them. I did not realize until I got to the meeting room, that we would have more than 25 people in that mediation. Understandably, it blew up within 4 hours.

You have to be careful when you have multiple parties and you hope that they do work out things in advance. In *Spiderman*, every party had a different position and by the time we had the second hearing, every party had changed its position, and some had changed counsel. Most of my cases involve the Writers Guild and the Directors' Guild, and occasionally, SAG. Those unions have all created panels that date back a number of years and get weeded out from time to time. Chris marveled that I've lasted for 30 years. Panelists are selected by joint agreement of the Unions and the Alliance. I hear a lot of the residual cases, and many of these involve two employers or fewer. The case that David and Bill are talking about involved almost every studio.

Knowlton: Sara and Dixon are operating on the assumption that the parties tend to work out many issues in advance. But, suppose you show up on the first day of hearing and the arbitrator is handed a pile of subpoenas issued by one of the parties who is not satisfied with the other party's response? Quickly, you realize that

this is a labor arbitration that might involve that area that we think we're not really involved in—discovery—how do you manage that?

Adelstein: Some of the Guild agreements, specifically the Directors' Guild agreement, have some provisions for discovery. This can be very helpful. But more than that, the level of cooperation that exists can often avoid discovery problems. Frequently these are complex cases that you know are going to last 2 days, 5 days, or maybe even 30 days. You know that you're going to hear the case over a length of time because none of us are going to set aside 30 days to start a case and finish it—we all hope it's going to take a whole lot less than that when we start.

One of the things that we do is we try to exchange documents in advance and this often happens when counsel have worked together before. The other thing that I've done in complex cases is to ask for the first day of a hearing to be set aside specifically for discovery issues. Witnesses are not asked to show up. We use this day to deal with document demands and to conduct agreed-upon informal pre-hearing discovery so that we do not keep witnesses waiting. In a couple of cases we've actually given an opening statement to give the arbitrator an idea of what the case is about, so that he or she isn't walking into discovery disputes completely cold.

Cole: I agree with everything that David just said. Some time ago I was involved in a very complex case that lasted a couple of years. One of the things that I found very helpful, and this is something that you as arbitrators can start when you see that the case is terribly complex and there's going to be a need for discovery, is to arrange for a conference call to sort through the discovery issues. Chris Knowlton, for example, asked each advocate to send her a letter with their positions and then arranged for a conference call to discuss them. Ultimately what we did with this case, with Chris' urging, not only with respect to discovery issues but with respect to merit issues, was to put on segments of evidence and define the underlying issues and then try sample cases to get a decision, which effectively ended the dispute and probably saved another 30 to 60 days of arbitration.

Knowlton: I want to just comment on the test case procedure that we utilized for that hearing. There were many, many claims for many individuals, and each had unique characteristics. It was hard to know whether you had to hear all of those or whether there could be sample cases. So, I suggested to the parties that they give me a list of what they thought were the representative cases and the

features of those cases that made them representative. Then I made a ruling on the cases that were to be in the initial test case group. That was enormously helpful in clarifying my thinking about the issues, gave me some insight into the variety of facts that I might hear, and alerted me to the parties' thinking. The test cases covered less than half of all the cases that were actually filed, so we were able to work fairly efficiently. My hope was that this method would work to dispense with the need for further proceedings and provide representative rulings that the parties could use as a basis for further discussion.

Adler: One of the hallmarks of this kind of litigation or arbitration is bifurcation. If you can't bifurcate it, it's almost impossible to manage it. What the different pieces are going to be depends on what the claims are and what the complexity derives from. At no time, I think, is it practical to go forward on all fronts on all issues and all discovery at one time. It's just too mind-boggling for the advocates as well as the arbitrator. It's compounded probably in the entertainment industry because very often you'll have major studios that stand in for independent producers and the records are spotty at best. The Guilds are frequently in the position of asking for documentation without knowing who has control of it or asking for 10,000 documents to find one. If you can't break it down, you can't handle it.

