Chapter 1

PRESIDENTIAL ADDRESS: THE HUMAN CONDITION: ITS IMPACT ON ARBITRAL THINKING

Introduction

Margaret Brogan[1]

I am thrilled to introduce my wonderful friend, Roberta Golick, president of the National Academy of Arbitrators. As you might know, I was the second person that Bobbie asked to perform this honor. Well, actually, now that I think about it, I am not sure if I was the second person. About a half hour ago, she tapped me on the shoulder in the hallway and said, "Hey, are you interested in introducing me?"

So here I am trying to fill the very large, and very tall, shoes of Barbara Zausner. Barbara cannot be here today as she just had surgery—she is home from the hospital and doing well. Barbara sends her regrets and regards to all, and sends her deep affection to Bobbie. This is the first meeting Barbara has missed since 1983, so I know she is very sad to be absent, but she promises to see her Academy friends in Charleston.

I had a chance to speak to Barbara, and she told me that Bobbie paid her a large sum of money not to tell embarrassing stories. Fortunately, Bobbie hasn't had the time to pay me off.

A few thoughts of Bobbie as president. As a member of the Board and Executive Committee, and pal, I have had an excellent perch from which I have watched Bobbie carry out her duties. She has done so utilizing her acute intelligence, her creativity, her humor, and her great inclusiveness of all points of view. She is insightful and thoughtful in her decision making. Watching her run a Board meeting is like having a chance to see a great mediator at work. Bobbie has traveled across the country, meeting many

[1]National Academy of Arbitrators, Philadelphia, PA.

of you with enthusiasm at countless regional meetings—a true ambassador of our organization. At the same time, Bobbie has maintained a vibrant practice in her presidential year, including a stint on a White House Emergency Board. As Bobbie says, she was appointed to that Board by the real president, President Obama.

Bobbie has overseen and been involved in many projects while president. One in which I had a part was her video interview in connection with the documentary being produced by the College of Labor and Employment Lawyers History Project, which is being funded by the NAA Research and Education Foundation. *The Art and Science of Arbitration* will include highlights from NAA Fireside Chats as well as interviews. Bobbie asked me to be her interviewer, and my hardest job was staying out of the camera shot. It was a delight to ask her questions—to learn about her beginnings as a neutral—and to hear her views of the arbitration process.

One of the more insightful questions I asked her was, "I am not sure if you have noticed but you are a bit on the short side—do you ever go into a hearing room, sit down in the chair, and discover that your feet do not touch the floor?" She said, "Actually, yes, that does happen, but the harder situation is when I sit down in the chair and my nose is level with the table top."

I learned in that interview that Bobbie's first job in the field was for the Massachusetts Department of Labor, Board of Conciliation and Arbitration. Bobbie began as General Counsel and quickly began to mediate and then arbitrate. At the tender age of 25, Bobbie was the first woman and the youngest lawyer in the 100 year history of the agency. In a blink of an eye she was a success. But then—a few years later—she had the courage to leave the stability of government service to start what became an extremely prominent solo practice.

What I found intriguing was how Bobbie got that first job. After graduating from Boston University Law School, she woke up early one morning, got dressed in her best power suit, and armed herself with a stack of her résumés. She then went to the state office building and started at the top floor, and went into every office, trying to get past the secretary. If she did, a victory in itself, she then tried to convince the next person that the work of that particular agency, such as the Massachusetts Department of Parks and Recreation, was her life's passion.

Without any *immediate* success, she got about halfway down the building, until she found herself in the offices of the Massachusetts Board of Conciliation and Arbitration, where our esteemed

NAA colleague, Larry Holden, was chairman. Bobbie gave him her best speech. He looked at her and said, "Well, I already have a stack of résumés—but I need someone today. And here you are standing right in front of me. You want the job?"

Bobbie ended up with a total of three job offers from that day's excursion. She gave one job opportunity to her roommate, who had gone camping instead. Lucky for our profession, Bobbie chose the position with the Board of conciliation and arbitration. Larry Holden left the next year, and Bobbie took over his position in an acting capacity. And the rest is history.

You also might not know that Bobbie earned an undergraduate degree at Barnard College in Asian Studies, with a concentration in Japanese language and Asian affairs. As a special treat for all of us, Bobbie will be doing her presidential address today in Japanese.

