Chapter 9

SEARCH FOR THE TRUTH: THE "ACTIVE" ARBITRATOR—EXPLORATION OF NEW (OR DIFFERENT) INITIATIVES

I. What Is an Arbitrator's Role in the Hearing Process?

Amedeo Greco*

Answers to whether arbitrators should be "active," "search for the truth," and offer initiatives on their own rest in part upon what assumptions are made about the role arbitrators should play in the arbitration process.

For while it is axiomatic that arbitrators are a "creature of the parties," John Dunsford asks the key question: "What kind of creature" are they?[1]

Such an inquiry is particularly timely on the 50th anniversary of the *Trilogy*,[2] the only U.S. Supreme Court cases I am aware of which set forth a profession's basic job duties.

There, quoting Harry Shulman, the Court stated, "A proper conception of the arbitrator's function is basic."[3] Shulman wrote that an arbitrator should take an "active" part in the process because not all cases are presented by skilled advocates and because arbitrators, unlike courts, have a special duty to avoid errors in order to avoid "disturbing the parties' continuing relationship…."[4] Arbitrator Sylvester Garrett agreed that arbitrators should be

*Member, National Academy of Arbitrators, Madison, Wisconsin.

[1]Dunsford, *The Presidential Address: The Adversary System in Arbitration, Arbitration 1985, Law and Practice,* Proceedings of the 38th Annual Meeting, National Academy of Arbitrators (BNA Books, 1986), 1, 9.

[2]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. 594 (1960).

[3]*Warrior & Gulf Navigation Co., supra* note 2, p. 581; Shulman, *Reason, Contract, and Law in Labor Relations,* 68 Harv. L. Rev. 999, 1016.

[4]Shulman, *supra* note 3, 1017–18.

active, writing that the *Trilogy* established "the furthest legitimate possible reach of the arbitration function. . . ."[5]

If an arbitrator considers an arbitration hearing to be a continuation of the collective bargaining process with its own unique considerations, he or she may be more active in order to foster that process. If an arbitrator views a hearing to be a substitute for litigation where advocates totally control the presentation of a case, he or she may be less active and thus serve like a baseball umpire who merely rules on whether something is fair or foul.[6]

Arbitrators in theory can be as active as they want because they have very broad discretion in how to conduct a hearing. They may be inclined to be active because they often know more about the general arbitration process than some of the parties before them and because it is simple human nature for them to believe that their advice and involvement are beneficial and welcome.

But activism is tempered by the fact that arbitration is a very conservative process, one which does not normally foster bold innovations or surprises. Parties select arbitrators based upon their perceived predictability and the expectation that arbitrators will conduct themselves in a certain way. Parties thus expect that they are free to conduct their cases in the way they please without excessive interference from an arbitrator who is being paid to do what they want done. In addition, and as related below, there are practical considerations as to why activism must be carefully tailored to a particular case. Arbitrators therefore need self-restraint and must stick by the parties' restrictions, which is why activism does not have a free hand.

This tension between what arbitrators theoretically can do versus what they actually can do raises many questions regarding where this line should be drawn.

This paper does not address all these questions, let alone answer them, since there are few "right" answers; since some answers are based upon the facts of a particular situation and thus vary; and since an individual arbitrator's skills and values will help determine one's activism. That is why there are few sweeping generalizations

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[5]Garrett, *The Interpretative Process: Myths and Reality,* 38TH ANNUAL MEETING, *supra* note 1, 121, 137.

[6]One's views about the overriding purpose of a hearing also can influence an arbitrator's role in discipline cases. An arbitrator can act like an appellate court using a deferential standard of review to determine whether the employer's action was arbitrary and unreasonable or, alternatively, to act as a *de nova* tribunal where independent judgments are made regarding what happened and whether the level of discipline is appropriate.

regarding what constitutes an appropriate level of activism and why any activism exercised is a matter of degree.

I am active because I view arbitration hearings to be an extension of the collective bargaining process where the parties mutually try to find a solution to an issue and where they do so in a manner which fosters their continuing bargaining relationship.[7] Arbitrators are an integral part of this collaborative process, which is why, subject to the wishes of the parties in a given case, I actively participate in that endeavor.

I also believe that activism sometimes is warranted in order to obtain the information needed to make the correct decision given the finality of arbitration awards which are seldom reviewed by the courts, hence making it imperative that arbitrators get it right. This is particularly true for findings of fact, which often are dispositive of whether a grievance is granted or denied.

Parties usually accept some activism because they recognize that the arbitrator is neutral and is not trying to help or hurt either side; because it is in their own self-interests to have a full and fair hearing in order to provide legitimacy for an arbitrator's decision; because some advocates may be inexperienced and hence welcome some help; and because some cases are so messed up or complex that they cry out for an arbitrator's active involvement (proposing to call 63 witnesses at a hearing comes to mind).

Any activism, however, is subject to a number of caveats.

