

## CHAPTER 2

### THE NAA AGORA: WHAT'S RIGHT WITH LABOR ARBITRATION . . . AND HOW TO KEEP IT THAT WAY

- Provocateur:** Roger I. Abrams, NAA Member, Boston, Massachusetts
- The First Circle:** Richard I. Bloch, NAA Past President, Washington, DC  
George H. Cohen, Bredhoff & Kaiser, PLLC, Washington, DC  
James S. Cooper, NAA Member, Boston, Massachusetts  
Joan G. Dolan, NAA Member, Boston, Massachusetts  
Harry Rissetto, Morgan, Lewis & Bockius LLP, Washington, DC  
Theodore J. St. Antoine, NAA Past President, Ann Arbor, Michigan

**Jacquelin Drucker:** Now it's time for all of us to step into the Agora, the National Academy's marketplace of ideas. Leading the discussion this morning and introducing the members of the First Circle will be Professor Roger Abrams. Roger's not on the stage right now, for reasons that will become obvious in just a moment. By way of introduction, Roger, of course, is a National Academy member. He is the Richardson Professor of Law at Northeastern University Law School; and currently he is a visiting Professor of Law at Harvard Law School. Roger is the former dean of Northeastern Law, of Rutgers Law School, and of Nova University School of Law. Many of you may know Roger from his prominence in baseball, as an arbitrator, as a writer, as a commentator, and, I suspect, as a fan. I would like for you to join me in welcoming our provocateur, Roger Abrams, to come lead the Agora. Roger?

[Enter Roger Abrams, wearing a toga.]

**Abrams:** Would the Inner Circle please proceed to the Agora. Madam President, Mr. President-Elect, Ladies and Gentlemen, welcome to the Agora. As Jackie says, this is the marketplace of ideas about our profession—its history, its promise, its present,

and its future. I'm pleased to start the program by introducing this extraordinary panel of arbitrators and practitioners who will join in this discussion. The general topic is "what's right about arbitration"; but it also will cover what's wrong about arbitration. First, our colleague on the union side, George Cohen, formerly with Bredhoff & Kaiser here in Washington, a labor lawyer with a national practice representing private and public sector labor organizations and their members. George has had extensive experience in all aspects of collective bargaining and contract dispute resolution procedures spanning five decades. In particular, he has been active in the entertainment, sports, and television industries. He has argued five landmark U.S. Supreme Court cases and more than 100 cases before the United States Courts of Appeals, federal district courts, state courts, and government agencies. As an adjunct professor at his alma mater, Georgetown Law School, George teaches seminars in collective bargaining, labor law and professional sports, and law and occupational safety and health. Welcome to the Agora.

Richard Bloch—this is the second time I've been able to introduce Richard Bloch in the last few months. Rich visited my sports law class at Harvard, and I should tell you, he was a smash. Former president of the National Academy, full time arbitrator, adjunct professor at Georgetown, he resides here in the District with his wife, Susan, a professor of constitutional law at Georgetown, two children, three cats, a sheepdog, and a parrot that does card tricks. And if you know Rich, you know he also does card tricks; although apparently not as well as his parrot.

I learned how to be a labor arbitrator from Ted St. Antoine, and so when it was time to invite panelists for the Agora, he was first on my list. Ted is the James E. and Sarah A. Degan Professor Emeritus of Law at the University of Michigan. He was dean of the Law School from 1971 until 1978. Ted has been a labor arbitrator for 35 years; and he, too, has been president of our Academy. He is currently chair of the UAW Public Review Board and a member of the board of directors of the American Arbitration Association. He recently served as chair of the Michigan Attorney Discipline Board. And for those of you who seek further insight into arbitration, please note the book Ted has edited, "The Common Law of the Workplace: The Views of Arbitrators," a fine Academy publication, now in its second edition.

Our other distinguished attorney participant is Harry Risetto, a partner with Morgan, Lewis & Bockius here in Washington and

also a graduate of Georgetown Law. He clerked for Judge John Sirica and Chief Justice Warren Burger. His nationwide management practice focuses on companies in the airline and railroad industries. During the past 25 years, Harry has participated in scores of rights arbitrations and numerous interest arbitrations and presidential emergency boards. A regular lecturer and writer on labor matters, Harry has served as an adjunct professor at Georgetown. And since 1999, he has been selected to be included in the Best Lawyers in America publication. Welcome, Harry.

Joan Dolan is a distinguished graduate of the Northeastern University School of Law. She teaches as an adjunct professor across town at Boston College, teaching the alternative dispute resolution course covering arbitration in labor, commercial, and employment disputes. Joan serves as an arbitrator and mediator in a variety of public and private settings throughout New England, both as an ad hoc neutral and as a permanent umpire. She currently serves as the Chair of the National Academy's Technology Committee.

And then there is my longtime friend, Jim Cooper. He is the last one to have seen me wearing a toga. We are Cornell fraternity brothers. I have only hazy memories of that night in the toga almost 40 years ago. In fact, I'm not even sure it happened. Jim insists that it did. We also shared a roommate at various times. Jim has served as a labor arbitrator in labor management disputes for 25 years in both the public and private sectors. Before beginning his career as an arbitrator, Jim won accolades from labor and management as chairman of the Massachusetts Labor Relations Commission during the early years under the Commonwealth's Public Sector Law. He is a distinguished graduate of the Rutgers Law School.

What then are we about today at the National Academy's Agora? How will this proceeding differ from our customary Academy program with formal papers and commentary? The Agora will be much more like a typical first-year law school classroom using the Socratic method—questions, answers, more questions and more answers, as we search for truth together.

Although we are all thoroughly modern labor arbitrators and labor practitioners, the arbitration of disputes between parties dates to the days of ancient Greece. Parties in different cities, for example, would agree to a pre-dispute mechanism for resolving their foreseeable conflicts. For example, in 421 B.C., Athens and Sparta, two parties that had more problems than most employers

and unions, agreed to the following clause known as the Peace of Narceas: “It shall not be permissible that the Lacadaemonians and their allies, to make war upon the Athenians and their allies or to inflict upon them damage in any manner under any pretext whatsoever.” The same prohibition was made to the Novenians and their allies. “But if there shall arise a dispute between them,” the document continues, “they will remit its solution to a procedure according to a method upon which they shall come to agreement.” The problem, however, is obvious. The parties didn’t agree to the details of their dispute resolution procedure. I guess there was sloppy construction even back then. And of course, they can’t leave it all to the arbitrator for interpretation, because they decided to have a war!

We won’t have a war here today. We have ground rules for the Agora. I will have questions for members of the panel. I ask the panel to keep your answers as short as possible. There are also two microphones set up in the center aisle. If you want to participate, raise your hand and I will recognize you (just as I would do in class) and you can use one of the two microphones. This proceeding is being taped, so before asking a question or making a comment, please identify yourself and where you are from. Let us then begin.

### **Act I: *Steelworkers Revisited***

**Abrams:** I’d like to start with Act I. Let’s go back to the source. Let’s try to remember how this profession was created, how the integrity of the process was first defined. It was 46 years ago on the other side of town; Justice Douglas writing for a majority of the Court in the *Steelworkers Trilogy*<sup>1</sup> created modern labor arbitration. In retrospect, his three remarkable opinions have affected our lives as neutrals and the work lives of participants who use this process to resolve their disputes.

