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The Problem of the Missing Witness: Toward an Educator-Facilitator Role for Labor Arbitrators

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A problem often encountered in labor arbitration is what, if anything, the arbitrator should do if the parties involved fail to produce a key witness. The authors examine in detail the many interests, goals and arguments that should be considered when an arbitrator is faced with the problem of the missing witness. They conclude that the arbitrator should avoid both passivity and aggressive activism and assume instead an "educator-facilitator" role.

I

INTRODUCTION

In the United States, contract disputes between labor unions and employers, unless settled through negotiation, are normally resolved through binding grievance arbitration. A difficult problem often encountered in labor arbitration is what, if anything, the arbitrator should do if the parties fail to produce a witness whose testimony is essential to a proper disposition of the case.

Consider, for example, the following case. A policemen's union contests in arbitration a city's discharge of two policemen for allegedly assaulting an arrestee held in the city's police station. Neither em-

* Many people contributed to this article; we want particularly to thank United States District Court Judge Jack B. Weinstein and Professors Eileen Silverstein, James H. Stark, Wendy W. Susco, and Michele Taruffo.
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1. To be distinguished is "interest arbitration," which involves settlement of disputes as to the terms of a new labor contract. This article discusses only grievance arbitration.
2. This case and other cases used in this article, while unreported, are drawn from Professor Sacks' experience as a labor arbitrator.
ployer nor union calls the alleged victim as a witness, even though his testimony is obviously crucial. Should the arbitrator play a passive role, deciding the case on the basis of the evidence the parties choose to present to him? Or should he be more active? If so, within what limits and in what fashion should he conduct his search for the missing piece? Should he limit himself to a polite inquiry about the missing witness? If the answer given seems sensible (e.g., the witness recently died), the arbitrator might easily let the matter rest. But suppose the answer does not seem plausible. Suppose the witness had told the party's advocate that he was "too busy" to appear, but the advocate made no effort to subpoena him. Should the arbitrator pursue the matter further by offering to subpoena the witness? As a last resort, should the arbitrator ever call the witness as his own?

The proper role for the labor arbitrator in the missing witness situation is part of a much larger problem: the role of the decision-maker in adjudicative proceedings. The missing witness problem confronts not only arbitrators, but judges, hearing officers, administrative law judges and members of administrative agencies. Moreover, the decision-maker, whether arbitrator or other, must decide how active to be in seeking additional documentary evidence, in questioning witnesses, in engaging in legal research beyond that done by the parties, in developing theories in addition to those put forth by the parties, and in insuring that all interests are represented in the proceeding, even though this may require that additional parties be brought in. Indeed, the problem of activity versus passivity on the part of the decision-makers involves the larger question of whether adjudication ought to be based on an adversarial or an interrogative (inquisitorial) model.

This article addresses the problem of the arbitrator and the missing witness. After rejecting three potential "easy" solutions to the

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3. In the actual case, used as an example in the pages that follow, the arbitrator stated his belief that the missing testimony of the arrestee was critical. When it became clear that neither would call the witness, the arbitrator indicated that the parties' behavior was disturbing. The union gave no reasons for its action, but the arbitrator surmised that the reason was that the testimony would have supported the city's case. The city explained that it did not want to call the witness because the arrestee was suing the city and the police officers for deprivation of his civil rights. The city believed that calling the arrestee as a witness in the arbitration would have jeopardized its defense in the civil suits.

The arbitrator then stated that he would call the witness himself. The union lawyer's reaction was almost violent; he characterized the arbitrator's decision as "officious meddling." The arbitrator reconsidered and decided not to call the witness. The city, after changing its counsel in the case, decided not to summon the witness after all. The arbitrator decided not to uphold the police officers' discharge, and modified their penalty to a lengthy suspension without back pay.

4. We plan to address the issue of the arbitrator's role, if any, in developing additional theories, in a later article.

5. For general discussion of these two models, see G. HAZARD, ETHICS IN THE PRACTICE OF LAW 120-23 (1978); Fuller, The Adversary System, in TALKS ON AMERICAN LAW 30 (H. Berman ed. 1961).
problem and discussing the arguments for arbitral passivity, we pro-
pose that the arbitrator take a modestly active stance, and play an "edu-
cator-facilitator" role. That is, we believe an arbitrator confronted 
with a missing witness should educate the parties as to the importance 
of the missing testimony and suggest methods through which a party 
may overcome its reluctance to call the witness. The remainder of the 
article is devoted to examining the many factors an arbitrator must 
consider when deciding how to deal with a missing witness problem. 
Although limited to the narrow question of the missing witness, we 
hope our identification and analysis of these factors will shed some 
light on the broader question of the optimal active/passive combina-
tion in the adjudicative role.

II

Is There A Simple Solution to the Missing Witness 
Problem? Three Possibilities Examined

In wrestling with the problem of what the arbitrator should do 
when he faces a missing witness problem, we have identified three pos-
sibilities for a quick solution which would obviate the need for any 
elaborate analysis of the issue.

A. One solution would be to forget the problem since an arbitra-
tor can err only once. If such an arbitral response to the missing wit-
ness problem displeases either party, that party will simply refrain from 
using the particular arbitrator again. The keystone of this quick solu-
tion is that, to survive in the profession, arbitrators must remain accept-
able to unions and employers. Arbitrators thus have a strong incentive 
to conform their conduct to party expectations.

There are several difficulties, however, with this solution, which is 
based on arbitrators' contingent tenure. For one thing, not all arbitra-
tion is done on an ad hoc basis. Under some collective bargaining 
agreements, a particular arbitrator—or panel of arbitrators—is selected 
to arbitrate all disputes throughout the life of the contract. In these 
situations, companies or unions could lose confidence in arbitration if 
the permanent umpire (or panelist) was more active or more passive 
than the party wanted.

Even in ad hoc arbitration, the arbitrator might do damage in one 
case, frustrating party intentions and expectations and damaging not 
only his own reputation but that of arbitration generally. Moreover, 
since arbitration has no formal feedback process, it might be months or 
years before either the arbitrator or the parties using him discover the 
mismatch between the arbitrator's conception of the arbitral role and 
the parties' conception of that role.

At a deeper level though, party satisfaction with its "private judge"
is not necessarily the ultimate test of the proper limits of the arbitral role. Dean Harry Shulman, an eminent arbitrator, and Professor Lon Fuller, a distinguished student of adjudication, offer important although conflicting insights into this issue. Dean Shulman argues that one of the advantages of voluntary arbitration is party control of the process through the incident risk of dismissal imposed on the arbitrator. He goes so far as to urge, for example, that concerns normally harbored about ex parte communications with and by judges are not equally applicable to arbitrators, given the parties' control over the selection process.\(^6\)

But this argument is unpersuasive. In rejecting Shulman's confidence in party control, Professor Fuller offers two important thoughts.\(^7\) First, he notes that whatever arrangements develop in a particular situation are not necessarily approved by the people affected. For example, it is unrealistic to say that workers in a factory have approved a particular conception of the arbitrator's role. (In fact, only a few chief figures, and principally the arbitrator himself, have any sense of the possible alternatives.) Second, if "party consent" means merely the approval of those small numbers of officials directly concerned with the arbitration, it alone cannot justify the arbitrator's conduct. Consider, for example, the threat to the integrity of arbitration posed by arbitrator indifference to an award "rigged" by the officials involved.\(^8\)

Indeed, the reputation, and hence utility, of arbitration as a dispute-resolving mechanism is threatened if it is perceived as lacking in integrity. In addition, reliance on "acceptability" as the major control over arbitrator conduct may make matters too easy for the arbitrator; he may be able to ignore or insufficiently consider the ethical or professional-responsibility issues raised by his behavior.\(^9\)

Private selection of the arbitrator, then, should not excuse the arbitrator from responsibility to the arbitral process. Thus, we cannot simply ignore the missing witness problem on the theory that party control of arbitrator selection insures satisfactory results.\(^10\)

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8. Id. A "rigged award" is a case in which the parties do not really dispute the validity under the contract of employer action but rather go through the motions of an adjudication simply to persuade the grievant and others that justice is being done. For additional discussion of the "rigged case," see E. Teple & R. Moerly, Arbitration and Conflict Resolution 87 (1979).
9. An example would be whether he should accede to the request of only one of the parties to mediate the dispute. See Code of Professional Responsibility for Arbitrators of Labor-Management Disputes § II-F (National Academy of Arbitrators 1974).
10. We do not suggest that party selection of arbitrators is without advantage. For a good defense of party selection, as compared with government selection (labor courts), see Getman, Labor Arbitration and Dispute Resolution, 88 Yale L.J. 916, 926-31 (1979).
PROBLEM OF MISSING WITNESS

B. Accordingly, we turn to a second potential easy solution to the problem: *follow the law*. Unfortunately, the law on this subject fails to provide an adequate guide for arbitrators when confronted with a missing witness situation. Arbitration statutes offer little guidance. The typical statute, such as Connecticut’s, does not speak to the issue at all. The only remotely relevant section provides that one ground for vacating an award is “if the arbitrators have been guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced.”¹¹ This provision does not guide the arbitrator about what to do when she believes crucial evidence is missing, unless we are to assume that the legislature intended by its silence that the arbitrator should do nothing.