Knowlton: It's a big task to figure out where the information is. The unions may have the information but they are large, complex operations. They may have the information in one department but the department that needs the information doesn't know that the other has it.

Dern: I think an interesting sideline is the retention of prior awards. All of the unions retain prior awards and they are cited at length, often ad nauseum, in opening briefs and many of the independent producers have no access to those opinions. So, you get into hassles over how are the independent producers going to get those opinions before they come to the hearing? As a part of the discovery, I've been asked for subpoenas to order a union to furnish all of the prior arbitration awards that it intends to rely on.

I agree with Bill—the phone is the greatest weapon in dealing with discovery issues. I try to get the parties on the phone to resolve discovery problems and when that doesn't work, make a motion to quash when you get to the hearing so that we can take the first hour or so to work through the problems. I think that there is an element of cooperation here that may not exist in other industries.

Knowlton: In these kinds of cases you often have a lot of different kinds of motions—including motions about privilege or confidentiality. Why don't you say a little bit about your experience in that regard and how you handle bringing those issues forward for decision.

Adelstein: One of the things that is unusual about this business is that so many of the people who actually serve as our clients are lawyers. My former partner is now the head of the Directors' Guild of America (DGA). For a number of years, the head of SAG has been an attorney. You have lawyers, hired as executives, running the labor organizations; you have producer executives who are attorneys; and the people who head up labor relations departments are usually lawyers.

Because of the pervasiveness of attorneys, the question of attorney-client privilege spreads throughout this industry. However, when the executive of the SAG talks with one of the employees who belongs to the Guild, that's not necessarily a privileged communication. So, the issue of privilege and confidentiality come up on a fairly regular basis and they often become contentious. One of the things that is helpful is for the advocates to be able to foresee when these issues are coming up and arrange with the arbitrator for certain acts to be established through stipulation. Most complicated cases will end up taking months or even years to resolve and the sessions may be 30 or 45 or 60 days apart. The factual stipulations may be submitted, say within 10 days, with moving papers, say, within another 7 days, and you end up with something that looks very much like a motion practice in court.

To the extent that you as arbitrators find yourself in one of these cases with counsel who have not gone through this before, you may be well-advised to offer this type of procedure. When arbitrators have done this in my cases, I don't think I've ever seen a separate statement on the bill charging for a phone call. I don't think my clients would have a problem paying for an hour's worth of an arbitrator's time to resolve discovery or privilege matters over the phone. I'd be happy to see that happen because it saves me a day of hearings and the potential of having witnesses sitting around.

Cole: We deal with very sophisticated clients. The representatives of the Guilds, the employers, and their labor people, as David said, are usually attorneys and are very sophisticated. They have agreed among themselves that, for example, notes of sidebar discussions are inadmissible in later arbitrations, even though there is nothing in the law that makes sidebars inadmissible, and

frankly I think it probably would be error for an arbitrator to exclude sidebar evidence absent an agreement. Still, our clients have agreed they were not going to admit that form of evidence because they had an ongoing relationship and could not permit sidebar notes from negotiations to be thrown back in their faces in later arbitration proceedings because of the impact that would have on negotiations. Other industries that I am familiar with have gone in the same direction and perhaps still other industries could learn from this.

One thing that does occur in the entertainment industry concerns issues of attorney-client privilege. Although David has a different view, I do not think there is any attorney-client privilege between unions and their members in the grievance process in this industry. When you exclude evidence based upon privilege, you may get not only an incorrect ruling, but one that may be set aside. If evidence material to the case was excluded on the basis of privilege, and a court finds, on a motion to vacate, that that it was improperly excluded, that finding could be a basis for setting aside an arbitration award.

What does a privilege do? Basically it hinders the search for the truth. It excludes relevant evidence for good policy reasons that American jurisprudence has determined should be excluded in the courts of law. But it keeps out evidence that is otherwise relevant to the arbitration decision. I think it's very important when those issues come up that you really give them their just due in terms of listening to the positions and reading the case law. I have written a paper on this topic (See Chapter 12.III.).