Some parties (and advocates) are focused entirely on winning and do not want the whole "truth," particularly if an arbitrator's questioning leads to a damaging admissions the other side did not bring out. For as Dunsford points out, "to be an advocate is to know in your bones that there are some parts of the whole truth that are bound to be detrimental to your client."[8]

That is why many advocates carefully prepare their witnesses by going over questions and answers before the hearing and instructing them to say as little as possible during cross-examination by answering with a simple "yes" or "no" in order to avoid saying too much. This does not achieve "the whole truth," but rather, only a part of the "truth"—in other words, the part which is most

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[7]For a similar view *see* McDermott, *The Presidential Address—An Exercise in Dialectic: Should Arbitration Behave as Does Litigation? Decisional Thinking of Arbitrators and Judges,* Proceedings of the 33rd Annual Meeting, National Academy of Arbitrators (BNA Books, 1981), 1.

[8]Dunsford, *supra* note 1, 12.

favorable to a party's position and why, like an iceberg, the rest of the "truth" may lie beneath the surface and hidden from view.

Arbitrators may be unable to ascertain the "whole truth" unless they call all necessary witnesses on their own or engage in extensive questioning which may lead to new or hidden areas. This is an approach I do not support because parties know their cases better than I do and because they have their own strategic reasons for presenting their cases in a certain way.

Some parties may cringe at the term "active arbitrator" because what is one party's welcome activism can be the other party's nightmare when activism adversely affects their case. Indeed, simply asking a witness what is meant by the phrases "I don't recall" or "I don't remember that" can help determine who wins or loses. These phrases may mean either that something did not happen, hence contradicting someone else's testimony, or that it occurred such a long time ago that the witness has no independent recollection of what happened, thereby leaving uncontradicted someone else's testimony which may be dispositive of the case.

Some parties may want to have exclusive control over whether there should be any initiatives on the ground that the parties themselves entirely control the process and that arbitrators are mere interlopers who are required to follow the rules and procedures the parties have established without offering any gratuitous advice.

Furthermore, the balancing of conflicting considerations may limit what can be done. Searching for the truth may entail the need for additional information or witnesses which can interfere with efficiency and thereby lengthen a hearing and increase the parties' costs. Parties may want to stay clear of questions raised by the arbitrator, and too much activism may raise doubts about an arbitrator's neutrality. And, if only one side accepts an initiative, that may cause problems in the parties' relationship.

In addition, arbitrators know that their professional acceptability is the coin of the realm in the arbitration selection process. They realize that if they stray too far from the mainstream and roam about excessively or act against the parties' wishes, their acceptability may suffer. The need to be jointly selected and to retain one's acceptability in the marketplace thus forces needed self-restraint and serves as a powerful brake on over-activism.

Moreover, each arbitration proceeding is idiosyncratic since the factual situation and the people involved are always different. Hence, what is appropriate in one situation may be inappropriate

in another. The same is true for different geographical areas since what constitutes acceptable activism in one area may be taboo in another.

An arbitrator's reputation and whether he or she serves in an ad hoc capacity or as a permanent umpire can help determine an arbitrator's role, as parties may be willing to accept activism from an arbitrator they know and trust as opposed to an unknown or inexperienced arbitrator.

Arbitrators in each case thus need to get a "feel" for what the parties want and ask themselves: "What do these parties expect of me in this case?"

Navigating through this sea of uncertainty is one of the major challenges arbitrators face because the line between acceptable versus unacceptable activism constantly changes, depending upon a variety of circumstances and the degree of activism involved.

That is why there is no magic formula in answering the questions posed and why the most that can be done is to come to grips with some of the underlying questions and to be mindful of U.S. Supreme Justice Louis D. Brandeis's observation: "In the end it's judgment that the world pays for."

In my judgment, it is proper for an arbitrator to take the following three initiatives because they improve the arbitration process and because their modest nature does not constitute over-activism.

1. An arbitrator can provide a gentle nudge before a hearing formally starts by informally trying to achieve efficiency in the way the hearing is conducted and in order to then get as much of the "truth" as possible. I have followed this practice for 37 years and find it to be very useful even in what appear to be simple cases because it almost always saves time and is cost efficient, and because a seemingly simple case may not be that simple upon closer examination.

I have found that almost all parties are willing to simplify an arbitration hearing in *some* fashion when asked to do so by the arbitrator. They may do so for no other reason than they do not want to appear as obstructionists before the person deciding their case, which is why an arbitrator's gentle nudge can go a long way.

Parties at the outset of a hearing thus can be encouraged to stipulate to undisputed facts and to make offers of proof per Part 5, Section 1(b), of the Code of Professional Responsibility for Arbitrators of Labor–Management Disputes (herein "Code"), which states:

> b. An arbitrator may: encourage stipulations of fact; restate the substance of issues or arguments to promote or verify understanding; question the parties' representatives or witnesses, when necessary or advisable, to obtain additional pertinent information; and request that the parties submit additional evidence, either at the hearing or by subsequent filing.

Parties also can be asked to agree on the authenticity and foundation of exhibits because that is more efficient than having witnesses testify about them during their testimony, and because a party can agree to authenticity while at the same time reserving their right to argue relevancy or any other issues.

They also can be asked to identify each witness they tentatively plan to call (reserving their right to call anyone else) and to relate in a sentence or two what the witnesses will say. This enables the parties to avoid duplicative witnesses and to agree on possible offers of proof regarding what certain witnesses would testify to if called to testify.