Definition of proper arbitral behavior, though, is not completely derived from the vacation provisions. These provisions give us only the outside limits placed on arbitrator behavior. The vacation statutes do not mean that as long as the arbitrator has not violated the norms expressed in the legislation he has acted properly.¹² Here, as in many areas, the lack of available appeal does not indicate that the correct decision has been made or that the decision has been made through the correct procedures.¹³ Moreover, the fact that arbitration agencies, such as the Connecticut State Board of Mediation and Arbitration, find it necessary to issue rules on grievance arbitration indicates that the legislature merely established a broad framework for arbitration—a set of minimum standards—leaving to others the task of working out details.

While we have found no judicial decisions dealing with arbitrator action or inaction in a missing witness situation,¹⁴ arbitration rules do offer some guidance. Rule 28 of the Voluntary Labor Arbitration Rules of the American Arbitration Association (AAA) provides:

The parties may offer such evidence as they desire and shall produce such additional evidence as the Arbitrator may deem necessary to an un-

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¹². Imagine the following case: A collective bargaining agreement between a faculty union and a community college administration provides that if a new faculty member is appointed, any existing faculty member with “substantially equivalent” credentials will have his salary raised to the same level as the new member. A new teacher is appointed, and an existing member complains that he is entitled to have his pay raised to the level of the newcomer. At a hearing both parties focus their arguments on the issue of equivalence. Subsequently, when the arbitrator hands down his decision, he rules against the grievant on the ground of laches. We would condemn this behavior as improper both in terms of the lack of responsiveness to the parties’ claims and the failure to give them a chance to meet the laches argument.

¹³. Similarly, for example, in baseball one can argue that an umpire’s call was erroneous even if that decision is final.

¹⁴. We searched Lexis and the West Decennial Digests from 1936 to October 1980, but found nothing.
derstanding and determination of the dispute. When the Arbitrator is authorized by law to subpoena witnesses and documents, he may do so upon his own initiative or upon the request of any party. . . . 15

The first sentence clearly authorizes the arbitrator to direct the parties to produce a witness. That power can be made effective against a recalcitrant party, since arbitrators usually have subpoena powers and, under the terms of the second sentence, an arbitrator could subpoena a witness "upon his own initiative." This rule is important because many grievance arbitrations are conducted under AAA auspices, and because the AAA rules have served as a model for other arbitration agencies, such as the Connecticut State Board of Mediation and Arbitration (CSBMA). Thus, section 31-91-37 of the CSBMA Rules of Procedure provides that "[t]he parties may offer such evidence as they desire and shall produce such additional evidence as the panel members may deem necessary to an understanding and determination of the dispute," and section 31-91-34 permits arbitration panels of the Board to exercise the Board's subpoena power.16

Rules of this sort authorize the arbitrator to call a witness on his own. Moreover, by inference, they suggest the power to do something less, such as raise the issue with the parties and explore the adequacy of their reasons for declining to produce a witness whom the arbitrator deems crucial. These rules, however, are open-ended. Neither requires that the arbitrator follow a particular course of action. Rather, they simply confer authority, which an arbitrator may or may not use. Thus, they offer no solution as to how the arbitrator should decide when to use such authority.

C. A third possible solution would be: do as the trial judge does. That is, since the judicial process has been perfected over a number of centuries, judges presumably have found solutions easily adaptable to arbitration.17

There are, however, two critical problems with this potential source of guidance. First, judges rarely express their views in opinions

15. AMERICAN ARBITRATION ASSOCIATION, VOLUNTARY LABOR ARBITRATION RULES (1979) (emphasis added).

16. In pertinent part, section 31-91-34 reads as follows: "The subpoena power of the Board may be used at the discretion of the panel only when it becomes evident that the panel will be unable to render a fair and just decision without the appearance of a material witness or pertinent records or documents." The two cited rules are found in CONN. AGENCIES REGS. §§ 39-91-37, 39-91-34 (1981).

17. Professor Fuller, in analyzing the forms and limits of adjudication as a method of social ordering, and trying to define in some general sense what it means to act like a judge, includes as "adjudicators" not only those who are called judges, but also decision-makers such as hearing officers, commissioners, and arbitrators. L. FULLER, THE PROBLEMS OF JURISPRUDENCE 705 (1949).
or elsewhere about the missing witness problem.\textsuperscript{18} When they do, they apparently disagree. Our impression from speaking with a few federal trial judges and reading published opinions\textsuperscript{19} is that—with the exception of expert witnesses\textsuperscript{20}—there is neither uniform judicial practice nor any consensus in principle about whether and when a judge should call a witness.\textsuperscript{21}

Consider, for example, the well-known Supreme Court case of \textit{Johnson v. United States};\textsuperscript{22} involving a personal injury suit brought under the Jones Act. There, a fellow employee of the plaintiff seaman had witnessed the accident and was available to testify about the cause of plaintiff's injury, but was not called by either party. The majority did not find the absence of the witness crucial. In a dissenting opinion, however, Justice Frankfurter argued:

A trial is not a game of blind man's bluff; and the trial judge—particularly in a case where he himself is the trier of the facts upon which he is to pronounce the law—need not blindfold himself by failing to call an available vital witness simply because the parties, for reasons of trial tactics, choose to withhold his testimony.

Federal judges are not referees at prize-fights but functionaries of justice.\textsuperscript{23} Justice Frankfurter thought the case should be remanded so the trial judge could call the bystander witness. He was alone in his dissent, however, and his position occasioned some scholarly criticism.\textsuperscript{24}

In a recent article U.S. District Court Judge William W. Schwarzer urged trial judges to play a very active role in assuring the constitutionally-guaranteed right to effective assistance of counsel in criminal cases including, for example, continual monitoring of per-

\textsuperscript{18} Judges apparently have the legal authority to call a witness. \textit{See}, \textit{e.g.}, \textit{Fed. R. Evid. 614}, 706.

\textsuperscript{19} \textit{See}, \textit{e.g.}, \textit{Johnson v. United States}, 333 U.S. 46 (1948); \textit{United States v. General Motors Corp.}, 561 F.2d 923 (D.C. Cir. 1977), \textit{cert. denied}, 434 U.S. 1033 (1978).

\textsuperscript{20} \textit{See infra} note 98.

\textsuperscript{21} Trial judges, the cases reveal, have wide discretion in handling this question. Our search, however, disclosed no established, unambiguous set of criteria to be employed in the exercise of that discretionary authority. \textit{See}, \textit{e.g.}, \textit{Longview Refining Co. v. Shore Co.}, 554 F.2d 1006 (Temp. Emer. Ct. App. 1977); \textit{Schneider v. Yakima County}, 65 Wash. 2d 352, 397 P.2d 411 (1965); 9 J. \textit{Wigmore, Wigmore on Evidence} \textsection 2484 (Chadbourn rev. 1981).

In some cases the missing witness problem is resolved before the case gets to trial. Thus, a United States magistrate, or a judge conducting a pre-trial conference, may alert the parties to the problem, and as a result effect a resolution at this earlier stage of the process. Thus, any full-scale study of the practice of judges would have to take into account the entire process and not just the ideas or practices of trial judges.

\textsuperscript{22} 333 U.S. 46 (1948).

\textsuperscript{23} \textit{Id.} at 54 (Frankfurter, J., dissenting in part).

\textsuperscript{24} \textit{See Note, Trial Judge's Duty to Call Witnesses in Res Ipsa Loquitor Cases}, 58 \textit{Yale L.J.} 183 (1948).
formance of counsel. Schwarzer also discussed civil litigation, and implied that it would be proper for a trial judge to protect a party by calling a witness if the advocate failed or refused to call the witness for insufficient reason. We suspect, though, that many judges would reject the activist role recommended by Judge Schwarzer. From our brief survey, we conclude that no consensus exists among judges as to what judges do, or ought to do, when they believe a crucial witness has not been called to testify.

A second problem with the judicial model is the difference between judicial and arbitral processes, particularly with respect to the missing witness issue. In other words, if there were a consistent judicial practice, is there good reason for the arbitrator not to follow it? While for our purposes we need not resolve this question, we submit there are some significant differences between the two processes. For example, if a judge calls a witness in a jury trial, the jury may give undue weight to that witness' testimony. In arbitration, there is no such problem, although there might be if an arbitrator were inclined to give undue weight to the testimony of a witness he insisted on calling. Judge and arbitrator also differ in their source of authority. The judge derives his commission from the state and has broad power to do justice—within the limits imposed by constitution, statute, precedent, and self-restraint. In dealing with contracts, for instance, the judge need not enforce provisions which are deemed unduly harsh. If a judge, in the

26. Id. at 665-69.
27. It is worth noting that there may be a trend in Western Europe to expand judicial power to include the right to call witnesses. One of the authors, at a conference in Israel, discussed with a number of European participants the practice in Western Europe of calling witnesses in civil cases. In some countries, such as Austria and Germany, the judge has had this power for many years. In other countries, such as France and Italy, recent changes in codes have given judges the power. Whether judges, especially older ones who have grown up on a system tuned to a passive role, will use this power remains to be seen. The change, it was said, evinces a greater concern for achieving justice, and a downgrading of the classic liberal view that free individuals be permitted to pursue their own interests, with the state acting only as referee.
28. United States v. General Motors Corp., 561 F.2d 923, 934 n.52 (D.C. Cir. 1977) (judge may "tilt or oversteer jury or control their deliberations . . . ").
29. See infra text accompanying notes 87-98.
30. In response to the question of how adjudication is affected by the source of the arbiter's power, Professor Fuller sets forth, in summary manner, the possible advantages of (1) adjudication supported by governmental authority, as in the case of a judge, and (2) adjudication which derives its power from a contract of the parties, as in most forms of arbitration. He observes that one special quality of contractually authorized arbitration—that the contract to arbitrate may contain explicit or implicit limits on the adjudicative process itself—cannot be called unequivocally an "advantage" or a "disadvantage." Fuller, The Forms and Limits of Adjudication, 92 HARV. L. REV. 353, 392-93 (1978).
31. Fuller, supra note 7, at 7-9.
interest of justice, can refuse to enforce a contract, surely he can call a
witness despite what the parties say.