It is easy to state what the *Trilogy* holds. When a dispute arises during the term of an agreement, even if the matter is frivolous, a court should order the parties to arbitration because arbitration is the procedure that the parties have selected and it has therapeutic value and a cathartic effect. It is not a court’s job to determine the

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<sup>1</sup>*Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

merits of the dispute. There is a presumption of arbitrability, and the matter should go to arbitration. After arbitration, it is not a court's job to rethink the decisions of arbitrators or to review the merits. The court is to determine only whether the arbitrator drew the "essence" of the award from the parties' agreement.

What I want to do today is first jump into that area. Ted St. Antoine, why did Justice Douglas rule the way he did?

**St. Antoine:** Well, your Worship, you may think he had a single vision. I think he suffered from a bit of double vision. On the one hand, he viewed this as a very cozy process where a few old friends sit down and the arbitrator knows all about the operations of a shop and he decides the case exercising personal judgment. But on the other hand, Justice Douglas talks about the fact that the arbitrator can't do it simply according to his or her own views of industrial justice. And, what has haunted us ever since, that the award has to draw its essence from the collective bargaining agreement. Now all of those are good things; but, in my judgment, too many courts today below the U.S. Supreme Court continue to insist that this drawing of the essence of the award from the collective bargaining agreement means that a court can take a look at the merits of what the arbitrator has done. And I think Justice Douglas had in mind the notion that the arbitrator, right or wrong, should prevail as long as there was no corruption or denial of due process, and the arbitrator did only the job the parties asked of him or her. But we have had a very hard time getting that lesson across to the lower courts.

**Cohen:** In our law library, the *Trilogy* just jumps out of the book when you look at the volume. You don't even have to open it up. The answer to your question, I think, is very simply this: Mr. Justice Douglas paid incredible attention to two things. One, Davy Feller's brief and, second, Davy Feller's argument. And if anybody wants to go back into their computer—the technology of which I do not understand—and press a button and hit that brief, you will see an amazing similarity to some of the most sophisticated nuances that are actually contained in the opinion.

**Abrams:** I find that the *Trilogy* is often cited to me in arbitration as standing for the proposition that an arbitrator should apply a presumption of arbitrability. Now, I think it's generally well known that arbitrators don't particularly like to hold a matter not arbitrable. It doesn't really help very much other than to get rid of a single case. It may not help the parties move their process along, but does the *Trilogy* have anything to do with what we do on the ground as labor arbitrators? Joan? Any comments on that?

**Dolan:** I think the *Trilogy* has everything to do with it. And I understand completely what Ted is saying; but when I read the *Trilogy* again—as I do every year to teach it—every time I read it, I’m so grabbed by what a fabulous piece of work it is. One of the things that has struck me in the last couple years in terms of what’s right about labor arbitration is a comparison with employment arbitration. Even in the toughest labor arbitration, I think there is still that intangible quality of the continuing relationship, which is the underpinning of the *Trilogy* rationale. As we know, this element does not exist in most employment arbitrations. This continuing relationship between the parties, between the advocates, between the arbitrator and the parties, permeates every single thing we do in labor arbitration, and as it never will in employment arbitration.

**Cooper:** Even when I have a case that is clearly a loser for the union, I always have to pull myself back and remember that, hey, this is the grievant’s day. This is the opportunity for him to speak his piece. What is important, win or lose, is the fact that the process is there for them. Sometimes during a hearing, if the grievant wants to be excused, I always stop the hearing. I always say, “We’re not doing anything without the grievant here.” It’s that kind of approach that I think the *Steelworkers Trilogy* adopts. And I just sometimes wish that more appellate judges would go back and re-read the *Trilogy*. And I don’t just mean the federal judges. I mean the state court judges, too, because I think they have not followed the *Trilogy* in the way that Douglas would have liked when he wrote that decision.

**Abrams:** Harry, do you think that the courts are overstepping their bounds in reviewing arbitration decisions?

**Rissetto:** Well, I think there are really four stakeholders in the arbitration process. There’s the employer, the union, the employee, and the public. And historically, there’s been a tension among those four interests; and the *Trilogy* is, obviously, very important because it was an affirmation of the process, which is essentially a management-union process. And I think from time to time, usually, as a result of the facts of a particular case, the courts become intrigued on two grounds: one, the process doesn’t support the employee. And I think *Alexander v. Gardner-Denver Co.*,<sup>2</sup> the discrimination cases, are an example of those. And on the other side, sometimes the public interest intervenes as a result of

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<sup>2</sup>415 U.S. 36, 7FEP 81 (1974).

a decision—usually a discharge decision, sometimes in the airline and railroad industry—that reinstates an employee on provocative facts. And, in that kind of case, the courts sometimes are motivated by notions of public interest to step into the process to a greater intent than the *Trilogy* would anticipate.

**Abrams:** Rich, have you seen this tension between what’s going on privately and this overriding public interest in the results of purely private labor arbitration?

**Bloch:** I think where Harry was going was to suggest that sometimes courts do violence to the *Trilogy* when reviewing arbitration decisions on the basis of the perceived public interest. Let’s say, for example, that an arbitrator has a drug or alcohol case where the evidence shows that the individual has been intoxicated on several occasions. But that arbitrator, after looking at the evidence, concludes that there is no basis for the discharge. Then the parties end up in front of a federal district court judge. Now, to begin with, you start with the basic gut problem that all lawyers have when they’re before a court and they’re asking the court to keep their hands off a dispute. The judge is a person who is paid to resolve disputes, and, if they hadn’t read the *Trilogy*, their initial inclination would be, this is another hour of work for me, let’s go, I’m going to review what happened, and if I find this is unreasonable as a matter of fact or law, goodbye arbitration award. So those of us who have argued on behalf of this hapless group of human beings called arbitrators, we have done our best to educate those courts as to exactly how much deference and respect they must pay to those written words. But again, depending on your background, your history, and what circuit court you’re looking at, and I actually had the honor of writing a little paper about this about 10 years ago, there has been a dramatic increase in the number of cases in which federal courts purporting to review the arbitrator’s essence from the contract determination have, in fact, addressed the merits and reversed arbitration awards.

**Abrams:** But, what if the arbitrator does it wrong? We all know Ted St. Antoine’s wonderful construct of the arbitrator as the party’s “designated contract reader,” the “joint alter-ego of the parties.” If you decide, however, that the arbitrator is a joint alter-ego, then arguably whatever he decides cannot be wrong. But, Ted, don’t arbitrators make mistakes?

**St. Antoine:** Um, no. But more seriously—no. That is what it means when the parties write an arbitration clause and say that the ruling of the arbitrator will be final and binding. Whatever

this arbitrator—stupid as he or she may be—says is exactly what we meant. That is what that contractual language means. Needless to say, in speaking this way I am speaking of a legally cognizable mistake, the sort a court should correct. It is in that sense that I say arbitrators don't make mistakes. And I'm happy to report that the Supreme Court in the *Eastern Associated Coal Corp. v. Mine Workers*<sup>3</sup> decision came very, very close to saying exactly that. Do read that opinion. It's the only time I've ever been cited by the U.S. Supreme Court, so I have great regard for that one. Yes, Ms. Dolan?