To know Bobbie includes the great treat of spending time with her wonderful family—her beautiful daughter Julia, handsome son Max, and adorable grandchildren, two-year-old Charlie and two-month-old Madeline. Bobbie is proud of her children and their accomplishments, and happy that they are off her payroll. And, of course, there is her darling husband of 25 years, Dan. Dan is a successful professional in the world of public relations and is Bobbie's greatest champion and supporter. We affectionately call him concierge Dan due to his skill at making dinner reservations. Dan is a special person and very dear friend.

One particular family visit to Boston comes to mind. Bobbie and I planned a weekend with our daughters about 15 years ago. My daughter Kate was in high school, so this was our first "adult" mother-daughter vacation. Kate and I met up with Bobbie on a beautiful day, and we were enjoying ourselves, taking in the atmosphere of the historical sites of Boston, including the Faneuil Hall area. We were on a very short timetable. Then, as we were walking by, this woman stopped us and said, "Do you want to make $5?" Kate and I started to walk away, but Bobbie said, "Of course!" I said, "What are you doing?" and she said, "But it's $5!" So this woman takes us down to the basement of a building where we are asked to taste test very bad shredded cheese for 40 minutes. As is her nature, Bobbie wanted to see the project through. At some point I turned to her and said, "What is your per diem, anyway?" A picture of the two of us holding our $5 bills is one of my prized possessions.

In the half hour I have had to think about this introduction, I have pondered about my friendship with Bobbie, which is one of the greatest treasures in my life. Why are we such close friends? I think, first, we share a sense of fashion. One of my earliest conversations with Bobbie was when I called seeking her advice on what to wear to all of these functions at an Annual Meeting. I learned essential pointers, such as: you need a separate suitcase for all your shoes. Despite my earlier comments on our $5 excursion, we have also enjoyed countless hours spending each other's money by giving sage counsel on buying that next pricey computer, or briefcase, or, of course, pair of shoes.

But most of all, we are there for each other. I can tell you, Bobbie has been there for me. There have been many times, too numerous to count, when I have called her—about a problem in work or in life in general. She knows immediately, probably from the catch in my voice, that I need help. And time and time again, she has dropped everything she is doing, focused on my issues, and has given me crystal clear clarity. As I am sure many of you have experienced, she makes you feel when you are talking to her that you are the most important person in the world. She convinces you that everything is going to work out. What a phenomenal mediator and arbitrator she must be.

I cannot thank Bobbie enough. But I also believe that this gift of friendship is a hallmark of this organization. Many of us feel this type of connection with each other. It is what makes the Academy so unique. It is why we return to see each other meeting after meeting. It is why we work so hard for its survival.

We owe an enormous debt of gratitude to Bobbie for her stewardship and hard work on our behalf. She is a shining light, who brought steady grace to our organization, and helped steer us well.

So, then, it is my great pleasure to introduce the president of the National Academy of Arbitrators, Roberta Golick.

Presidential Address: The Human Condition: Its Impact on Arbitral Thinking

ROBERTA GOLICK[2]

Thank you, Margie Brogan, for that terrific introduction, and you know, as long as you opened up the subject of shoes, may I

[2]National Academy of Arbitrators, Sudbury, MA.

remind you that you once phoned me from a taxi on your way to a hearing to tell me you just noticed you were wearing two different ones?

Greetings, Academy members, guests, and friends, all. This morning someone asked me how long I was going to speak, and I assured him I was going to be short and sweet. He said, "You're already short. You just need to be sweet." In my case, it's easier to be short.

Nearly three years ago, when it started to sink in that this day would eventually come, I sought counsel from a friend. "What should I talk about?" I asked. "Talk about something you feel *passionate* about," she advised. "Well," I said, "I feel passionate about people talking on their cell phones in elevators." "Hmmm …" she paused. "Is there perhaps some *achievement* you feel is worth noting?" "Oh, absolutely," I replied. "I now do the *Times* crossword in ink." "C'mon," she snapped, "you're speaking to the pillars of the profession. Get serious." So, I thought for a while, like for the next two and a half years, and I kept coming back to a story that I had followed with utter fascination back in 2009 when President Obama nominated Sonia Sotomayor to the U.S. Supreme Court. It was the story about the role of empathy in a judge's decision-making process.