In contrast, the arbitrator draws his authority from the collective
bargaining agreement. He has no power to disregard the contract.\textsuperscript{32} Unlike the judge, he cannot argue that since he has the power to void a
contract provision he can surely void a party agreement not to call a
particular witness.

Moreover, because his selection is subject to the parties’ discretion
the arbitrator often feels he should behave in a way which conforms to
party expectations. Hence, the arbitrator may quite understandably
hesitate to call a witness over party objections. In contrast, judges usu-
ally have long terms, or even lifetime appointments. This substantial
difference in tenure may well indicate that judges are entitled to exer-
cise power more freely than arbitrators.

The admonition to “do as the judges do” founders for the forego-
ing reasons. Most importantly, judges furnish no consistent practice to
emulate. But even if they did, differences between the judicial and ar-
bitral roles might still make its application to our problem
questionable.

Since there are no quick solutions to the missing witness problem,
we must engage in a more detailed analysis.

III

THE GOALS OF ADJUDICATION

Before developing the respective cases for arbitrator passivity and
arbitrator activism in the missing witness situation, it will be helpful to
set forth the goals of adjudication in the labor-relations context. A pri-
mary goal is \textit{truth-finding}; that is, the arbitrator must find the actual
facts so that he may then apply the provisions of the collective bargain-
ing agreement to them.\textsuperscript{33} Equally important and obviously intercon-
nected is \textit{doing justice}, which may be defined as correctly interpreting
the agreement and correctly applying its provisions to the employer-
union dispute. A third goal is \textit{promoting reasonable efficiency} in the

\textsuperscript{32} Of course, if the parties give him the authority to pass upon legal questions outside the
contract, e.g., whether a provision in the contract is void under a statute, and the arbitrator is
willing to exercise that power, he becomes more like a judge. Whether and when the arbitrator
should pass upon questions of “external law” is a subject of much debate among arbitrators. For
an introduction to the literature, see E. Teple \& R. Moberly, Arbitration and Conflict
Resolution 382-95 (1978).

\textsuperscript{33} We are aware of the view that adjudication is not really a serious search for truth, but
finds its justification on other grounds, such as the moral education of the community. We doubt
that many parties to a grievance arbitration would accept this view; nor do we believe that the
search for truth in labor arbitration is so hopeless that we should abandon the quest. Our impres-
sion is that arbitrators usually come pretty close to finding the facts correctly, and to the extent
that they fail, attention to such factors as the missing witness problem would improve the results.
expenditure of money and time resolving the dispute. We would ordinarily not want to spend $500 on an arbitration to resolve a dispute over whether a police officer or the employing city should pay for a damaged flashlight worth only $10. We also want arbitration to be expeditious in producing a final decision in the dispute.

A fourth arbitration goal is promoting the acceptability of the decision. In particular, the decision should be acceptable to the loser (even though it will often disagree with the result) so that it complies promptly with the decision, and does not challenge the award in court, or before some other forum, such as a labor relations agency. But the decision should also be acceptable to the wider community, such as the other employees in the shop and the general public, so that the reputation of arbitration as an effective and just dispute-settling mechanism is preserved. The goal of acceptability is obviously dependent on whether the decision-making process—including the degree of activism displayed by the arbitrator—is, and is perceived to be, fair.

Still other more subtle goals may be affected by the way in which we resolve the active/passive problem. Respecting the dignity and the autonomy of the parties is such a goal. A procedure which interferes with a party's control of the presentation of its case infringes on autonomy, and may decrease acceptability of the decision. A related goal is supporting "industrial self-government," that is, the process by which unions and employers govern their own relationships by rules and procedures of their own choosing. Arbitration is an integral part of that arrangement, and it must function effectively if the grievance procedure is to work well.

These goals of adjudication in the labor-relations context are directly affected by the choice made in resolving the missing witness problem. They are, therefore, crucial to the following analysis of the problem.
Arbitrator passivity in the missing witness situation may promote the goals of labor arbitration. Arbitration, like other forms of adjudication in the United States, uses an adversary system for finding truth and doing justice. Under such a system, the parties may not expect or want the decision-maker to do anything but listen and decide. Intervention by the decision-maker may be resented and resisted, and may be perceived by one side as being partial to the other.

Because grievance arbitration, unlike the judicial or administrative process, is purely consensual, party expectations have special force. The parties themselves—without legal compulsion and as a part of “industrial self-government”—choose arbitration as their dispute-resolving mechanism. Moreover, the parties play a large role in selecting the particular arbitrator and can often both veto the choice of one person and rank the acceptability of others. Thus it would not be unreasonable for the parties to argue that because they shaped the arbitral process and selected the arbitrator, the decision-maker should follow their wishes and not his own vision of his office.

If the parties reason this way, arbitrator intervention, even if limited merely to a question of why the witness has not been called, could damage acceptability of his award, harm the reputation of grievance arbitration generally, diminish party dignity and autonomy, and have ripple effects on other elements of industrial self-government, such as reducing the effectiveness of the grievance machinery. The risks to the goals of labor arbitration are especially great if the arbitrator not only raises the missing witness problem but proceeds to explore with the parties the reasons for their refusal to call. The danger is greatest if the arbitrator refuses to accept those reasons and decides to call the witness as her own. The dangers of arbitrator intervention are illustrated by the police discharge case described at the beginning of this article where the union’s lawyer reacted almost violently, characterizing the arbitrator’s conduct as “officious meddling.”

A related argument may be derived from “free market” principles. If one party can afford a more resourceful advocate than the other party, so be it. There is no reason for the arbitrator to attempt to right the balance between good and bad advocates. If a party’s advocate does not see the importance of calling a witness, it is not the arbitrator’s role to rescue him from his folly.

38. See supra note 3 and accompanying text.
Still another argument for the passive approach is that the arbitrator may not have the last word—justice may yet be done. To be sure, chances are remote that a court will vacate an arbitration award because a party (or the arbitrator) failed to call a witness. The party that failed to call the witness is unlikely to embarrass itself by asking a court to rescue it from its own failing, and the grievant will usually not have "standing" to challenge the award, since he is not a party to the arbitration or the underlying contract. 39 On the other hand, if a union's representation of an employee in an arbitration is shockingly inadequate, the employee might have a claim against the union (and the employer) for breach of the union's duty of "fair representation." 40

V
THE CASE FOR LIMITED ARBITRATOR ACTIVISM:
THE ARBITRATOR AS EDUCATOR AND FACILITATOR

Despite the arguments supporting a passive role for the arbitrator confronted with a missing witness situation, we are persuaded that a better case can be made for at least a limited form of arbitrator activism. We believe an arbitrator should intervene in order to educate the parties about the existence and nature of the problem, 41 and, if neces-


Clark v. Hein-Werner Corp., has never been overruled by the Wisconsin Supreme Court and is occasionally cited with approval by other courts, e.g., National Elevator Industries, Inc. v. Local 5, Elevator Constructors, 426 F. Supp. 343 (E.D. Pa. 1977). However, the early concept of an employee right of intervention (standing) has been replaced by the more limited fair representation action against the union. Bellanger v. Matteson, 115 R.I. 1332, 346 A.2d 124 (1975), cert. denied, 424 U.S. 968 (1976).

40. This important principle, derived from the union's statutory role as exclusive representative of all employees in the bargaining unit, 29 U.S.C. § 159(a) (1976), requires the union to give fair and at least minimally competent treatment to a grievant, both in deciding whether to carry the case to arbitration, and then in conducting the arbitration proceeding itself. See, e.g., Vaca v. Sipes, 386 U.S. 171 (1967).

There is considerable literature on the "fair representation" doctrine. See, e.g., Rabin, The Impact of the Duty of Fair Representation Upon Labor Arbitration, 29 SYRACUSE L. REV. 852 (1978). It appears, however, that unions are not liable for mere mistakes (ordinary negligence) in representing a grievant. See Morgan, Fair is Foul and Foul is Fair—Ruzicka and the Duty of Fair Representation in the Circuit Courts, 11 TOLEDO L. REV. 335 (1980).

41. For example, consider our police discharge case. See supra text accompanying note 3. When the arbitrator indicated that he thought the testimony crucial and the parties' failure to call the witness disturbing, the arbitrator was "educating" the parties as to the perceived defect in the record. The arbitrator, unfortunately, inquired no further, but leaped ahead to suggest that he would call the witness, thus provoking an angry response from the union. Had he pursued the
sary, to help them solve it.\textsuperscript{42} In short, the arbitrator should play an \textit{educational} and \textit{facilitating} role.\textsuperscript{43}

We divide our arguments for the educator-facilitator role into two sets. The first is addressed to the parties themselves. The argument in brief is that it is in the parties' \textit{self-interest} to have grievance arbitrators assume some responsibility for developing a complete record by playing an educational and facilitating role. The second set of arguments involves the \textit{public} interest in truth-seeking and justice in arbitration, goals which will sometimes require arbitrators to go beyond a passive stance.