**Dolan:** I cannot tell you how awesome an experience it is to think about disagreeing with both Plato and Ted St. Antoine at the same time! The thing that strikes me the most about this, partially because I have had this discussion with many friends who are judges and they say essentially what George just said, the bottom line from their perspective is this: I know I'm not supposed to touch these things, but if an arbitrator puts some pilot who's a drunk back in the sky, I don't care about the *Steelworkers Trilogy*. And, as a human being, I say, "Okay. I can live with that."

What I think that is both hard to live with and so important is something that we never talk about. We've all read decisions (and maybe even written them) in which an employee's very major misconduct is spelled out, but then the opinion ends with a single sentence reinstating without back pay on the bare rationale that the employee had no disciplinary history. I think it is very important as we watch the real problem of erosion of the *Trilogy* judicial review principles to ask ourselves how much of that is the result of the way we write.

**Abrams:** Harry, you represent companies who go into this process before potentially lawless, unreviewable neutrals. Is it a breach of your professional duty to say, "All right, let's go and arbitrate?" How can you bring them to arbitration?

**Rissetto:** Well, the alternative is not very acceptable. There is a highly visible, highly vocal dispute going on in the workplace. It's distracting the employees, it's distracting management, and it needs to be resolved. You have skillful representatives on management and labor, and they can't resolve it. What do we do? Do we use economic force? Or do we engage someone to tell us what we agreed to? And I think arbitration serves a very, very positive purpose in that context. And, in fact, you have no choice. If you have

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<sup>3</sup>531 U.S. 57 (2000).



an arbitration promise the dispute arises under, Justice Douglas shows up and says, go over there, do the arbitration.

**Abrams:** Jim, you mentioned the importance of the grievance and the grievant's experience. Sometimes we lose sight of that in the process. Although perhaps a secondary aspect of the *Trilogy*, Justice Douglas does make two references to the cathartic and therapeutic effects of arbitration. Have you seen that happen in your two decades and a half in the business?

**Cooper:** Sometimes, like when I run into the parties and ask, "Hey, what happened to, you know, Joe Blow?" And they say, "Oh, he's doing great. He's doing a great job. We just promoted him to a supervisor," or you know, something like that. And at that point in time, I really feel good about myself. I really feel good that I made a right decision and that the person's life really has improved. There aren't a lot of times when you get a sense of satisfaction from what you're doing like that. But it's happened a couple of times.

**Abrams:** Great. I want to remind the audience that if you want to participate, there are two microphones. Just go up and stand by them; I will see you and recognize you.

I should tell you the story of when my wife, Fran, and I went to an arbitration north of Orlando when we lived in Florida, involving the discharge of a bus driver who had some problems with the kids on the bus. The driver was at the hearing the whole time, huddled in a corner next to one of the union officials. And when it was his time to testify, he did, in fact, tell his side of the story. And then when the parties were finished with the witness, I asked him a couple of questions. And Fran, on the way back, said, "Did you see the grievant's affect?" Psychologists! She explained, "When he turned to you he kind of relaxed and his arms were unfolded and he just looked so much healthier than he had." And I said, "Douglas was right! It's the therapeutic effect!" The grievant got a couple hundred dollars' worth of therapy at no charge! I think he also got his job back.

**Jim Harkless:** I'm from Washington, DC. To get back to Justice Douglas' thinking, and George alluded to it in his remarks about Davy Feller's brief, it's surprising to me as one who took labor law with Archie Cox and was present when Harry Shulman gave his lecture that no one has mentioned these citations in the *Trilogy* that are so important in our field. I'd like some comments about the influence those two articles had on his thinking.

**Abrams:** Any comments on Jim's suggestion? You know, the Court always loved to cite articles like these masterpieces. I wonder, however, whether arbitration has developed less based on what Harvard and Yale law professors might say and more based on what arbitrators and advocates say on a day-to-day basis.

**Cohen:** Let's go back to what Harry Shulman said: The notion of arbitration as a mechanism to resolve disputes short of having to do the ultimate economic act—the strike—has certainly become a fact of life. But this, of course, leads to the fundamental question about what's wrong with the current system. I think everyone in this room supports the notion of informal, expeditious resolution of disputes so they do not fester at the workplace. But, this goal has become quite illusory for the reasons that we all know and understand: namely the scheduling and processing of cases. My favorite model has been the safety and health procedures in a collective bargaining agreement where within 24 hours someone shows up on the spot, looks at a situation, decides what needs to be done, and issues an award. I would like to see those kind of procedures translated into other types of issues. It does not serve the interests of either party, certainly the folks that I've had the pleasure of representing, to wait for months while we go through the familiar act of, "I'll be back in July. Oh, but August is a busy month. We can't schedule after then because it is the high holidays or it is too close to Halloween."

**Rosemary Townley:** Good morning, Toga Boy. I would like to address George's comment about being expeditious because I think this is such an important point. And, given we have advocates here with us today, scheduling has been one of the things that's been driving me crazy for the last four years. Busy arbitrators get a call and when you give a date that's 9 to 12 months out, you get so much flak from the parties who say, "Well, I need something sooner." And, I respond, "Well, I don't have anything sooner. Why don't you use one of the newer arbitrators who have just joined the AAA (American Arbitration Association) panel?" For example, in New York State, the bar association has a mentoring program. There are a number of new folks who have gone through the program, and who are available. But I hear, "Well, no. We don't know them." I reply, "Yes, but it's a suspension case. It's a letter in the file case. These are the cases I cut my teeth on 20 years ago. Why are you not willing to try someone new on those types of cases?" Then I hear, "Well, my client just doesn't want to

take any chances anymore. The economic climate is different.” You know, I just don’t buy that. I think the parties have to take some of the blame and not pin it all on the arbitrators when it comes to scheduling.

As a second point, advocates should give the case administrator or the arbitrator some idea of how many days they are going to need for the hearing. How many times do I walk into a hearing and then hear, “You know, we’re going to need a couple days for this.” Well, isn’t that great, because my next date now is, you know, a year from today. If I know beforehand that you need multiple days, I may not be able to give you back-to-back days, but perhaps I could give a second date six weeks beyond day one, and if the parties don’t need the second day, you just cancel it. You don’t even incur any liability with respect to cancellation fees. You have to become more creative in terms of how you do the scheduling because I think it angers the grievant. By the time grievants come to the hearing, they feel as if they’ve been slapped around by the process. I’ve talked to union representatives to even try to encourage them to slot in more of the cases this way. But, they say, “No, it’s more important that we start cases rather than worrying about finishing them.” I mean, we’re all to blame. But I think that we’ve been going around in circles for 10 years on this.

**Abrams:** Comments? Rich, do you think we ought to let these new arbitrators take our appointments?

**Bloch:** Well, I just recall Peter Seitz’s comments when I came into the Academy and he came over to meet me at a cocktail party and said, “Show me a new arbitrator and I’ll show you someone with his hand in my pocket.”

**St. Antoine:** Let me heartily endorse Rosemary Townley’s suggestion of using new arbitrators. Bob Fleming, former president of the Academy, had a seminar when he was teaching at the University of Wisconsin, where he gave a bunch of third-year law students (who probably had never seen an arbitration case) redacted copies of case transcripts he had handled. I hate to say this to all the old, experienced arbitrators, but the fact is, as Bob reported in his wonderful book “The Arbitration Process,” that there was an extraordinary correlation between the results of these third-year law students and Bob’s own decisions.