With Justice David Souter's announced retirement, President Obama pledged that he would nominate a successor "who understands that justice isn't about some abstract legal theory or footnote in a casebook."[3] Justice, he declared, should reflect "how laws affect the daily realities of people's lives."[4] He continued: "I view that quality of empathy, of understanding and identifying with people's hopes and struggles as an essential ingredient for arriving at just decisions and outcomes."[5] Sotomayor possessed what Obama described as "a common touch and a sense of compassion; an understanding of how the world works and how ordinary people live."[6] Suddenly, the word "empathy" was on everyone's tongue. And not necessarily in a good way. Empathy to some

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[3]Jesse Lee, *The President's Remarks on Justice Souter*, White House Blog (May 1, 2009, 4:23 PM EST), http://www.whitehouse.gov/blog/09/05/01/The-Presidents-Remarks-on-Justice-Souter.

[4]*Id.*

[5]*Id.*

[6]Press Release, The White House, Remarks by the President in Nominating Judge Sonia Sotomayor to the United States Supreme Court (May 26, 2009), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-nominating-judge-sonia-sotomayor-united-states-supreme-court.

meant bias. And in a flash, the Supreme Court nominee had some explaining to do.

The firestorm over the word "empathy" renewed an age-old debate about what judges bring of themselves—their experiences, their beliefs, their emotions, and, scarily, their intuition—to the decision-making process. And it forced me to think about what we arbitrators—judges of labor-management and employment disputes—bring of ourselves to the decision-making process. What I plan to talk about today is the sometimes gnarly path connecting our hearts and our minds.

Some writers who latched onto the "E" word following President Obama's remarks opined that an empathic judge, one for whom the experience of another resonates, is biased because to be guided by empathy means to interject one's personal values into the record.

Other writers, though, suggested that to understand what it's like to walk in another's shoes is not the same thing as feeling their pinch. David Brooks, writing in *The New York Times,* commented that "emotions are an inherent part of decision-making,"[7] and to believe otherwise is to accept what he described as the "falsehood that this is a nation of laws, not men;" The falsehood, he wrote, is "that in rendering decisions . . . objective judges are able to put aside emotion and unruly passion and issue opinions on the basis of pure reason."[8]

This was not a novel idea. Historically, jurists have been candid when speaking about the influence of life experience on the decision-making process.

More than 60 years ago, Justice Felix Frankfurter said: "The words of the Constitution are so unrestricted by their intrinsic meaning or by their history or by tradition or by prior decisions that they leave the individual Justice free, if indeed they do not compel him, to gather meaning not from reading the Constitution but from reading life."[9]

But Benjamin Cardozo may have said it most eloquently nearly a century ago, when he wrote: "The great tides and currents which engulf the rest of men do not turn aside in their course and pass judges by."[10]

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[7]David Brooks, *The Empathy Issue,* N.Y. TIMES, May 28, 2009. at A23.

[8]*Id.*

[9]Felix Frankfurter, *The Supreme Court*, PARLIAMENTARY AFFAIRS 3:1 (1949).

[10]BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (Yale University Press 1921).

Now, what does all this rhetoric mean to us? Labor arbitrators don't work in the rarefied atmosphere of the Supreme Court. Our decisions don't usually impact broad segments of the population; they don't change the course of history; and our rulings can be undone in the give and take of negotiations. Yet, when it comes to the debate about how to reconcile our world view with our neutrality, we arbitrators face the same challenges as these prominent jurists.

So, how do we achieve an appropriate separation between our life experience and our arbitral responsibilities? And how can the parties who select us for our good judgment be assured that the product we've delivered is a just outcome based on the record presented? First, we must all acknowledge the fundamental truth that we're not robots. Although my kids have suggested numerous times that I ought to get a life, most of us who arbitrate have been on the planet for many decades and have witnessed and experienced a lot of life. We don't mechanically process testimony and documents, spit out an answer and reset at zero for the next hearing. Some of us can identify with the downtrodden; some of us relate better to the business establishment; some of us have hated our bosses; some of us have been bosses; many of us have raised children, buried parents and friends, and battled illnesses. We don't shed our identities at the hearing room door.