\textbf{A. Party Self-Interest}

The parties in any form of adjudication have a strong interest in knowing how they fare with the decision-maker. The decision-maker, in turn, should have a responsibility to inform them of his doubts and concerns. As Professor Fuller has expressed it,

I should like . . . to record my discontent with the implications sometimes drawn from the adversary system in my own country. One of these lies in the notion that a judge should throughout the trial remain passive; somewhat like a well-behaved child, he speaks only when spoken to. His role is thought of as being that of an umpire who is stirred to action only when he must resolve a dispute that arises between the contending lawyers. The notion is, I believe, based on a profound mistake. The essence of the adversary system is that each side is accorded participation in the decision that is reached, a participation that takes the form of presenting proofs and arguments. . . . [W]hen the party is given through his attorney an opportunity to present arguments, this opportunity loses its value if argument has to be directed into a vacuum. To argue his case effectively, the lawyer must have some idea of what is going on inside the judge's mind. A more active participation by the judge—assuming it stops short of a prejudgment of the case itself—can

\begin{footnotesize}
\text{matter with the city, he probably would have been told that calling the victim would somehow constitute an "admission" of the policemen's misconduct, and hence be irreducible as evidence against the city in the civil rights suit. But the arbitrator could have pointed out the probability that (1) the very act of discharging the policemen was itself an "admission" and (2) introducing as an exhibit in the arbitration a copy of the discharge letters was another "admission." For fuller discussion of this point, see infra text accompanying notes 107-08.}

Such education alone might result in the production of the witness. Indeed, in the policemen discharge case the arbitrator's persistence—even without any effort to deal with the city's concern about the civil rights suit—was apparently sufficient to induce the city to call the witness. The city, however, did not actually call the witness.

\text{42. For example, consider this case: A key witness is not produced, and the arbitrator inquires as to the reason. He is told that the witness is 74 years old and infirm. The obvious response is to suggest that the parties take a deposition, or arrange a conference telephone call, in which the arbitrator could listen to examination and cross-examination of the witness.}

\text{43. We are indebted to U.S. District Court Judge Jack B. Weinstein (Chief Judge, Eastern District of New York) for the descriptive terms, and for some ideas as to how the role can be carried out, based on Judge Weinstein's own experience as a federal trial court judge.}
\end{footnotesize}
therefore enhance the meaning and effectiveness of an adversary presentation.\textsuperscript{44}

Professor Fuller has applied this argument to labor arbitration as well.\textsuperscript{45} We would add that, if the arbitrator also assumes a "facilitating" role, he would further help the parties develop their best case and thereby enhance the effectiveness of adversary presentation. If fairness is to be served, the arbitrator must sometimes aid the parties by candidly disclosing his tentative appraisal of the factual issues, so that the parties will be encouraged to bring forward additional evidence.

Party failure to develop the strongest possible case for its position is not unusual.\textsuperscript{46} Sometimes it stems from the advocate's over-identification with the interests of the client and the resulting partisanship. More often, it comes from advocates in arbitration who are not trained in law or in the marshalling and presentation of evidence. But even if an advocate is highly skilled, he may be overburdened by excessive caseloads, and may not recognize that he has overlooked a key witness. Or he may recognize the problem but believe that it is too late to do anything about it. These factors can either delude the advocate into believing that he is performing well or produce an awareness that he is \textit{not} being effective without an accompanying understanding of just what to do about it. An arbitrator may significantly aid a party by pointing out an apparent weakness in its case.

Perhaps such considerations led the National Academy of Arbitrators, the American Arbitration Association, and the Federal Mediation and Conciliation Service to include in their Code of Professional Responsibility for labor arbitrators, as an "explanatory comment," the following: "An arbitrator may \ldots request that the parties submit additional evidence \ldots at the hearing \ldots."\textsuperscript{47} That the arbitrator may "request" the parties to produce a missing witness suggests at least a modestly activist role. At a minimum, it assumes that an arbitrator should not sit idly by if he believes he has not heard all the necessary

\begin{itemize}
\item 44. Fuller, \textit{The Adversary System}, in \textit{TALKS ON AMERICAN LAW} 30, 41 (1961) (emphasis added).
\item 45. "[I]t is the part of the wise arbitrator at some time, usually toward the end of the hearing, to convey to the parties some notion of the difficulties he finds in supporting or in answering certain of the arguments that have been addressed to him. \ldots Such discussions, initiated by the arbitrator himself, enhance meaningful participation by the parties in the decision and thus enhance the integrity of adjudication itself." Fuller, \textit{Collective Bargaining and the Arbitrator}, in \textit{COLLECTIVE BARGAINING AND THE ARBITRATOR'S ROLE, PROCEEDINGS OF THE FIFTEENTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS} 8, 25-26, 49A (1962).
\item 46. Professor Robert Rabin, an experienced arbitrator, commenting on the quality of representation in grievance arbitration cases, says, "Indeed, many cases, perhaps most, are not presented very well." Rabin, \textit{The Impact of the Duty of Fair Representation Upon Labor Arbitration}, 29 \textit{SYRACUSE L. REV.} 851, 866 (1978).
\item 47. \textit{CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES} § V(A)(l)(b) (National Academy of Arbitrators 1974).
\end{itemize}
testimony.\textsuperscript{48}

While many advocates will agree with our position,\textsuperscript{49} others may feel that arbitrator intervention, even if limited to an educational and facilitating role, will only help their opponent. Advocates who are better trained, have smaller caseloads, or have more assistance than their opponents may feel that any possible benefit to them will be outweighed by the benefits to their adversaries. They would prefer a passive arbitrator.

To this we have two responses. First, even the best advocate can sometimes err. Accordingly, the question for the self-confident advocate is whether she is willing to run the risk of losing a case because the arbitrator has failed to speak up.

Our second response answers what is implicit in the argument of the self-confident advocate: that the “free market” ought to be allowed to operate in the arbitration context. In other words, “may the best advocate win, and let the chips fall where they may.” While we have previously identified this as an argument for arbitrator inaction,\textsuperscript{50} we believe that the free market analogy is simply inadequate in the arbitration context.

In collective bargaining, where the issues are wages, hours, and working conditions, a social consensus as to the proper resolution of the issues is rarely to be found. For instance, there is no generally accepted theory of distributive justice with ready answers to questions such as “What is a fair wage?”\textsuperscript{51} Accordingly, in collective bargaining, it is sensible to let “market forces” operate within very broad limits. Once a contract has been forged, however, “justice” is more easily found, since the search is narrowed considerably by the terms of the agreement. The questions are no longer broad ones like “What is a fair wage?”, but narrower ones like “What are the grievant’s rights under Article XIII, Section 3, covering involuntary transfers?” To some considerable extent then, a just answer, an answer derived from the contract, can be found.

\textsuperscript{48} The case for arbitral intervention could be put in terms of “righting the balance” between advocates of very uneven capability. We do not use this theory, although implementation of the educational-facilitating role, as we define it, may often have this balancing effect. The justification we offer (assuming the self-interest rationale for activism is rejected) is securing justice in arbitration; see infra text accompanying notes 73-75.

\textsuperscript{49} That an advocate accepts the arbitral role suggested here, however, does not mean that she will always be happy with the result. If, for instance, the arbitrator voices concern about a missing witness, and the employer decides to produce the witness, and that witness’ testimony destroys the union’s case, the union’s advocate may be unhappy or even angry with the outcome. However, so long as the union’s advocate thinks the arbitrator acted properly and that he would behave in the same fashion if the parties’ positions were reversed, we need not concern ourselves with the reaction to a particular exercise of that role.

\textsuperscript{50} See supra text accompanying notes 38-40.

\textsuperscript{51} See, e.g., N. Rescher, Distributive Justice 73 (1966).
Justice in a labor case is not only good in itself but can also serve party self-interest. For employers, just results in arbitrations can promote labor peace, high morale among employees, and job satisfaction. For unions, just awards avoid employer resentment and anger, which can easily spill over into negative and hostile attitudes toward settlement of grievances, and even into the negotiations for a new contract. The question, then, for the advocate who believes that she is so competent that she will lose more than she will gain from arbitral activism is whether she desires a just result or merely to win at all costs.

If parties accept our argument for a modest degree of arbitrator activism, based upon their own self-interest, the risks that arbitrator intervention will frustrate the goals of arbitration are slight.\textsuperscript{52} If parties believe that they will gain from the arbitrator's educator-facilitator role, it presents little threat to the acceptability of awards, to the dignity and autonomy of the parties, or to the reputation of labor arbitration generally.

\textbf{B. Public Interest: A Broader Perspective on the Educator-Facilitator Role}

Quite apart from party self-interest, the public interest in labor arbitration may justify the educator-facilitator role. The community has an obvious interest in a dispute-settlement process that affects the vital interests of thousands of employers and millions of workers in both the private and public sectors. Society encourages, reinforces, and shapes the use of the arbitral process. The provision for arbitral subpoena power,\textsuperscript{53} for example, or the rule that exclusion of pertinent evidence is grounds for vacating an award,\textsuperscript{54} suggests a legislative commitment to truth-seeking. An arbitration statute in an important sense embodies certain social values.