By doing the above, an arbitrator can understand a case sooner rather than later, thereby providing greater guidance (and more needed time) on how to rule on objections and other issues subsequently raised during the hearing. And, by focusing almost exclusively on disputed facts rather than undisputed facts, the parties can spend more of their time and energy on disputed facts, hence improving the chances that the "truth" will be better revealed.

Such steps should aid in the "search for the truth" because it normally is easier to get the parties to informally work out what the "truth" is before a hearing formally starts rather than getting it through the often laborious and contentious hearing process, which depends upon a cascade of witnesses who provide bits and pieces of the "truth" throughout the hearing.

An arbitrator can review the stipulated exhibits and facts during a break before the formal hearing actually starts and to then take the initiative and tell parties that if they want to discuss a possible settlement, they can do so outside in the hall while the arbitrator reviews those materials.

Some parties may try to make one last stab at a settlement if new facts or documents emerge in the informal pre-hearing conference which undermine their case, a not uncommon occurrence. In addition, most parties know that an imperfect settlement is better than a good award because the parties themselves know the best way to resolve a problem. A settlement also makes it unnecessary for an advocate to explain why his or her side lost.

2. To better achieve the finality that arbitration awards should provide, arbitrators should take the initiative and ask parties at the outset of a hearing whether they want the arbitrator to retain remedial jurisdiction over the application or interpretation of any possible remedy, an issue addressed by Part 6, Section D, of the Code.[9] It states that an arbitrator can retain remedial jurisdiction either *sua sponte* or over one party's objection unless prohibited by the parties' agreement or applicable law. This avoids the needless delay and expenses incurred over resolving unresolved remedial issues the arbitrator is being paid to resolve.

This, too, can involve a "search for the truth" because the arbitrator may be the only one who truly knows what a specific remedy means and how it can be best implemented. If remedial jurisdiction is not retained, unresolved remedial issues will be resolved by strangers to the proceeding—in other words, the courts. That undermines one of the chief goals of the *Trilogy* which, as Bill Murphy pointed out, is "to keep the law out" by making sure grievances are resolved within the parties' own system of self-governance rather than through the courts.[10]

3. Arbitrators can make arbitration hearings more user-friendly by trying to view a hearing through the eyes of those who are participating in it.

We thus should remember that a hearing is mainly a working person's process since a working person almost always initiates a grievance and a working supervisor normally responds to it. It is easy to forget that when arbitrators primarily interact with advocates who dominate a hearing and who usually command an arbitrator's full attention.

That is why it may be necessary to explain to witnesses why they are being sequestered; why they are not allowed to answer a question; and any other matters which may need an explanation so everyone better understands *their* process. Explanations also can help advocates, particularly the inexperienced or less stellar ones, better understand the basis of the arbitrator's reasoning, thereby increasing an advocate's knowledge of the process.

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[9]It is simple for arbitrators to first tell parties that they do not know anything about the case and that they always ask if the parties want them to retain jurisdiction as a matter of practice, thereby assuring parties they are not prejudging their case and that their inquiry is routine. It's been my experience that about 90–95 percent of the parties agree to do so. For those who do not, this issue can be addressed in the award.

[10]Murphy, *The Presidential Address; The Academy at Forty,* in *Arbitration 1987: The Academy at Forty,* Proceedings of the 40th Annual Meeting of the National Academy of Arbitrators (BNA Books, 1998), 1, 4.

When necessary, arbitrators can tell parties near the end of a hearing that they have particular concerns about the case they want the parties to address. Without such guidance, parties may not know what an arbitrator is thinking and not provide the information the arbitrator needs when writing the decision.

This is particularly true if an arbitrator wants to address new issues or parts of the collective bargaining agreement which the parties have never raised. Parties know their dispute just as well, if not better, than the arbitrator and they have agreed, for whatever reasons, to not address those matters.

Without their needed input, an arbitrator's activism can wreak havoc on what other language means, which is why arbitrators should not consider other language (or issues) unless they first solicit the parties' input. But that, too, can be perilous when such an initiative causes a party to lose, thereby drawing that party's considerable ire and questions about the arbitrator's neutrality.

This last issue demonstrates how difficult it is to draw the line between acceptable versus unacceptable activism and the potential dangers of over-activism.

In the end, an arbitrator must answer such questions based upon his/her judgment and, as Gabriel Alexander stated, the "elements of personality that affect human judgment."[11]

That is why the title of this paper refers to "an arbitrator" rather than to "the arbitrator," which may imply that arbitrators are a monolithic body and of one view on this subject. The latter term is inappropriate because each arbitrator must judge where to draw the line on one's own activism, thereby bringing to mind Shakespeare's words: "And this above all: to thine own self be true, and it must follow, as the night the day, thou canst not then be false to any man."[12]

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[11]Marshall, *Comment, Discretion in Arbitration,* in *Arbitration and the Public Interest,* PROCEEDINGS OF THE 24TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS (BNA Books, 1971), 98.

[12]*Hamlet,* I, iii, 75.