Adelstein: I think that arbitrators are very concerned about making sure that relevant evidence comes in. We all know that the rules of evidence that are followed by federal and state courts do not strictly apply in arbitration, especially in labor-management disputes. Frequently labor arbitrators will accept evidence that would never see the light of day in a court, such as hearsay. I have two thoughts on this matter.

First, as Bill pointed out, a privilege does prevent evidence from coming into the record. While there is no jury in arbitrations, the arbitrator is the finder of fact, and has to receive evidence. If the arbitrator upholds the privilege, you are essentially telling the parties that you are not going to hear that evidence. However, there are privileges that arbitrators and other agencies honor on a regular basis that are not necessarily in the Federal Rules of Evidence. For example, the National Labor Relations Board has

recognized something that it refers to as a collective bargaining privilege. This privilege extends to certain internal communications such as union discussions with its bargaining committee about strategy. This may be one reason that Bill may be seeing this union-grievant privilege offered more and more as a basis for excluding discussions that take place between the union and the grievant.

Second, my clients, and by extension me, are regularly asked to try to determine whether grievances should be processed through to arbitration and the only way we can do that, especially in the discharge area, is if we can have a frank discussion with the employee who has been discharged. We tell them that we want to hear the worst and once we do, the union can make an assessment about whether to pitch that case to an arbitrator. If the union receives information that way and then asserts the privilege, it's not because it is trying to mislead the arbitrator or because it's trying to keep truthful evidence out. It's simply the fact that the union knows that it's not likely to get the full story from the grievant unless that privilege exists. There is a quasi-fiduciary relationship here. We all know that unions have a duty to fairly represent their members and make sound decisions about whether to proceed to arbitration.

So, I think there's a good reason for arbitrators to find that this union-grievant privilege exists. Even though the privilege may present some of the truth from coming in, the fact of the matter is that this issue usually comes up because counsel for the employer, in an attempt to undermine witness credibility, wants to cross-examine either the grievant or a union representative aggressively about conversations that took place between the two of them. Cross-examination and credibility are important issues, but we are not talking about facts that are not already in the record—the grievant is there to testify as is the union representative—at least to the extent that he or she has independent knowledge of facts. What we're really looking at is sort of a secondary tier of evidence—not the actual events that occurred but what someone said about them later. So in the scheme of trying to weigh whether certain evidence should come in, I think this is a second tier of evidence that need not come in and that where arbitrators have upheld this privilege, they have done so wisely.

Knowlton: One of the things that Dixon mentioned to me outside this session concerned his use of tentative rulings. This is unusual in labor arbitration and I wanted him to talk a little bit

about the use of a tentative ruling and how that fits into an efficient hearing process.

Dern: I do tend to put forth tentative rulings in complex cases if I feel that sufficient evidence has come in to indicate which direction the case might be going. I also think it's sometimes very helpful to the parties to know where my head is and how I might rule. I don't do this to preclude them from going forward and continuing to present evidence. However, in many cases that I've had over the years when I have taken the attorneys aside and told them how I saw the case going, I found that this often leads to settlement. I think this approach has a tremendous value because there is a tendency for these cases to go on and on. Almost every one of our cases has a court reporter, pre-hearing briefs, and post-hearing briefs, so there's a lot of merit to try to focus the parties on where the decision may come down. That's been my approach. Some people agree with it, some people don't, but I've found it very successful.

Knowlton: Sara, do you use tentative rulings at all?

Adler: Not formally. I do a lot of bifurcating so I do partial or interim rulings in the expectation that at some point there will be enough of those pieces ruled upon that the parties can settle the rest of it. This is frequently the case, particularly when large damages are involved. That's really something the parties should be able to work out once they know where the liability lines are going to be drawn.