I did a somewhat similar experiment in a seminar that I conducted. Assuming that I can never be wrong and that I’m the appropriate standard, the students agreed with me 83 percent of the time. And now I do have to confess, Joan, that when they dis-

agreed with me, I could very well have been the one who was in error and that the students were right. I do think we greatly underestimate the capacity of a reasonably intelligent person who has had some acquaintance with the law and the procedure of arbitration to handle cases well.

**Abrams:** But, Harry, you wouldn't pick a new arbitrator who was going to do it wrong?

**Rissetto:** Well, I think it's a big challenge because we have a problem. I mean, we're going to eventually run out of this generation of arbitrators. I think the parties, management and labor, need to institutionalize the process of selecting new arbitrators. The parties need to segregate a series of cases where they both agree that they will depart from their normal panels with the typical names, and, instead, select new arbitrators to hear those cases. From there on, it's the marketplace. I mean, the arbitrator's job then is to impress the parties with their impartiality, efficiency, and sagacity. But, I think the starting point is for the parties to institutionalize the process of using new arbitrators.

**Abrams:** Some parties have done that in the past. In the mid-1970s, General Electric and the IUE (International Union of Electronic, Electrical, Salaried, Machine, and Furniture Workers) decided to fund a program on training new arbitrators. They picked Professor St. Antoine to help in the process of selecting the candidates, and I was one of them. But, not too many companies and unions have decided to do that since. I am pleased that Harry's going to recommend it to his clients.

**Alvin Goldman:** Alvin Goldman, Lexington, Kentucky. Two points, if I may: one, the historical issue of how come the Court got it so right in the *Trilogy*. I think in addition to the brilliance of David Feller, there was another item that was working for them and the name has already been mentioned. That is Harry Shulman. If I'm correct, Harry was a colleague of William O. Douglas on the Yale Law School faculty. They often rode the New Haven Railroad together. I would imagine that William O. Douglas learned a good bit about the nature of labor arbitration informally from Harry Shulman. William Brennan, as I recall, had experience as a management attorney.

**Abrams:** Alvin, I think he was a union attorney in New Jersey.

**Goldman:** Oh, union. I'm sorry. And I suspect that Earl Warren, in his years as Governor of California, found it necessary to become familiar with the dynamics of labor-management relations. One of the problems, I think, that we face these days, is that

with the decline of union membership, especially in many parts of the country where it has almost vanished, fewer and fewer people who are being placed on the bench have that kind of background. I suspect that many of these cases come to federal district court judges who at the first stage had to be educated as to the difference between the term “arbitration” and the term “mediation.” And I think that is behind some of the problems that we are facing now.

Now the other point is with regard to the parade of horrors that Joan offered. One thing that we, as arbitrators, need to do is remind ourselves that in most of these kinds of situations, we are not the judges of last resort. Our job is to enforce the collective agreement. If a pilot shows up drunk, there are other avenues of redress besides the arbitrator upholding the discharge. There is a federal agency that can take the license away from that pilot. In the case of the nurse, if I was representing the health care facility in that situation, I would anticipate that there was going to be a liability suit against the hospital for negligent supervision, for negligent hiring, or some sort. As attorney for the health care facility, I expect that the first thing I would do would be to join the nurse in the suit because the nurse was guilty of the same negligence and is jointly liable. I expect that I’d be able to work out an arrangement whereby he or she would be removed as a defendant in exchange for resigning from the job.

**Abrams:** Thank you, Alvin. We have talked a bit about this extraordinary regime that starts with the *Trilogy* and has its roots much deeper into the work that Harry Shulman did as an arbitrator, not just as an academic, and how life may be changing a bit now for a variety of reasons. Well, life has changed rather dramatically for those of us who do work in the federal sector. If you want to know what life is like without the *Trilogy*, take one of those cases! Do any of you do federal cases?

**Dolan:** Well, what I can tell you is this next week I have to go from Boston to Washington for the fourth time in connection with a compliance matter concerning an award I issued in a federal case four years ago. It took two years for me to get paid by the federal agency. And then it took three years before there was the first compliance with my award, which is a case involving about 50 employees with all kinds of pay issues. So next week, I come back for the fourth time, and the degree of compliance is embarrassing!

**Abrams:** I do national cases for the Internal Revenue Service and the National Treasury Employees Union (NTEU). What is

unique in those settings is the availability of post-arbitration review, for the most part on the merits, which in the federal public sector involves plenary review of the law. The ready availability for the losing party to file exceptions with the Federal Labor Relations Authority (FLRA) changes the way an arbitrator does his or her job. We have to write arbitration opinions thinking about the inevitable review of our decisions and spend a lot of time trying to understand the current FLRA doctrine. That's difficult with the doctrine evolving, especially over the last couple of years. It makes the process far more legalistic and very different from the regime that Justice Douglas told us about.

**Howell Langford:** I'm a labor arbitrator, Academy member, Portland, Oregon. As the general topic this morning is "what's right with labor arbitration," it occurred to me that we just quickly ran over a huge pile of what's right. In the suggestion that you can take a transcript of one of our cases and hand it to a bunch of third-year law students and have them come up with the same conclusion, ladies and gentlemen, that's what's right about the process. The process is succeeding when it is driven by the underlying facts on the ground and not by any other extraneous factors. Think about how worked-up the data are that you're handing to those law students. It's been through the process of analysis by learned counsel; and, equally important, it's data that was presented to one of us. Now, I don't think I flatter myself. I'm pretty darn sure that my regular clients don't pull stuff with me that they would pull with a newer arbitrator. So, if you take one of my transcripts and you give it to a bunch of law students, they are already looking at a product with a huge amount of pre-work and analysis focusing on the stuff that we all know ought to be focused on in deciding the case on the basis of the merits. And, that's what's right about labor arbitration.

**Elliot Goldstein:** I guess I want to pick up on what Joan said. It seems to me, when you think about the shock-the-conscience type of cases, I would suggest the articulation and the writing suggests you should look again at the decision. In many of these cases, at least in terms of remedy or how they work out, they are terrible cases because they really were wrongly decided on any common sense kind of approach. One of the things that should happen is if you can't write a decision that articulates your result in a reasoned way, then you should take a good look at your result.

**Dan Nielsen:** I'm from Racine, Wisconsin. You touched on a point at the very beginning that I'd like to hear the panel com-

ment on and maybe they can do that after the break. And that is the constant citation by the parties on both sides of the *Trilogy* for the proposition that there's a presumption of arbitrability by the arbitrator. I've never seen that, but it's always kind of daunting to stand up and say, "No, you're all wrong. That's not what it says." So I would be interested in hearing what the panel thinks it says.

**Abrams:** What the courts do, of course, under the *Trilogy*, is apply this presumption as long as the matter is "arguably arbitrable." There must be a clear, express exclusion from arbitration to overcome the presumption. If the courts do their job right and actually read Justice Douglas, that's where they will come out. The comment that I made earlier is the problem I see with taking that part of the *Trilogy* and putting it into arbitration. An arbitrator's obligation is not to decide whether a matter is "arguably arbitrable." If the parties raise arbitrability, the arbitrator's job is to find out whether it is actually arbitrable. Once a matter gets to us, frankly, the *Trilogy* is not applicable, even though it certainly will be cited in the next brief that I get on arbitrability.

Let's break for 15 minutes. The Agora shall resume.