The highest court of the State of Delaware recently provided a welcome burst of support for this notion. An arbitration award that made its way through the state courts involved the reinstatement of an employee who had been discharged for excessive absenteeism. The grievant's mother-in-law, who had previously provided childcare for the grievant's children, had died from a serious illness, disrupting the employee's support system. Before the grievant could get his family situation settled, he missed many days of work, and he was fired. The arbitrator wrote a cogent, fully explained decision as to why the discharge was not for just cause, and he sustained the grievance. The employer, unhappy with the outcome, moved to vacate the award, alleging that the integrity of the arbitration was compromised. Why? Because the arbitrator didn't disclose to the parties during the hearing that some months earlier his own family member had passed away from the same condition. The employer argued to the court that the arbitrator's shared life experience gave the appearance of bias or partiality. The Delaware Supreme Court, noting that arbitrators can be held to the same standards as judges, stated: "The mere fact that an

arbitrator may share a personal life experience with a party or a party's agent is legally insufficient to constitute a substantial relationship that a reasonable person would conclude is powerfully suggestive of bias."[11] The court wrote, "We hold that arbitrators are not disqualified because of their shared life experience with a party or a party's agent and that the disclosure of a shared life experience is not mandatory."[12]

When I first read this decision, I thought it was bold. But the more I thought about it, the more I came to realize that it expresses little more than common sense. For we come to our cases not merely with experience, but with our private thoughts as well: our political beliefs, our pet peeves, our opinions, our sensibilities. Listen, I once had a grievant who was clipping his fingernails on the witness stand during a break. I was thinking, "If one of those body parts hits me, he's a dead man." Now these are feelings that we can't control. We can control whether we speak them *aloud*, thank goodness; we can control how they affect our decision-making, but we cannot control that we have them.

If we were obligated to disclose every element in our life experience or world view that related on some level to a case we were hearing, the arbitration process would come to a screeching halt.

Which brings me to my second point: For any of us to deny that we respond viscerally to the appeal, or lack thereof, of people, of testimony, of stories, or of arguments is both self-delusional and dangerous.

I thought about this when I heard a case involving the discharge of the chief meat cutter in a supermarket. He and his subordinate meat cutters were long-term employees, big burly guys, buddies both at work and on the outside. The supermarket also employed a young man—probably in his early 20s—who worked evenings as the meat room cleaner. It was menial and unpleasant work, and the young man wasn't very good at it. He was frequently criticized by the chief cutter. According to the young man's report, after one particularly humiliating dressing down in front of the other guys, the chief slapped him across the face and ordered him back to work. Distraught, the young man fled to the manager's office, reported the incident, and after investigation, the chief meat cutter was fired. The union challenged the discharge. At arbitration

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[11]Delaware Transit Corp. v. Amalgamated Transit Union Local 842, 34 A.3d 1064 (Del. 2011).

[12]*Id.* at 1073.

the young man, testifying for the company, described incident after incident in which he'd been the butt of teasing, insults, and pranks, all of which he apparently accepted as his due, but being slapped across the face undid him. The grievant, for his part, acknowledged that he criticized the employee's poor performance, but he denied slapping him, and he insisted that all the prior incidents of so-called bullying were nothing more than the usual horseplay in that work environment and in which the young man himself had participated.

The personal challenge for me in this case was that the young man appeared to me to have a disability—not that one word was said about this at the hearing, but I believed I recognized in this child-like employee traits that were familiar to me growing up with a brother who's been diagnosed with Asperger syndrome. The accuser's testimony rang true to me in part because I felt that, like my brother, he was not capable of sustaining a lie. As I listened to him describe the shenanigans in the meat room, he struck me as someone who could not see beyond the literal world around him, someone who was unable to strategize, unable to have fabricated the detailed events he described or actually see their significance beyond how they made him feel in the moment.

I'll return to this case to let you know the outcome, but my point now is that, though it sounds like a paradox, to be impartial is to recognize what elements in a case resonate with us and why, and to recognize what factors may be coloring our reactions. To be impartial, we must be aware of our own predispositions and force ourselves to be skeptical of the confidence we feel in our first, seemingly reliable impressions.