Thus, while the arbitrator owes his existence to the agreement of the parties and these parties are given great latitude in structuring the arbitral process, there are accepted principles and practices which limit our deference to this consensual arrangement. For example, participation by an arbitrator in a rigged award is universally condemned.\textsuperscript{55} Along the same lines, it is accepted practice—indeed, a responsibility of the arbitrator under section II-I of the Code of Profession Responsibility—that the arbitrator examine and pass on the reasonableness of any consent award.\textsuperscript{56} These rules suggest values going beyond the self-in-

\begin{itemize}
\item \textsuperscript{52} \textit{See supra} text accompanying notes 33-37.
\item \textsuperscript{53} \textit{See}, e.g., \textit{CAL. CIV. PROC. CODE} § 1282.6 (West 1972).
\item \textsuperscript{54} \textit{See}, e.g., \textit{id.}
\item \textsuperscript{55} \textit{See supra} note 8.
\item \textsuperscript{56} \textit{CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES} (National Academy of Arbitrators 1975).
\end{itemize}
terest of the parties. Finally and generally, the social concern with the quality of the employer-employee relationship may justify arbitral activism. 57

What then should society expect from arbitration? Justice is a goal, both in itself, and as a means of attaining other goals, such as labor peace. Since unjust decisions may cause unrest in the workplace, and thereby hinder efficiency and productivity, the public has an interest in just arbitration decisions. 58 Moreover, unjust decisions may be resisted, leading to protracted litigation over the validity of the award. Unjust decisions compromise the reputation of arbitration generally and may therefore undermine its effectiveness as the last step in the settlement of labor disputes. Society’s interests in preserving industrial peace, while protecting and promoting arbitration as an alternative to oft-overworked judicial and administrative agencies, would consequently be endangered. 59

Given the social interest in achieving justice in arbitration, it follows that procedures helping promote justice should be encouraged, unless their costs are too high. Obviously, the development of a complete record in arbitration—both testimonial and documentary—helps produce accurate findings of fact, and hence lays the foundation for correct application of legal standards (i.e., the provisions of the con-

57. Our promotion of the educator-facilitator role may find some support in the broad social concern with the quality of the employer-employee relationship—a concern which goes beyond the immediate parties and one to which the arbitrator should be sensitive. Obviously, as a society we are well past the point where an employer can deal with employees as he wishes. Numerous statutes have been enacted—for example, wage and hour, anti-discrimination, and occupational health and safety legislation—evidencing social interest in the employment relationship. Although these statutes address particular problems, together they evince a more general concern with the quality of the employment relationship and its social impact. See generally Landis, Statutes and the Sources of Law, in Harvard Legal Essays 213 (1934).

58. Justice in the arbitration process is important on both substantive and formal levels. "Substantive justice" refers to satisfying reasonable expectations which derive from the contract. "Formal justice" refers to equality of treatment among similarly situated persons, that is, consistent application of rules.

59. For a strong statement of the public interest in arbitration, including its utility as an instrument of justice for the industrial community, see Meltzer, Ruminations About Ideology, Law, and Labor Arbitration, in the Arbitrator, the NLRB, and the Courts, in Proceedings of the National Academy of Arbitrators 6-7 (1967).
tract). If the arbitrator, by playing an educational and facilitating role, can aid in developing a complete record, justice is served.

We can put our argument another way. Although the arbitrator's primary responsibility is to the parties—the legal entities known as "employer" and "union"—she also has responsibilities to others. She has responsibilities to the grievant represented by the union, and to the public and its interest in arbitral justice. The union is an artificial person; so too usually is the employer. But real people are represented and affected by these artificial entities; their interests must be protected as well.

In our discharged police officer case,60 the city's advocate surely realized that failure to call the arrestee seriously weakened his case. Evidently he had decided that it was more important to protect the municipal taxpayers from potential liability in a civil rights suit than to insure that the discharge was upheld by the arbitrator. But who represented the interests of future arrestees who might come into contact with the officer? And who represented the public interest in insuring legally correct and humane treatment in its jails? Not the local prosecutor; he had already decided to leave the entire matter to the city to handle through its discharge procedure. Perhaps the arrestee would receive money damages from the city in his civil rights suit; but that would not insure that the police officers—if they had abused their offices—would be disciplined or discharged. Thus, if the arbitrator had not intervened to inquire about the absence of a key witness, important public interests could have suffered.61

In short, social interest in justice, and the need for effective representation of interests beyond those of employer and union, justify a modest degree of arbitrator intervention to insure a complete record.

VI

THE EDUCATOR-FACILITATOR ROLE— IS THE PRICE TOO HIGH?

We have argued that, even if parties refuse to accept the educator-facilitator role as a matter of party self-interest, the public interest in truth-seeking and arbitral justice justifies that role. Performance of that role, however, may undermine some of the goals of adjudication. If so, we must weigh the costs against the benefits.

60. See supra note 3 and accompanying text.
61. It is significant that, in the actual case, the arbitrator's decision to give lengthy suspensions (without back pay) rather than discharge the offending policemen, drew criticism from the media. This indicates that the public is interested in the results of at least some arbitration proceedings, and helps refute the claim that arbitration is only a matter of self-government created by and confined to the parties.
If the arbitrator handles the missing witness problem in a clumsy fashion—for instance, by raising the issue in a room full of people—he could harm advocate dignity and adversely affect advocate-client relations. Common sense and tact, however, should normally prevent such consequences.\textsuperscript{62}

If arbitral intervention results either in the production of the witness or some adequate substitute, and the resulting testimony has a decisive effect on the case, the losing party may become annoyed with the arbitrator. This, in turn, might affect the acceptability of the award or even damage the reputation of arbitration as a dispute-settlement mechanism. On the other hand, if as we have argued, justice in arbitration is an exceptionally important goal, arbitrators should be prepared to live with criticism resulting from disappointment. And since grievance arbitration is well-rooted in American labor relations, occasional and modest arbitrator activism will not seriously threaten its stature.

Arbitral activism arguably could encourage sloppiness and inadequate advocate preparation and presentation. There are at least two answers to this contention. First, parties are entitled to know how their case is viewed by the decision-maker; this benefit should not be sacrificed merely to induce higher standards of advocacy. Second, arbitrator intervention may actually encourage advocates to be more careful in the future, both by showing them what to do, and by giving them an incentive to avoid sloppy performance. No advocate wants the decision-maker to call attention to a deficiency in his presentation, no matter how tactfully the intervention is performed.

A further objection is that the arbitrator might not educate the parties properly. This risk undeniably militates against the arbitral role we espouse, but if the advocate has doubts, he can request a continuance to do his own research and reach his own conclusions.

Still another possible cost of arbitral intervention could be interference with an advocate's strategy. Advocate A often knows in advance which witnesses his opponent (Advocate B) will call. The arbitrator usually arrives at the hearing knowing nothing of the case, let alone the possible need for an additional witness. If A knows that B is not planning to call Witness W, A will probably decide not to call Witnesses X and Y, whose testimony would contradict that of W. The arbitrator, however, may decide that W's testimony is crucial, mention it to the advocates, and be told by B that he will call W.

A now has to readjust his strategy and arrange for both the interviewing of X and Y and their presence at the hearing. This is inconvenient, but is unlikely to do fundamental damage to A's case. Any claim of surprise or lack of opportunity to present rebuttal testimony can be

\textsuperscript{62}. See infra Section VII.A.
remedied by granting a continuance so that A can prepare X and Y. Of course, A might have preferred to present X and Y at some other point in the hearings, but this tactical advantage does not seem important enough to justify requiring the arbitrator to remain silent when she discovers that an important witness will not testify.

Finally, it might be argued that an arbitrator who discovers the absence of a key witness, and is successful in persuading one of the parties to call her, may be so enamoured of his own contribution to the proceedings as to be unable to appraise the resulting testimony fairly. The witness, however, will be actually called and examined by an advocate, on the basis of her own judgment; the arbitrator has merely suggested the calling of the witness.

To be sure, we could be mistaken about the apparently small costs and large benefits of modest arbitral activism. But this additional step in truth-seeking is not radical, and we believe that some arbitrators are now doing some of what we suggest. The arbitrator-author has tested the educator-facilitator role without apparent adverse effects. We encourage arbitrators and parties to experiment with this role and determine whether, as we believe, the benefits greatly exceed the costs.

VII

THE EDUCATOR-FACILITATOR ROLE—SOME CONCRETE SUGGESTIONS

Following is a series of suggestions describing how an arbitrator should fill the educator-facilitator role. Not only will such suggestions aid arbitrators who share our views, but more importantly, they will aid the reader in appraising our analysis. Our suggestions begin with minimum arbitrator involvement and work up to maximum action (i.e., calling the witness).

A. Making an Initial Approach

The arbitrator must first decide whether the missing testimony is crucial. Sometimes, this will be difficult to determine, given that the arbitrator may be unable to sort out the issues and marshal the facts in the middle of a tense proceeding. When in doubt, though, he should raise the missing witness issue. It would be better to discover then whether he needs the evidence rather than to realize, weeks later, upon

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63. Evidence on arbitrator custom and practice when the missing witness problem arises would be helpful to our analysis. We have not attempted a survey here, however. We offer only our impressions, based on observations and conversations with and about arbitrators. We think that arbitral practice varies widely, with some arbitrators very passive and others quite active. We also suspect that some arbitrators do not have a consistent approach to the problem, but vary their conduct with the circumstances.
reviewing the case, that he should have raised the matter with the parties.64

The arbitrator must also decide whether non-production of the witness—even though her testimony is crucial—is justified by some other factor. For instance, if relatively little is at stake in the case and it would require great effort and expense to locate the missing witness, it would be sensible to drop the matter.