Knowlton: Tell us the other kinds of issues you might bifurcate.

Adler: It depends on the case but frequently there are multiple issues. A case involving residuals might also involve where the residuals are coming from and what kind of information will be relied upon. Most of the entertainment issues tend to be complex in that sense, except perhaps in the routine residual case when somebody hasn't paid and they need an award to go after them. One of the things that strikes me is that entertainment is an industry that keeps track. For example, there is a long history of most language that somebody has construed at least once before.

Knowlton: Dixon, talk about how you use precedents.

Dern: I guess the best way I can describe it is to give you an idea of the sorts of issues we deal with in television. If you use a clip in a show, you pay for the clip. But, if you use a significant number of clips, you pay an overall rate that is three or four times greater. There is a question of economic advantage and the test really came down to a question of the definition of significant use. Both the

Writers and Directors Guilds had a provision in their agreements dealing with this issue. These cases started a number of years ago. The late Ed Mosk, who was the brother of our Supreme Court Justice, was on both panels as was I. Ed had one of the early cases and he sort of threw out an idea on the meaning of "significant." I later wrote an opinion that, for better or for worse, became known as the Dern Rule where I laid out four tests, but I cannot remember today what they all were. My ruling apparently was sufficiently articulate to be cited in later cases and it established a precedent. It was finally built into the text of the DGA agreement today. There is a great deal of that type of precedent. Almost every union will bring out earlier opinions of arbitrators in the field.

Adler: These contracts go back to the 1930s.

Dern: Yes, as do some of our arbitrators. I have actually had cases where I have had opinions cited to me that I wrote 10 or 15 years ago. We are supposed to file a copy of our awards with the Motion Picture Association and the union, of course, gets a copy because they're involved.

Knowlton: How do you deal with proprietary information where one party feels that they want to present certain evidence to the arbitrator but they don't want another party to know about it?

Cole: It is an issue that we have quite often encountered because we may be representing Warner Brothers, Universal, and Disney in the same case, and while they have similar interests with respect to the interpretation of the collective bargaining agreement, they are fierce competitors. For example, a case that Chris handled related to scripts that had been in development and whether writers had been asked to do extra writing for which they should be compensated. We were dealing with a variety of projects that one studio might not know that the other studio was developing. The way we ultimately resolved that issue was to have certain studio representatives leave the room while we discussed some of those facts. In another case, the overall issues were dealt with in the main brief, while parts of the remainder of the briefs were separated by employer. We basically reach agreement among ourselves with our clients and then get the arbitrator to so rule. We have also entered into stipulations with the Guilds concerning keeping specified information confidential, and we ask the arbitrators to do the same.

From the floor: How did you handle these records under such circumstances?

Adelstein: In the case that Bill and I handled with Rich Bloch, we had representatives of two of the three studios walk out of the room and we designated the transcript as confidential. We had a stipulation to the effect that it would not be shared with the other parties and the reporter was directed to note that it was a confidential transcript on the top of the paper. Then Bill had the wonderful time of explaining to his clients that he had information from other clients that he couldn't share with them. From the Guilds' perspective, what's important for us is that we get the information in the record. We were having a home video executive from one of the three studios testify about how videocassettes are distributed, and two of the executives from the other studios had to leave the room while this gentleman testified. I had my doubts about how proprietary this information was but when I saw how much anguish it caused, I was convinced.

Adler: Just as a footnote for people who don't work in this industry, one of the advantages we have is that there's a very small group of court reporters who are very knowledgeable, who know all the players, and who are very careful. That helps a lot to solve the complex problem of who gets which pages.

Knowlton: And they know all the players too and they know how to spell their names. In my hearing, we had a whole section that was devoted to past practice and the bargaining history that was common to everyone. After going through this material from start to finish, we then had individual hearings involving each of the employers to deal with each of their specific claims. I thought that having the hearings just on the past practice and the bargaining history was a great way to designate what was to be for everybody, was not to be for everybody, and how to organize both the hearing and the information. In writing this decision, it was wonderful to have all the bargaining history in one place and a lot of the past practice evidence in one place rather than going through a 35-volume transcript to find and extract all those bits and pieces.