## Act II: The Next Generation of Arbitrators

**Abrams:** Welcome back to the Agora. Before I call on George, let me see if members of the panel have additional comments they wish to make upon reflection.

**Dolan:** During the break, I was talking with Ann Murphy from the Fairfax County Public Schools. Ann said that she thought that a big part of this problem with new arbitrators was that what the parties see when they get a list is just a name. In the old days, you would have a new arbitrator who was traveling with Ted St. Antoine or Rich Bloch or any of the other people who are such wonderful arbitrators with great reputations. Now, she said, they don't see young people traveling with experienced arbitrators.

This is a real problem. Many of us, including me, had the extraordinary experience of apprenticing with people like Ted or Rich. For me, I spent a year with an arbitrator named Bill Fallon who was one of the absolute greats—everything an arbitrator should be. I've never met anybody in New England who didn't have total respect for Bill. During that year, we traveled together, ate together, discussed cases the whole time we were traveling, and talked on the phone. I drafted opinions; Bill reviewed them, and

spent time talking with me about things that should have been in the opinions if they weren't. It was a comprehensive, time-consuming, true mentor and apprenticeship relationship.

I think that there have been profound changes that make it difficult for many of us to have that same type of mentoring relationship today. Somebody called me last week and said, "I'd like to apprentice with you." The problem is, to be frank about it, for those of us who are in a younger generation; we do not have a full-time secretary. We do not have a wife. I said to this person who called me, "I would love to do it; but I can't do it because I can't do it right." Given the social differences for those of us who are younger arbitrators who don't have the support system that existed in the past, I just can't make that commitment to do the proper mentor job I was lucky enough to have experienced.

**Abrams:** That is a problem. We're going to get into it shortly, but first, there is a question from one of the microphones.

**Jim Adler:** I am from Los Angeles. Going back to the discussion of the *Trilogy*, I wonder if part of the problem is that the *Trilogy* attempted to address all of arbitration and that there really is a difference between contract interpretation and discipline, particularly discharge cases, where you're dealing on the one hand with a person's economic life at a union job and on the other with potential issues of public policy, such as being asked to reinstate somebody who may have been on alcohol or drugs. So, I wonder if discipline and discharge aren't different and shouldn't be subject to different standards. For example, I think that the duty of fair representation raises a different set of issues in those cases. If the union and an employer got together collusively and said, "We don't like this guy," there is a basis for judicial intervention. It could be from the Board, but it could also be from an arbitrator. So, I just wonder if there shouldn't be some difference recognized.

**Bloch:** Putting aside the question of whether there's impropriety and collusion where there should be judicial protection, I still maintain that the process is that of the parties. It's a private process. As long as the parties are doing what they can justifiably do within a collective bargaining relationship, it is not something where a court should second guess. If the parties act illegally, then, of course, the courts must intervene. But otherwise, this is something that the courts would not step into had the parties acted bilaterally, and the courts shouldn't do so when the arbitrator is carrying out the contractual mandates of the contract, either.



**Abrams:** In fact it could be argued that the courts can't oversee what is, in effect, the separate governmental structure that the parties have established. It would be like U.S. courts reviewing judgments from France or the U.K. Jim?

**Adler:** I would draw the lines between the public sector and the private sector more than between contract interpretation and discipline cases. I think in the public sector, you're really running a huge risk on issues of public statutes and public policy as interpreted by courts. In many of the public sector cases, you've got to deal with those statutes and policies whether they are announced by court case or by law. And under those circumstances, I think, the *Trilogy* becomes much less persuasive as a basis for your authority. In the private sector cases, I also think that the real problem is drugs. The courts have real serious problems with druggies. And it's the drug cases that have been reviewed with extraordinary detail by the courts. And, I think, again, on the drug cases, you've got to be very careful in terms of what you do and what your findings are under those circumstances.

**Abrams:** Good. Thank you. We've now been posed a problem. Rosemary says we need to get junior people to do what we're doing because the folks who started this profession after the Second World War and who created the Academy are passing from the scene. How are we going to train the next generation of arbitrators? Ideas? Suggestions? What about law schools? Should Cornell ILR do it? Should there be a formal credentialing process so that when we ask parties to pick a new arbitrator, and they say, "Who shall I pick?" we say, "Oh, get one with the NAA seal of approval." Ideas?

**Rissetto:** You're looking for judgment from an arbitrator. And, I think judgment ordinarily comes out of experience. To take someone who is 23 or 24 years old who doesn't have much life experience with the workplace and anoint them as arbitrator is a pretty risky business. I think we need to move in the other direction.

**Cohen:** To add a little spice to the discussion, when I go back to the basic *Trilogy* and think 50 or 60 years later, the number of lawyers who have infected this process is the most frightening thing to me. Certainly, I cut my eye teeth with the Steelworkers union. We had an arbitration department with a lot of talented people, but they were not attorneys. The lawyers were saved for the critically difficult contract interpretation disputes and major discharge cases. The vast majority of cases were handled in a very proficient way by non-lawyers. Once you add lawyers on both sides

of every case it turns arbitration into something that I don't think it was ever intended to be, namely, a fully formal litigation process. I think that is one of the basic problem areas that we have now.

**Abrams:** "First," Shakespeare said, "kill all the lawyers." But the folks who cite that quote forget why Shakespeare put those words into the mouth of one of his characters. This rebel against the British crown was concerned that if lawyers were around, there might be fairness and there might be due process. I don't think we first "kill" all the lawyers, but we can certainly move them to the tougher cases.

**Dan Brent:** I'm an Academy member from Princeton, New Jersey. Just to follow up. The words that follow that Shakespeare quote are: "And then chaos shall reign." And, you are right, people very often, purposely or otherwise, omit that line. I'd like to just share a perspective and some information about several training paradigms in which I was involved in 1975 and more recently as a mentor. I think personal interaction with established arbitrators for new arbitrators is essential because what we do is not something that can be conveyed solely by academic training in a law school. Much of the skill that an arbitrator brings to this process is what happens in the hallway, such as knowing when to pull the parties aside and help them to settle a case. We need something like the medical model of watching a surgeon perform surgery before one jumps in and tries to do it. So, mere book learning will not do it.

It also should be a cooperative process. In 1975, the New Jersey State Board of Mediation, the AAA in New Jersey, and the New Jersey State Bar Association put on a year-long arbitration training program with weekly meetings. Among the graduates of that program are Dick Adelman, Tia Schneider Dennenberg, Barbara Sauzner, and myself. It was taught by Jonas Arends. It was a long enough course to convey a great deal of substance. And one of the aspects, as I recall, was a commitment from the Bar Association and some of the practitioners to integrate us into the cases. There is a similar program that is currently sponsored in New York. The model is that new arbitrators are mentored by four Academy members. They come with us until they've seen a case to fruition. They write a practice award. And when the four Academy members agree unanimously that this person has shown a level of development sufficient to be approved by the program, they are then certified and introduced to the state bar association. I'll defer any greater description to John Sands because he runs the program.