In making the above decisions, though, the arbitrator must be fully aware of his own motives. Self-awareness must include efforts to avoid any desire to dominate, to "show off" or to shock. Monetary self-interest must also be considered. Often if the missing witness is to testify, another hearing will be required and, since arbitrators are paid on a per diem basis, another hearing may mean several hundred dollars more in the arbitrator's pocket. It follows that, before deciding that the testimony of a missing witness is essential, the arbitrator should be certain that neither psychological nor monetary self-interest is at the root of the decision to intervene.

The need for courtesy, tact, and good judgment requires little discussion. The advocate who has failed to call a witness—whether from ignorance, carelessness, or deliberate decision—may resent arbitrator intervention, especially when the "client," for example, the grievant or the employer's chief executive officer, is present in the hearing room. To avoid embarrassing a party, the arbitrator may communicate *ex parte* with one of the advocates regarding the missing witness. We counsel strongly against such a course of action. *Ex parte* communications between decision-maker and advocate are frowned upon in all parts of our legal system, and with good reason. The decision-maker may learn something influential from one side to which the opposite is never able to respond, thus subverting a basic principle of procedural fairness. Moreover, for the arbitrator to be seen talking privately to one side may excite suspicions and fears by the other side, and thus compromise the apparent fairness of the proceeding.

We suggest the arbitrator talk privately with both advocates to minimize the potential embarrassment. Such a private discussion, like an *in camera* conference in judicial proceedings, might also prevent "grandstanding" by the other advocate. That is, an advocate who appreciates the reasons for the arbitrator's actions would be prevented from protesting loudly and dramatically in the presence of the client.

Tact and skill may also be required when dealing with the party who might be harmed by the witness' testimony. Its advocate may wonder why the other side has not called a witness whose testimony

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64. Of course, the arbitrator could request a reopening of the hearing, but this course of action would create delay and additional expense, frustrating the avowed aims of arbitration.
clearly would support its case. For the arbitrator to now ask about the witness may dash hopes and provoke irritation. In such a situation, the arbitrator may be called upon to justify his educator-facilitator role. Indeed, he may have to have some courage to intervene at all; passivity is the easier course of action. If a party challenges intervention as beyond the proper arbitral role, the arbitrator could perhaps respond that, while the intervention aids the opponent in this instance, the tables could be turned in the future. On an appropriate occasion, the arbitrator may also wish to stress the public interest in arbitral justice.

Even after the arbitrator overcomes any initial negative reactions, he may have to exercise considerable skill in identifying party motives, evaluating the reasons given for failure to call the witness, and devising imaginative solutions to problems. For instance, assume that the arbitrator has carefully considered the need for the missing testimony and has concluded that the issue should be raised with the parties. He should first note the absence of the witness and give his views as to why the testimony seems important. Educating the parties in this fashion may end the matter; the party which might have been expected to call the witness may agree to do so. Often, however, the party may decline to call the witness and may or may not state its reasons. The arbitrator’s role now is to ascertain the reasons underlying that decision, evaluate and discuss them with the parties, and, if necessary, suggest the potential consequences of a failure to call, as well as possible alternatives to calling, the witness.

Sometimes, the arbitrators will quickly be persuaded to drop the matter. Imagine, for example, a discharge case in which the employer has raised nine separate incidents of employee misconduct and poor work performance. The arbitrator is dissatisfied with the testimony as to one incident, and so informs the employer’s advocate. The latter replies that the particular incident of poor work performance is relatively minor, and that the other eight incidents are more than sufficient to sustain the charge. If the arbitrator concurs, the matter should be dropped.

If the arbitrator continues to believe in the importance of the testimony, however, he might suggest other methods of securing it. Suppose the party explains its failure to call the witness on the ground that she is in the hospital, or has moved away. The arbitrator should suggest a written deposition, a videotaped deposition, or a visit by the parties and the arbitrator to the hospital. Here, the arbitrator plays a facilitating role.

**B. Using the Rules of Evidence**

The arbitrator can sometimes clear up the problem if he is aware
of the rules of evidence and their relevance, if any, to arbitration proceedings. The following examples illustrate this point.

1. The Voucher Rule

The lawyer for one of the parties may argue that it is too risky to call a witness whose testimony may be unfavorable because the voucher rule precludes impeaching the witness' credibility. The knowledgeable arbitrator will reply that the modern rules of evidence, such as the federal rules, have abandoned the voucher rule and that there is no reason for arbitrators to follow it. The arbitrator will thus be able to reassure the advocate that, should the witness' testimony turn out to be hostile, the advocate will nevertheless be free to cross-examine her own witness. The arbitrator might further explain that an arbitrator will not identify a party with a particular witness to the detriment of that party. While there may be such a risk in a jury trial, it is absent in an arbitration.

Indeed, neither party may want to call a witness whose testimony is uncertain. If, for instance, the witness is a fellow-employee of the grievant, and an honest rendition of what she saw and heard would hurt the grievant, the fellow-employee may feel caught in the middle. If she tells the truth, she may incur the hostility of the grievant, other fellow-employees, or the union. If she lies or shades the truth, she may incur the hostility of the employer. Both parties will be aware of this, and neither may want to risk calling the witness. The witness herself may try hard to avoid becoming involved. Where the arbitrator senses this problem (a red flag being any case in which the missing witness is a fellow-employee of the grievant), the arbitrator should encourage the parties to produce the witness. Besides assuring the parties that they may cross-examine any witness they call, and that the decision-maker will not identify the witnesses with the party which calls them, the arbitrator may point out that, although no one can be sure of the witness' testimony, the evidence could be important to achieving a just result. Possibly both parties could jointly call the witness with each free to examine her at length.

65. For discussion of the voucher rule, see E. Cleary, McCormick on Evidence 75-78 (2d ed. 1972).
67. Writing in 1958, Professor Willard Wirtz stated that traditional practice in arbitration was for the employer not to call as witnesses fellow-employees of the grievant. Wirtz strongly criticized this tradition, urging that, where necessary, the arbitrator himself call such a witness. Wirtz, Due Process of Arbitration, in The Arbitrator and the Parties, Proceedings of the Eleventh Annual Meeting of the National Academy of Arbitrators 18-19 (1958). Whether or not this tradition still continues, we do not know. If it does, we would agree with Wirtz's criticism, although we would favor the arbitrator's calling the witnesses only after the
2. The Hearsay Rule

Imagine a case in which the party has introduced an eyewitness' written statement. Although hearsay, the statement has been accepted into evidence. To determine the weight to be given the statement, however, the arbitrator must quickly decide whether the statement either falls within an exception to the hearsay rule or has inherent reliability. If neither, and the issue is a crucial one, the arbitrator will hesitate to give much credence to the statement, given the absence of the cross-examination safeguard. If she points this out to the appropriate party as a part of her obligation to let the parties know her doubts and concerns, the witness will often be produced so that through cross-examination all concerned will have greater assurance that the witness is telling the truth.

3. Negative Inferences

While drawing inferences from a party's failure to call a witness is a delicate matter, there are certainly some situations where it is appropriate to do so. Suppose that during a discharge case the union has not produced an alibi witness, who is the discharged grievant's friend and has no connection with the employer. The arbitrator could appropriately draw an inference against the union that the friend's testimony would be unfavorable. There would appear to be few other reasons why the union would not produce the witness. If such an inference is appropriate, the arbitrator should point this out to the union's advocate. The advocate would thus be given an opportunity to produce the witness or explain why the witness has not been called.

4. The Burden of Proof

Occasionally, the arbitrator can induce a party to call the missing witness by candidly stating his tentative view of the weight of the evidence on the issue, and how that relates to the burden and standard of proof. Consider again the police discharge case and assume that the employer has introduced several witnesses in support of its claim that the policemen assaulted the arrestee. The union has also introduced much contrary testimony. The arbitrator cannot determine what occurred in the police station. He does know that the arrestee has not been called, that the burden of proof in a discharge case is on the em-

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68. Most arbitrators will admit hearsay into evidence, but give it only "the weight it deserves."
69. See E. Cleary, supra note 65, at 656-58.
70. See supra note 3 and accompanying text.
ployer, and that, because the conduct charged involves criminal behavior, the standard of proof which arbitrators usually require is "beyond a reasonable doubt." The arbitrator should point out these three facts to the employer's advocate, so that the advocate is fully aware of the risk he is running by failing to call the arrestee.

C. Evaluating Parties' Tactics

There will be times when a Party A justifies the failure to call a crucial witness on "tactical" grounds. The arbitrator ought not to accept this explanation at face value and should instead ask opposing Party B whether it will call the witness. Since A's "tactical" reason for not calling a witness may well be a belief that the witness' testimony will help B, the arbitrator's question directed to B may result in B calling the witness, now that B has been "educated" about the importance of the testimony.