Knowlton: We have a long list of subjects that we could cover including things like injunctive relief, the use of a special master, or how to handle simultaneous litigation going outside of the arbitral proceeding. I think what I'll do is to invite your questions.

Adler: I just want to make one other comment to put all of this in context. Unlike a lot of the cases that we do as arbitrators, you also have to recognize that these are parties that are well-financed and leisurely. Some of the things that we talk about in the entertain-

ment industry flow from the fact that both parties have money and, as far as I can tell, they're never in a hurry.

Cole: I'm not going to buy the last part of that but they definitely are well-financed.

From the Floor: I have two questions. One is on confidential information. How do you handle that in the award if you're going to use that confidential information as a basis for the award? The other question was with regard to those sidebar agreements about excluding evidence. How does the arbitrator determine whether there was an agreement to exclude evidence so as to not get reversed for excluding material evidence?

Dern: I'll take the latter one. In our business, if a case involves a sidebar agreement, both parties will tell me. I actually started to ask the history of a provision one day and both parties told me I could not ask that because it was part of the sidebar. I've had only one situation come up where they disagreed as to whether a particular item was part of the sidebar. I told them if they couldn't agree, they would have to return with notes and bring the person in who had taken the notes and give me testimony as to whether it was really sidebar, and they agreed.

Adelstein: The only time there's a dispute amongst the parties is if there's a difference of opinion as to whether something happened in sidebar. If it happened in sidebar, the negotiators with all these unions agree it's off limits because of the damage it would do to the collective bargaining relationship.

Adler: Sometimes there's an exception. A few years ago I received a letter from the DGA saying that there was a provision in the DGA Agreement for which they could find no bargaining history. The letter said that they had no idea where the provision came from or how it got into the Agreement, and asked me to tell them what it meant, specifying that they did not need a hearing because they did not have any evidence.

Dern: There's another provision in the DGA Agreement that I questioned in a hearing and was told that it came out of cases that had come up 10 years prior at the Writers Guild. One of the arbitrators had ruled one way and another arbitrator—me—had ruled the other way and they wanted to resolve that dispute.

Adelstein: One place where the issue might come up, although I haven't seen it, is with the independent producers. In addition to the major studios, there are a number of good-sized independent producers who will sign the basic agreement and may end up in an arbitration against one of the Guilds. They may want to have

particular language in the bargaining agreement construed, and the Guild may deny them the right to the information because it was based upon a discussion that took place at sidebar. I'm not sure what an arbitrator does with that. I know what I'd argue on behalf of the Guild but the party who's at the arbitration, this independent producer, wasn't there, didn't have that agreement and yet has to live with the language. Please remember too that we are talking about very thick documents. The independent producer really doesn't do any negotiation to speak of, but simply signs the agreement and, in essence, buys not just the language, but the bargaining history without knowing what the bargaining history is or what the practice has been.

Knowlton: I want to touch a little bit about how you draft an award in these circumstances. You can try to write a very sanitized award that doesn't disclose proprietary information and you may or may not need to include that proprietary information in order to get your point across and explain your reasoning. But, if you do have to include proprietary information, you have to seal that part of your award and provide it to only the parties it pertains to, just as the parties separate the general from the particular in their briefs, treat them separately, and mark them appropriately.

From the Floor: With respect to the actual drafting of the award, is there anything distinguishable with respect to the format?

Adler: There may be interim written awards. They really aren't any different, you just incorporate the interim awards into the final award. That part of it pretty much looks the same as any other arbitration case.

Cole: When you are dealing with sophisticated parties who have established collective bargaining relationships, it is really important in my mind that the arbitrator decides the issue that's before him or her and doesn't go on beyond that. Just to give you the absurd example, there's a case pending now with the Directors Guild. There is a stipulation that gave the arbitrator the issue and told him to decide it either yes or no without saying another word.