**John Sands:** I'm from New Jersey. I have the honor of administering the program currently. Dick Adelman did it before me. It has been extraordinarily successful. We have at least six current Academy members who came through our program. What we do is have four Academy members mentor the candidates. To gain admission to the program, an applicant must have given up advocacy entirely and must have actually decided four cases. If an applicant meets these criteria, then he or she is assigned to the mentor program. Not everybody makes it. The individual must perform adequately so that the four Academy mentors eventually certify that the individual has completed the program successfully. Then what happens is that the individual is introduced at the next meeting of the state bar where there are usually 500 or 600 labor and employment law section members present. The next edition of the quarterly newsletter also contains a full résumé and contact information, which goes out to the 2,500 members in the New York City metropolitan area. At that point, they are well on their way. Rosemary insisted that we show you Exhibits 1 and 2.

**Townley:** Here are demonstrative exhibits: The first is Jay Siegal, a former management attorney for 15 years who quit his practice to devote full time to arbitration. He had appeared before me for many years. Second, Barton Bloom was a full-time union attorney for 25 years before he retired. Both of these gentlemen were my mentees. They are now on the AAA list. And if anyone tells me they can't handle a letter in the file case or a suspension case, I'm sorry, I don't buy it. This is what we're talking about. These are the new arbitrators.

**Sands:** Let me just make one point. There is a rich resource of potential new arbitrators. I'm sure many of you in the audience share my experience of advocates saying to me, "Gee, you look like you're having fun. How do I become an arbitrator?" I say to those whom I don't take seriously, "Raise your right hand, repeat after me: I am an arbitrator. Now get cases." The best potential pool we have are the advocates who have established to the labor-management community their judgment, how they behave in adversarial situations, and their conflict management styles and techniques. I know that's how I got into it. That's where judgment comes from. And, that's what we should encourage—people to mentor advocates, not just lawyers, but advocates who are union representatives, who are human resources people, who've lived with this process and know what we need. Thank you.

**Beber Helburn:** I want to go back to the point before the letter goes in the file or the two-day disciplinary suspension goes in the file and before we talk about judgment. I have been fortunate enough to have trained or mentored at least a handful of folks who are now getting cases. When I train folks, they go to a hearing. They take their own set of notes. They get a set of exhibits. They write their own awards. And, after I've put mine in the mail, then we talk. And with some of these folks at the outset, I've seen some very atrocious decisions. Decisions that were atrocious not simply because they differed from mine, but on other grounds as well. And, as we got into it, my observation was that the notes that I took were very different than the notes that they took. There's got to be something on the ground to teach new folks the nuts and bolts of the craft. And some of that takes the personal one-on-one that Bill Fallon did and a lot of other folks did because if they don't know how to do it right at that point, then you may well get bad judgment and it's not because they're not bright people, it may be because they haven't got the skill set that allows them to show off the understanding and the intellect.

**Abrams:** And, the parties will recognize that, and they won't be selected.

**Jay Ginsberg:** I'm from New York. I was on the committee that set up that underutilized arbitrator program. I've been arbitrating for 40 years. The only suggestion—aside from what we did in New York, which works—are two things: number one, with regard to scheduling, I have kept a record of the delays in the work that I do. And it is the advocates, not the neutrals, who have caused the delays. One of the ways I accomplished my purpose in quicker processing is to talk pre-hearing with the advocates and ask, "How much time do you need? Do we need back-to-back days? Give me an honest answer." And we'd plug it in at an early stage. Number two, I don't schedule three or four days a month for the purpose of offering a date to those who need it, and that seems to work.

**Alan Symonette:** Good morning. I'm from Philadelphia, Pennsylvania. To directly answer the question of how we find and prepare new arbitrators, I think we have to strip off some of the veneer and go down to a basic cultural issue. The older generation of arbitrators, those that we would like to follow, had a fundamental understanding of the culture of collective bargaining. I think that this is very critical. And, I can say that as far as the advocates go, they understand collective bargaining and the dignity of work. But, younger people who came of age after 1980 may not have that

understanding. You have business schools that no longer teach collective bargaining, and you don't have the industrial relations schools like Wisconsin that teach collective bargaining. So, basically, what you have are some 30 year olds who are now multimillionaires, but many more individuals who are struggling to make a decent wage. And there's the question of the dignity of work that is under attack. So before we start talking about developing arbitrators, the question we have to ask ourselves is: "What kind of work force do we want?" Until we solve that problem, we're going to see a diminishing number of arbitrators. Thank you.

**Allen Ponak:** I am from Calgary, Alberta. I just want to follow up on Alan's comments. What I've noticed—I taught at a business school for 30 years—and what I see, not only in my business school but everywhere else, is the decline of unions, and almost a disappearance of labor relations courses. I see the same thing happening in law schools and in economics programs. Even the industrial relations schools, those that are still managing to survive, are really emphasizing human resource management in a union-free environment. We don't teach labor relations, the students have no exposure, and it's no surprise that we have a lack of new young talent wanting to be arbitrators.

### **Act III: Continuing Training for Neutrals**

**Abrams:** George, what do we all do now that we've trained all these new arbitrators and the last union closes its door?

**Cohen:** I have signed an oath that requires that to be a moot issue. [Laughter.] And I'm not prepared to address that, Roger. For purposes of this group, I think it's appropriate for us to focus on what's good about the arbitration process and why more men and women who are in the work force do not appreciate that one of the things that is available to them, rather than being an at-will employee subject to what we know an at-will employee is subject to, is the magnificence of a just cause standard for discharge and the magnificence of having an exclusive bargaining representative. The ability to take a dispute and get an impartial, neutral person, after listening to their side of the story, to issue an award that will be binding on everyone including their employer, is absolutely marvelous. So I have no solutions for purposes of today's discussion as to what one does about the decline in the number of unionized employees. I think everyone in this room can make their own assessment about that.

**Susan Grody-Ruben:** I'm from Cleveland. Getting back to what's right with arbitration, ironically, in this very hotel seven years ago, I attended the Federal Mediation and Conciliation Service (FMCS) Arbitrator Institute. It was the first time they had done it, at least in recent times. Academy members who were the teachers included Sara Adler, Jackie Drucker, Dennis Nolan, and Alan Symonette. And, a couple of us from that group of 20 participants are arbitrators now. Why just two or three of us, and not all 20? I think it goes back to what John Sands said, which is that the two or three with a collective bargaining background became arbitrators. The others—divorce lawyers and whatever—sorry! It doesn't work, no matter how many classes they go to. So I really second what John says that arbitrators should be recruiting advocates in an ethical way to get them thinking about being arbitrators because I think that's where the best pool is.

**Amedeo Greco:** Hi, I'm from Madison, Wisconsin. I want to make two comments. Sylvester Garret, in about 1975, wrote a great article about the judiciary and arbitration. He said that in the *Trilogy* cases, Justice Douglas wrote what he did as a calculated way to keep judges from intruding into the arbitral system. And Bill Murphy, in another article, summarized the *Trilogy* cases by saying that the overriding message was to keep the law out. I would suggest that the DNA of judges is to decide cases, and you're always going to have a tension between their DNA and what the *Trilogy* cases say, which is that judges should not decide the merits of the arbitration. But this is my question for the two advocates, and this goes to the future of arbitration and future arbitrators. The Academy is considering altering some of its membership standards so that we may admit employment lawyers. My question is this: Do the advocates have any interest in knowing what we're doing before we do it? And if they do, should they be informed of what we're thinking of doing before we do it?

**Rissetto:** I think we have an intense interest, at least speaking personally, in what you do because, historically and currently, being a member of the National Academy of Arbitrators is a seal of approval of great value. And I know numerous collective bargaining agreements that say, in disputes over such-and-such, that the arbitrator will be selected from the Academy list. Now, to the extent that this list, for one reason or another, becomes less excellent than it is now, I think it causes a problem for the advocates in terms of arbitrator selection.