My third point, which I pose as a question, is: What do we do when something comes up that is more than a passing "aha" moment of connection with a person or circumstance that is central to a case? The Delaware Supreme Court stated that a failure to disclose a shared life experience is not indicative of bias or partiality, and therefore not grounds for vacatur, but isn't it our responsibility in the first instance to decide whether there is something we *should* disclose? It seems to me that before we don the court's protective cloak, we must acknowledge what it is that's echoing within us, think about its source, and determine whether we can do the job the parties have entrusted us to do. We need to ensure that our own life experience and the lens through which we privately view the world will not distort our perception of the evidence in front of us. So long as we are comfortable that we're

able to remain impartial, we're fulfilling our duty to the parties. When we feel doubt, we need to own up to it and be prepared to step down.

My supermarket case didn't call for a disclosure because, in fact, there was no assertion that the accuser suffered from any health condition at all. There was testimony that he was unable to drive, testimony that he lived at home with his parents who grounded him and took away his Nintendo when he misbehaved, testimony that he tended to wander around the store when he should have been attending to his duties, and testimony that no matter how hard he tried, he just wasn't able to perform his job competently. So my internal debate was not whether I had a duty to disclose something to the parties but whether my initial inclination to credit his testimony was based on the record independent of my untutored assessment of his psyche.

Few cases are black and white, and as the record in this one grew, so did my reason to question whether the young man had been truthful. The purported bully was extremely impressive on the stand. As the case progressed, the union's evidence revealed a complex dynamic between the grievant and the alleged victim.

This brings me to my final point, which is that the arbitration process imposes upon arbitrators a critical obligation, that is, the duty to explain ourselves. Decision-writing is, in my view, the great reality check. The task of putting our rationale into words forces us to tell the story, acknowledge the competing arguments, take a stand, and most importantly, support it.

When the testimony ended in the supermarket case, I didn't know where my deliberations would take me. I had come to terms with the fact that I had no idea whether the accuser was capable of lying or was capable of acting on an ulterior motive. The employer had put on a strong case, but the union's case, and the grievant's testimony in particular, gave me pause. With time and distance, I could readily put aside the empathy that I had felt for the young man during his testimony, and my only goal as I reviewed the record was to make the right decision for the right reasons.

It would probably make for a better story if I were to tell you that, upon careful examination of the record, I realized that I'd been misled by my first impression of the young man's credibility. In fact, what I realized was that I'd been misled by the grievant's confident presentation. One by one, the elements that I thought might have weakened the victim's version of events emerged as clever attempts by the grievant and others to mask the truth.

Video footage from outside the meat room didn't jibe with the grievant's chronology; his statements during the company's investigation were inconsistent with his testimony at arbitration; the meat room buddies' claims that they didn't see a thing were dubious given the layout of the meat room, and so on. With the benefit of perspective and the chance to really focus, I was able to see that the young man had indeed been the victim of cruel bullying. In the end, I ruled for the company, not because of the empathy I'd earlier felt, but because it was the correct outcome based on the evidence.

Decision making, as a body of current literature tells us—some of it even in language we arbitrators can understand—involves a combination of intuitive responses and deliberative exercise. In some fields, like firefighting, acting on one's intuition is a professional asset, but not in ours. Our decisions may not change the world, but they do change people's lives and their livelihoods, their relationships within the workplace, and their rights and obligations to each other. We know that our intuition, though honed by experience and often reliable, must be calibrated by the hard work of deliberation. This is particularly important because our decisions, for the most part, are not reviewable by a higher court. I think most arbitrators will agree that the crucial test of our decision making occurs at the writing stage. It is where the pencil meets the pad that our conclusions must pass muster for logic, cohesion, and above all, impartiality.

My mission today was not to educate or preach, for I've said nothing that each of us hasn't grappled with a thousand times. But I hope that by speaking about the challenges we face from the moment we enter the hearing room until the moment we sign the award, I've provided a springboard for further conversation. I thank you for giving me the opportunity to speak about a subject that I find endlessly interesting. And I thank you for not *conspicuously* using your cell phones for the past half hour.