From the Floor: About the sidebar discussions. The parties seem to have made a conscious decision that bargaining history is irrelevant in terms of interpreting particular contract language. If so, how often does this issue ever come out in the open?

Adelstein: Not very often, but when it does come out it's usually because someone forgets, someone else tries to refresh his or her memory, and someone else objects and says, "Wait a minute, that was a sidebar."

It can be frustrating though because negotiations are sometimes cryptic. You'll know exactly what you agreed upon but the gestalt of what the understanding was is not just what was said across the bargaining table but what was said in the hall and at sidebar. And when you are trying to explain the gestalt to the arbitrator, there's a minefield that you can't go into.

Cole: It does come up also when we're doing informal discovery with each other because we routinely ask for bargaining notes of the other side and we always redact sidebar notes. The arbitrator wouldn't even know about it. I can remember a particular situation where a witness started to talk about an issue and the other witness asked for a break and took the first witness aside. When the first witness returned, he said that the other side reminded them that the material was part of a sidebar and would not be discussed.

Adler: There is one relationship where a court reporter reports the on-record negotiations. If it's not in the transcript, it didn't happen!

Adelstein: I wanted to mention one other practice that Bill and I used in one case. We were handling a case involving SAG and Disney. The case involved the old Mickey Mouse Club. SAG was claiming that additional compensation was owed the Mouseketeers for use of old episodes from the 1950s. Time limit issues were a very important part of the case and these limits could possibly apply to every Mouseketeer. When did each and every Joe or Bobby or Darlene actually find out that a particular practice was going on? It was an unusual procedure but we actually had a number of days in which we had the Mouseketeers provide depositions, and these transcripts then went to the arbitrator. This was testimony outside the presence of the arbitrator and it was going to be hard for the arbitrator to make credibility decisions. However, this was a very wise use of the parties' resources. This was not something I would recommend to be used liberally but occasionally it's something that might end up being useful to the parties.

Knowlton: I recently had a case that involved one of the contracts that did have a discovery procedure and it included a procedure for depositions that paralleled the state statute for discovery. We went through the whole process and we had a lot of conference calls to settle disputes and to make the discovery work smoothly and we did a lot of pre-hearing planning of that process. They deposed every single witness, they had expert witnesses who were deposed in advance, and so on. By the time we got to the

hearing, the parties had negotiated that provision out of their contract.

We've run out of time and I hope you've enjoyed this as much as I have.

II. THE UNION-GRIEVANT PRIVILEGE: A WELL-RECOGNIZED METHOD FOR PROTECTING CONFIDENTIAL COMMUNICATIONS AND FOSTERING THE EFFICIENT RESOLUTION OF GRIEVANCES

DAVID ADELSTEIN*

A recent California court case[1] appears to have emboldened management counsel seeking to invade what we, as union counsel, have understood to be a longstanding tradition in labor arbitration. Confidential communications between a union representative and a grievant concerning a pending or potential grievance are privileged, and arbitrators will deny employer requests to question the union representative or grievant about the communication. On the few occasions this issue has been joined, unions and their counsel have asserted that failing to exclude these communications from the arbitral record creates a disincentive for grievants to make a complete and frank recitation of the facts to the union representative investigating the member's claim. Employers and their counsel may cite state and federal statutes and cases rejecting a union-member privilege or rejecting privileges in the labor arbitration context, hoping that arbitrators may be reluctant to exclude evidence that appears to have some, albeit marginal, relevance to the issues at hand.

But permitting employers to cross-examine grievants or union representatives about confidential communications concerning the grievance has far more serious consequences than the accepted practice of admitting evidence of questionable materiality, with

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[1]American Airlines v. Superior Court, 114 Cal. App. 4th 881 (Calif. Ct. App. 2003).