On the other hand, A's reluctance may be for other reasons, such as doubt as to whether the witness observed enough of the disputed event to make his testimony worthwhile. In this situation, B may have the same doubts. B may feel satisfied with its case and believe that it is A's burden to produce the witness. This would force A to call the witness, or to adhere to its "tactical decision," or to reveal its real motives. No script can be written for the arbitrator in this situation. Appropriate responses range from dropping the matter altogether to stating an intention to draw an adverse inference against one of the parties.

It is even possible that both parties may rely upon a "tactical decision" to justify a failure to call the witness. Here too the arbitrator should inquire further. Perhaps this case is a rigged award and a witness' testimony would exculpate the discharged employee. Since it is generally agreed that arbitrators have some responsibility for preventing such abuses of the arbitral process, the arbitrator should explore further why neither side will call a key witness.

D. Exploring the Potential Relationships Between the Arbitration and Other Proceedings

Sometimes the arbitrator can eliminate the problem of the missing witness if he knows how other legal proceedings operate. In our police discharge case, the arbitrator could suggest that the arbitration be adjourned pending completion of the federal civil rights suit, thus obviating

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71. Where the grounds for discharge involve conduct which is criminal in nature, many arbitrators will apply the criminal standard of proof, rather than the "preponderance of the evidence standard." F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 623 (3d ed. 1973) and cases cited therein.

72. See Fuller, supra note 36, at 20-22.

73. See supra note 3 and accompanying text.
ing the city's need to call the arrestee in the arbitration until that time. Indeed, the pending arbitration may convince the federal court to advance the civil rights suit on its calendar in order to prevent undue delay of the discharge dispute.

Similarly, if a criminal action against the policemen were pending, the arbitrator might suggest postponing the arbitration until the criminal case is resolved. If the case results in a conviction, the grievant probably would not pursue his grievance. Even if grievant and union elect to continue with the arbitration, under modern rules of evidence, the conviction would be admissible in the arbitration,\textsuperscript{74} and thus would aid the decision on the grievance. If the criminal case against the police officers results in an acquittal, the employer might decide to drop the matter. If the employer continues to press the discharge case in the arbitration, the judgment of acquittal—assuming that the arbitrator would apply the “beyond a reasonable doubt” standard of proof\textsuperscript{75}—could be accepted into evidence.\textsuperscript{76} Postponement of the arbitration, in some cases, might also help assure the fairness of the criminal trial by preventing prejudicial publicity which could follow an arbitral finding of guilt.\textsuperscript{77}

On some occasions, a party will state its reason for declining to call a witness, and assessment of the validity of that reason will require legal research and probably an adjournment. In our police discharge illustration,\textsuperscript{78} the city's advocate might explain his reluctance to call the alleged victim as a witness on the ground that such an act would constitute an “admission” of the police officers' misconduct, introducible as evidence against the city in the civil rights suit.\textsuperscript{79} The arbitrator should request that the advocate consider the possibility that the city's conduct to date already constitutes an admission, and that calling the witness will not add to the risk of losing the civil rights suit. Specifically, the arbitrator should suggest that the very act of discharging the policemen was an admission, and that the further act of introducing the letter of

\textsuperscript{74} See, e.g., Fed. R. Evid. 803 (22), making admissible in other legal proceedings, judgments of conviction of an offense for which the penalty could be death or a sentence in excess of one year's imprisonment.

\textsuperscript{75} See supra note 71.

\textsuperscript{76} Collateral estoppel (issue preclusion) could not be invoked against the employer since he had no opportunity to litigate the matter in the criminal trial; the prosecutor was the moving party.

\textsuperscript{77} The effect of a criminal proceeding upon a subsequent arbitration is a complex one. However, the position taken here is reasonably consistent with that taken by Zack and Bloch, in their American Arbitration Association Study Guide, \textit{The Arbitration of Discipline Cases: Concepts and Questions} 67-68 (1979).

\textsuperscript{78} See supra note 3 and accompanying text.

\textsuperscript{79} See Fed. R. Evid. 613.
discharge in the arbitration proceeding was an additional admission.\textsuperscript{80} Presumably, then, not much more damage could be done if the arrestee appeared and testified.

\section*{E. Raising Broader Issues}

On occasion, of course, the arbitral intervention outlined above will not result in the witness being called. In such instances, and assuming the arbitrator is still convinced of the necessity of the testimony, the educational role we envision for the arbitrator would justify raising even broader questions with the advocates. For example, the arbitrator might ask if a bad decision in this case would worsen relations in the workplace. The reader might recall here our previous discussion of the relationship between arbitral justice and labor peace.\textsuperscript{81} As Dean Shulman has stated, "A court’s erroneous findings of fact in a particular litigation may work an injustice to the litigants but rarely disturb the future; similar error by an arbitrator may cause more harm by disturbing the parties' continuing relationship than by the injustice in the particular case."

The arbitrator might also ask if the decision will set a precedent for the parties in this plant and/or in other employer facilities. If so, the parties may want to insure that a complete record is developed.\textsuperscript{83} Further, the arbitrator might want to point out to a recalcitrant union the danger of a duty of fair representation suit by the grievant should the union lose.\textsuperscript{84} Because such suits often involve the employer as co-defendant, the employer's advocate may also have an interest in this issue. The arbitrator must make clear that she is not making a threat, but seeks only to prevent further litigation with its attendant expense, delay, and uncertainty. Furthermore, the matter should not be raised in front of the grievant, lest the arbitrator be accused of encouraging a suit against the employing parties.

Different adverse consequences could follow for an employer, or its advocate, if the employer performs miserably in arbitration and loses the case. Outside counsel always face the possibility of a malpractice claim. Or, in our police discharge case,\textsuperscript{85} an unwarranted or suspicious failure to call the arrestee could lead to bad publicity, an official

\textsuperscript{80} For discussion of these kinds of admissions, see Cleary, \textit{supra} note 65, at 630-31, 635, 650-51.

\textsuperscript{81} See \textit{supra} text accompanying notes 50-52.


\textsuperscript{83} Of course, the arbitrator usually will not know the answers to questions of this sort, but this should not deter him from raising them with the parties.

\textsuperscript{84} See \textit{supra} note 40 and accompanying text.

\textsuperscript{85} See \textit{supra} note 3 and accompanying text.
investigation, or even some form of litigation against those responsible for the failure to prosecute the case with due diligence. For example, a poorly prepared, half-hearted arbitration presentation by the city might, we think, be used as evidence in a federal civil rights suit against the city for failure to discipline police in the face of numerous complaints.\textsuperscript{86} In addition, the advocate's behavior may raise the spectre of collusion and may thus involve a violation of professional ethics. A municipal attorney's ongoing relationship with the police may be so close that it would be professionally irresponsible for the attorney to handle a police-discharge case.\textsuperscript{87} Poor performance in arbitration may be evidence that there was in fact a conflict of interest and that the attorney should not have been involved in the adversarial proceeding against these municipal employees. In situations such as these the arbitrator would be justified in advising the employer's advocate of the potential consequences.

\section{F. Calling a Witness with Party Approval}

Finally, the arbitrator may occasionally have to call the witness as his own, but at the request of one or both parties. Party A may believe that it would jeopardize its interests by calling the witness in the arbitration, but be perfectly willing or even eager to have someone else call the witness. We see no reason why the arbitrator should not do this, even to the point of using his subpoena power, if necessary. Party B may protest, probably out of a desire to avoid unfavorable testimony. The arbitrator may therefore have to defend his intervention both on grounds of party self-interest and the public interest in arbitral justice.\textsuperscript{88}

Both parties might request, or be persuaded by the arbitrator to agree to, his summoning of the witness. A good example is the fellow-employee/witness case, described above.\textsuperscript{89} If neither party will call such a witness, and if the parties decline to call her as a joint witness, perhaps they might be induced to let the arbitrator call the witness as his own.\textsuperscript{90}


\textsuperscript{87} Perillo v. Advisory Comm. on Professional Ethics, 83 N.J. 366, 416 A.2d 801 (1980) (appropriate representational responsibilities of municipal attorneys in adversarial proceedings against municipal employees).

\textsuperscript{88} See supra text accompanying notes 41-61.

\textsuperscript{89} See supra text accompanying note 67.

\textsuperscript{90} As we will discuss more fully in Section VIII.A. infra, an arbitrator's calling and questioning a witness creates the danger of arbitral identification with the witness. This risk, however, seems worthwhile, especially since the witness will be available for cross examination.
VIII

SHOULD THE ARBITRATOR EVER CALL THE WITNESS OVER THE PARTIES' OBJECTION?

If the arbitrator skillfully plays the educator-facilitator role, he will often succeed in having the witness produced, or in securing some satisfactory substitute, such as a deposition. Sometimes, however, the party which ought to produce the witness will steadfastly decline to do so. The advocate for that party may argue that the expense and delay involved in holding another hearing solely to hear the witness outweighs the benefit of such additional testimony. On a broader level, the advocate may argue that it is more important to protect and maintain some other interest of his client than it is to win the arbitration. Or, the advocate may offer a flimsy excuse and the arbitrator may suspect that the case involves a "rigged award."

Should the arbitrator now call the witness himself? A decision to do this is more serious than playing the limited educator-facilitator role, because its potential costs in terms of the various goals of adjudication are greater. For instance, calling the witness presents a greater threat to the arbitrator's actual or perceived impartiality in appraising the credibility and importance of the witness' testimony. If the employee is in the public sector, arbitral intervention arguably would interfere with the democratic process, that is, the authority of elected and politically responsible officials to make choices among competing goals. For example, if a city, in a case involving discharge of a policeman for abuse of authority, chooses to protect good relations with the police union and with the police force by not exerting maximum efforts to sustain the discharge of the erring officer, there is a strong argument that the arbitrator should not question the city's judgment.