**Cohen:** In light of the overwhelming support for Harry's comments, I join in his opinion.

**Abrams:** I've wondered whether there was some reason why doctors and lawyers and nurses and teachers and other educators all have to do continuing education. Shouldn't there be a requirement that an arbitrator—given this extraordinary power granted by the *Trilogy*—has to do continuing education? We love when our members come to the annual meetings. Shouldn't they be required? If we have a seal of approval, as Harry Risetto suggested, shouldn't we do something like the other professions to make sure that we maintain our quality and not just increase the number of persons?

**St. Antoine:** Michigan is the odd state that still does not require any continuing legal education for its lawyers, and I may be influenced by that. I've questioned it, but the position of the judges who control this is that unless there are exams at the end of the continuing legal education session, they don't think they have any meaning. So I guess I would ask people who are familiar with continuing legal education programs, do you have exams at the end of your continuing legal education programs? The people who have any sense of integrity clearly don't need any requirement of a mandatory continuing legal education program. This room is a demonstration of what arbitrators and advocates think about the need for continuing legal education. I can't honestly answer your question in a way that would be satisfactory because in my experience, anybody with any sense of integrity and self-awareness needs continuing education, and they make sure that they get it.

**Abrams:** I have another idea. I spent the last semester co-teaching a course at Harvard with someone from the business school, and so I'm caught up in this notion of identifying product and branding and the rest. Harry Risetto just made my case by explaining the commercial value of the imprimatur of the National Academy. Don't you think we might make a little money by selling National Academy training? Shouldn't we take that brand, which we have worked so hard to protect, and use it as a way to achieve some fiscal sanity?

**Bloch:** I think it's a terrible idea.

**Peter Hurtgen:** I don't think that the National Academy or the FMCS should adopt continuing education as a marketing ploy. I think there is some merit in a focused, genuine effort to put together a longer-term program that includes mentoring and that includes traveling with those of you who are experienced. Maybe

even with some government grant money and some assistance from this organization both in personnel as well as in maybe some funding dollars. But, I don't think that it should be done as marketing. It should be thought about, instead, as a possible way to get some more arbitrators into the process.

**Tia Schneider Dennenberg:** I'm a local judge in a court of limited jurisdiction. And you can bet New York State has all sorts of requirements for us. Because I am not a lawyer, I have to take a test after my required training. And what has happened to this training is that it has descended to a moronic level because it's viewed as mass inoculation. It's the most resented kind of thing that you do because it adds nothing to your functioning as a judge.

As for arbitration, I think to a certain extent, a lot of it is personality. I mean, you have to have the skills, you have to have the ability to finesse, you have to have the knowledge. But, the package is often very individualistic. I think we have to accept that there are many paths to becoming an arbitrator. We have to have many tools available to people. But in the end, because it's such a quirky thing to say from the parties that we trust your judgment, it's something that's important to us, and it's final and binding. It means the package is very individualistic. And so we can't try to regulate it too much.

**Dolan:** I was just going to say that I will never wear a National Academy logo on a crocodile up on the left corner of my chest. I just find the branding concept to be utterly distasteful. But, I do think we have a dire need for training. Because of economics, we seem to have an increasing number of cases that are tried by inexperienced, unusual people, both lawyers and non-lawyers. Advocates in New England have told me over and over again that they are crying out for training. The elephant in the room in the training category is the AAA. They used to supply wonderful training, largely conducted by members of the Academy. It was frequent. It was reasonable in cost. They covered the nuts and bolts of how you try an arbitration case. Well, it doesn't exist anymore. The fact is that there are very few people supplying any kind of training to the advocates, which to me brings us right back to the *Trilogy* because the entire basis of the *Trilogy* is that there is a knowing, experienced body of people who have created this other world of arbitration.

**Walt Gershenfeld:** I think there is clearly a need for training. I think we all face a major problem in terms of the kind of people Rosemary Townley was talking about. We've got a new group of ar-



bitrators who are well-qualified and knowledgeable. But, they are finding that it's almost impossible to get on the panels these days. They've got to struggle to get there. And when they get there, they don't get cases. The caseload is down by 25 percent from the agencies—federal, state, and local. The supply of arbitrators has doubled and tripled. What can we do to keep them in the process when they're well-qualified? And I don't have any answers. And I don't know anybody who does.

**Dan Boone:** I'm an advocate and select arbitrators. It seems to me that potential arbitrators can learn from the experience of being in the same room with more experienced arbitrators. This can be developed at only the local level. You all have your regional groups that meet quarterly or meet to do this. The Academy can take the leadership through those regional meetings to identify the people who want to be arbitrators, to reach out to them, to say, "Okay, so-and-so's going to be an arbitrator who can have the mentoring to the degree that it's possible." It may not be that you can have the day-to-day contact; but you can have somebody go with the arbitrator, sit at the end of the room. Many of the arbitrators in California have been trained through that method. I would think that the Academy can institutionalize this training and put it into place in a systematic way.

**Steve Florman:** I'm from McLean, Virginia, and I've been an arbitrator for about four-and-a-half years. I was an advocate for about 30 years beforehand. And I don't have a big ego; and I don't think most of you should because I do remember in those 30 years I practiced that the arbitrator selected in most cases was simply the last man standing after six other people had been eliminated.

**Abrams:** And we think we're the first choice of the parties!

#### **Act IV: Best Practices**

**Abrams:** We have about 20 minutes left. I want to change the topic and change the tempo. Let's talk a little bit again about what's right with arbitration. We've all been doing this for a long time. In a row, in quick succession, tell me about one best practice that you've seen—either something you have done that you didn't do before, things that you've changed, something you've seen the parties do that you like. I know we can talk awhile about things that we don't like; but let's first start with things that we do like. Some thoughts?

**Cooper:** The best practice I like, first of all, is that when a hearing starts, I like to have the issue already framed. I think that that's really important.

**Abrams:** The parties should frame it before they show up.

**Cooper:** Well, either right there or before we get started with the hearing. I also like when a witness finishes his or her testimony, and the other party, whether it is cross-examination or re-direct, starts right away with the questions. I don't mind if they take a break at some point if they need to talk to the client about something; but frequently what happens in terms of the practice is that one party puts on a witness, there's an immediate break, and then it's 20–30 minutes before the first question is asked of that witness. I appreciate it when I see an advocate who goes right into the cross-examination and maybe does some of it and then takes a brief caucus, comes back, and finishes.

**Abrams:** I have noticed that, too; the parties are taking more of those breaks before starting cross. And, I know why. The client is there, and the representatives want to make sure they get it right; but it also suggests to the arbitrator that maybe some representatives don't know what they are doing. Joan? Best practice.

**Dolan:** I think that there's a trait that cuts across practically everything that's wrong in hearings. And that is, in my view, too much misguided aggression. Do I have to quarrel with the other side about what the issue is going to be? Do I have to give provocative opening statements that have the result of upsetting the other side and making the situation worse and not helping the arbitrator? And, we don't need these pointless objections, particularly when they are obviously geared to throw off the witness. That makes me mad! The parties should be sticking to the substance of what the case is about instead of distorting and immensely lengthening the hearing process with all this other stuff.

**Rissetto:** Let me be Joan's mirror image. The thing that impresses me most about an arbitrator is when, in a quiet way, he or she maintains control of the tempo of the hearing. And what irks me the most is passive arbitrators who sit there; I figure they're getting paid by the day and if it takes three days, they get three days' pay for the hearing. And if it takes four days, they get four days' pay. Unfortunately, our clients don't like that. They're increasingly cost conscious. And I think it's very helpful when the arbitrator shows leadership at the hearing in terms of when he or she has heard enough on a subject, heard enough from a witness, or heard enough from an advocate on a particular point.

**St. Antoine:** I'm going to take a shot at giving the advocates some suggestions as to how they can lessen the cost, the time, and the length of a hearing. Question yourself as to whether you really need post-hearing briefs. It's my experience that 80 to 90 percent of the time when I've heard a case, especially a discipline case, I walk out of that hearing room knowing how I'm going to decide it. Your post-hearing brief is actually very helpful to me in certain ways. It adds to my time, it adds to my charges, and it makes it easier to write my decision. But I don't need it. Also, ask yourself whether you really need to have a long decision from the arbitrator. I like long decisions. I get paid for more time. But, consider asking me for a summary decision, just one to two pages long. Is that going to be enough to meet your needs? I could go on with a whole list of things like this. But I do urge you to think about avoiding a cookie-cutter approach to the handling of every case that you have before you. There are ways that you can shorten the proceedings and lessen the time for a decision and especially lessen the cost. And I think those are very important considerations when so many people complain that we're getting much too expensive and much too time consuming in the handling of our arbitrations.

**Cohen:** I like an arbitrator who recognizes when a hearing gets overly combative and then does something about it in an appropriate way. I also like an arbitrator who has the audacity to ask a question or two, especially when my opponent is making an outrageous argument or presentation. It's also important to remember that arbitration is an extension of collective bargaining. It is not litigation in the true sense of the word.

And I think every mediator, every arbitrator ought to be aware that the comments you say may have irreparable harm on the relationship between the two parties when they walk out of the room; and that is quite a daunting thing. It's a self-evident factor that you do not want something that happens in the confines of the hearing room to cause deterioration in the parties' long-term situation. Take appropriate steps outside the confines of the hearing room to make sure that those developments are not going to unfold.

**Abrams:** Perhaps arbitrators should have their own version of the Hippocratic Oath when we show up at hearing. "First, do no harm." And even if the parties are harming themselves or each other, maybe there's a role for us to play.

My bit of best practice comes from the rare cases where the representatives of the parties, whether attorneys or not, argue their case in a way that I could actually accept as opposed to a management attorney who says, “Oh, well, management has a right to do anything any day, all the time, forever.” Or the union attorney who argues, “Well, you know, the Constitution applies in this private plant. First Amendment rights! Fifth Amendment rights!” I get those arguments, and I know why I get them. It’s because the lawyers are earning their fee. But, it is so much better when I get an argument or a brief that actually gives me a reasoned way to decide the case. I can’t decide that management has the right to do anything it wants any day of the week. I can’t decide that there are God-given protections that apply to private enterprise based on the Constitution. Arbitrators can’t do that. When the parties recognize that and do the thoughtful job that helps the arbitrator, it can be useful. I always ask the parties if they want to file briefs just because it gives them one last chance to get it right, which can’t always be done during the course of a hearing, but I agree with Ted that briefs are often unnecessary.

**Rissetto:** I’d like to make one comment very quickly: I don’t understand when you have a four-day hearing in a complicated case, you have a transcript, you have two 50-page briefs, why the arbitrator needs to spend 25 pages setting out the contentions of the parties. It strikes me as make work.

**Abrams:** I think one reason for providing a long statement of facts at least is to let the parties know that you listened. And, with regard to a party who’s going to lose a case, I want to lay it out as fairly as I can, even better than they did. Then I address their arguments in my opinion. And they say, “Well, all right, the arbitrator’s wrong; but at least he listened to me.”

**Dolan:** I agree strongly with Roger. I began my career as a union advocate and tried over 200 arbitration cases. That experience has colored everything I do as an arbitrator. If an arbitrator does as Roger suggests, the client knows that he or she has been fully heard. Both union and management advocates know that the points that were important to them have been considered and dealt with. When I was an advocate, both my clients and I had a far higher sense of satisfaction and peace with the process when arbitrators followed the approach Roger mentioned.

**Paul Cross:** As a union attorney, I was prompted to respond to a comment about the time that sometimes is taken following

a witness' direct examination before cross. Part of the problem when we hear a witness and given the lack of discovery that's available in the arbitration process—particularly if the grievance procedure is not working as it should—is that this may be the first time we've actually been able to hear the story or the position of the other side and it often takes some time to develop a response. So, I would hope that adverse inferences aren't being drawn from those 20- or 30-minute breaks that we sometimes have to take.

**Boone:** Earlier this month there was a meeting of AFL-CIO lawyers in New Orleans. And there was a workshop, the title of which was, "Whatever Happened to the One-Day Arbitration?" And there were two outstanding members of the Academy on the panel. It was well attended. I wish all of you had been there because it involved a dialogue that union lawyers have to get past the clichéd statements that are made either about the management attorneys or about the arbitrators and to have a real discussion about the conflicting realities that go into the process.

But, just one comment about briefs: As a best practice, if an arbitrator will say either, "I don't need a brief" or "If you're going to do a brief and you're insisting on a brief, this is what I'm troubled with, this is what I'm wrestling with, and this is what I want to hear about. Focus on that." If the employer attorney or the union attorney wants to write a 40-page document starting with the seven tests or whatever it might be, that's up to them. But you have helped the advocate who's paying attention to focus on what the real problem is. And that's a best practice that would be very beneficial for all of us.

**Sands:** I want to pick up on Joan Dolan's point about the change in the culture of advocacy in arbitration. I think it's entirely understandable. When many of us came along, there was labor law. Then employment law started to grow, and now there is employment law of which labor law is a small portion. What happened as employment law grew was that the management firms would send their litigators to handle the labor cases. And that is, I think, a lot of how this has changed. Now what I find is happening is that a number of us who were early advocates of using our conflict management skills in the employment law area are training the employment lawyers who appear before us in the appropriate way to efficiently manage a fact-finding enterprise in which they have a mutual interest. I hope the Academy takes the opportunity to get involved in employment law so we can train the people in that area to do what we think is the appropriate way of presenting

the necessary factual information for us to make decisions. And I suggest that the management and plaintiff side firms who also do labor law should be training their associates to do the same thing.

**Abrams:** Thank you. One last point and we'll conclude the Agora. This whole process, everything that Justice Douglas thought about, wrote about, everything that we've experienced, really depends upon not just the arbitrators. We also have to give great credit to advocates like Harry Risetto and George Cohen: Harry, whose firm submitted an amicus brief to the Supreme Court in the *Garvey*<sup>4</sup> case supporting the finality of the arbitration process; and George, who is always there to give us both perspectives, not just a singular partisan view. That's how this process should actually operate, by well-meaning people who are committed not just to their clients but to the process that supports the interests of their clients.

The last idea I have, which, of course, will be unanimously approved, is that it is time that we establish an arbitrator hall of fame so that we recognize those men and women who started this profession.

The Agora is adjourned.

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<sup>4</sup>532 U.S. 504 (2001).