Deciding whether or not to call the witness will often be delicate and difficult, and we cannot lay down any simple rules for handling the problem. Instead, we will list and discuss the factors which the arbitrator should consider before arriving at a decision. We then describe three hypothetical cases to shed further light on the problem.

A. Factors

1. Importance of the Missing Testimony

Before calling the witness, the arbitrator should reexamine the conclusion that the testimony is necessary. The arbitrator should be aware of the possible illegitimate motives that may influence his decision. For example, he may be influenced to adhere to his original judgment by factors such as the desire to seem firm and consistent, a

91. See supra text accompanying notes 33-37.
possible interest in extending the case to increase the fee, or a felt need to dominate the proceedings. There may be factors pulling him in the other direction: if he is to maintain personal "acceptability," a concern often felt by tenureless arbitrators, he will hesitate to annoy a party by taking a strong opposing stand. Or the arbitrator may want to "get this case over with," so that he can go on with other work. Although these factors make it difficult to rationally decide whether the witness is truly essential, the arbitrator must try.

2. Reasons Given for Not Calling the Witness

In assessing the reasons a party gives for declining to call a witness, the arbitrator must first try to determine a party's real motivations. It is possible, for example, that a party will not respond truthfully to the arbitrator's question. If the reason given for not calling the witness seems unconvincing, the arbitrator should inquire further in an attempt to discern the true "hidden agenda." In many situations he can be reasonably confident that the party's response is honest. For example, imagine a discharge case involving a police officer who caused a good deal of trouble for his superiors and was unpopular with other police officers. Since good labor relations with the police force appear not to be at stake and it is clear that the city wants to win the case, the reason it offers for not producing a key bystander witness—"we cannot find him"—is believable. In other situations this same reason might strike the arbitrator as transparent or unbelievable. As with any other inquiry, the arbitrator must assess the credibility of the speaker and the plausibility of his statements in light of the circumstances. In any case, the difficulties often involved in identifying and evaluating a party's reasons argue for considerable caution on the part of the arbitrator.

Assuming that the arbitrator has satisfied herself that she knows the real reason why the party will not call the witness, she must next appraise the validity of those reasons, e.g., whether producing the witness here would really damage the party's interest in another forum. The arbitrator must also weigh the substantiality of the interest which the party seeks to promote by its refusal to call a certain witness. The arbitrator must ask, for instance, if it is a purely pecuniary interest or outright indifference as to who wins the case.

Cases at the extremes illuminate the kind of analysis necessary. If, in a case without precedential value and involving $100 in holiday pay, the employer's advocate says that it simply is not worthwhile for his

92. The arbitrator may face a dilemma here. It may be that a party would disclose his real motive in a private conversation but would not make such a disclosure in front of the other party. However, a private conversation would entail an ex parte communication and such communications are improper. See supra text following note 64.
client to spend $150 obtaining a deposition from a witness living abroad, the matter should be dropped. Contrast the employee discharge case where the performance of the union’s advocate has been so poor, and his reasons for declining the arbitrator’s request to call the witness so specious, that the arbitrator suspects that the union wants the discharge upheld. This suspicion should push the arbitrator in the direction of calling the witness.

In appraising party reasons for declining to call a witness, and party interests, a factor to be considered is the limited “right” of a party to lose its own case. We do not believe that a party must use maximum effort to win every case. Within the limits imposed by the duty of fair representation and similar principles, a party is not even required to carry every dispute to arbitration. It can concede at an early stage of the grievance procedure, or compromise the case, even though it thinks that it might prevail in arbitration. Even when the party goes to arbitration, its duty has limits. For instance, it is not required to hire the best labor lawyer in town. A union has a right to use a staff representative, and the employer cannot be faulted if it uses its director of industrial relations. It follows from these propositions that a party is sometimes entitled to not call a witness, even though the refusal might jeopardize its chances of winning.

Suppose an important eyewitness to an occurrence is the president of the local union. His testimony is likely to be unfavorable to the union and the union does not call him. But the employer also fails to call him, possibly in order to avoid embarrassing the union official and incurring his wrath. If the arbitration happens to occur at a crucial point in the negotiations for a new three-year contract, the employer may rationally conclude that its overall interest in good labor relations is more important than its interest in winning this one arbitration.

3. Protecting Third-Party Interests

The arbitrator must, of course, be greatly concerned with protecting the individual interest of the grievant, who is not an actual party to the litigation. In the normal discharge case, for example, a decision sustaining the discharge may be more serious for the grievant than a minor criminal prosecution. It is arguable, therefore, that it is more important to insure that a witness for the individual employee be called than to require a witness for the employer to be called. We might feel a greater sense of injustice if an employee is wrongfully discharged than if an employee who ought to have been discharged is instead reinstated.

There will be other cases where group or collective interests will be

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of extreme importance. In our police discharge case, the interests of future arrestees and of the public in humane and legally correct treatment in jails is of major concern. In some cases, the arbitrator may be concerned about the effects of a bad decision on labor peace. Yet the arbitrator may be less adept than the parties in predicting the impact of a particular decision on labor relations in the particular enterprise. Accordingly, he should be cautious in invoking maintenance of good labor relations as a rationale for calling a witness.

There may also be cases where a party justifies a refusal to call a witness by pleading the interests of some third party. Take this case as an example: The school board has discharged an employee for allegedly making improper statements to a nine-year-old girl. The child has given a statement, which the board has introduced into evidence. The arbitrator is not satisfied with this hearsay and asks that the girl be called to testify. The board's advocate declines, arguing that it would be too embarrassing for the girl, and might even cause her permanent psychological damage.

The arbitrator should not accept this judgment too quickly. The board has no special competence in determining the effects of testifying on small children; the arbitrator might be just as competent. The parents of the girl, who have the most direct interest and the greatest competence, should be consulted. And the imaginative arbitrator, before deciding what to do, will consider how harm to the potential witness could be minimized. For example, she could exclude the press, public, and other witnesses. In short, in deciding whether to call the witness, the arbitrator must carefully weigh the importance of unrepresented or poorly-represented interests.

4. Potential Precedential Value of the Decision

Precedential value for the parties has already been mentioned. But a decision in a particular arbitration may have implications for other employers and unions in future cases.

Consider this example: A dairy has discharged an employee because he refuses to shave his beard; the dairy claims at the hearing that the beard threatens the purity of its products. The union responds that a snood (a kind of hair net) covering the beard provides adequate protection. The employer denies this. Neither party has called an expert witness, or, alternatively, both have called expert witnesses and their testimony is in hopeless conflict. The arbitrator wishes to hear an "impartial" expert witness, but the parties will not cooperate. If the arbi-

94. See supra note 3 and accompanying text.
95. See supra note 3 and accompanying text.
96. See supra text accompanying note 83.
trator knows that “beard” cases are currently an important issue in the settlement of grievances, he might reason that his decision could influence other decisions. Such reasoning might persuade him to call an expert witness himself.

More broadly, we are now confronted with the distinction between arbitration as a mechanism for resolving disputes, and arbitration as an institution for generating rules. In almost all adjudication, of course, there will be present an element of both dispute settlement and rule generation. To the extent that the parties take into account the results and justifications of prior arbitration awards (whether or not an opinion was written) the resolution of even one dispute will have effects extending beyond the immediate controversy. But it is helpful for analytical clarity to view the two functions as separate.

If dispute resolution, or rule generation for the parties, is primary, a strong (but not always compelling) case can be made for the proposition that the adjudicator should remain within the parameters set by the parties’ presentation of proofs and arguments. If the emphasis, however, is on rulemaking for these and other parties, our attitude may well shift. Even though an arbitrator’s decision lacks the legal force of a statute or administrative regulation, or the compelling force of stare decisis, it may nonetheless affect the decisions of others. The arbitral decision may have special weight if the arbitrator is well-known and highly respected. In these circumstances, limiting the arbitrator to the evidence and arguments made by the parties, in the name of responsiveness to party concerns, exacts a high price. The arbitrator must carefully consider whether that price ought to be paid.

The problem of accurately deciding a precedential case will be especially acute when technical matters are involved, as in the dairy example. Where neither party wants to produce an expert witness, and the arbitrator must resolve highly technical matters on an inadequate factual basis, the argument for the arbitrator calling an “impartial” expert is particularly compelling.

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98. Apparently, judges will unilaterally call witnesses where expert testimony is necessary to render coherent and to clarify complex or confused issues. See Scott v. Spanjer Bros., 298 F.2d 928 (2d Cir. 1962).

In these cases the judge may believe that he is doing more than settling a dispute. In certain situations rule generation may be his primary function, and the input of the parties may not adequately address factors which bear on the formulation of a sound, long-term rule. Since the rules he sets down must take account of applications to persons removed from the current parties and must be responsive to these other persons’ needs as well, it is not surprising that in such situations he looks for expert aid. The need for, and the extent of, such a practice will vary
5. Fairness of the Hearing

If the arbitrator calls the witness he may be forced to conduct the questioning himself, with all the attendant risks to neutrality. Although the parties can then cross-examine, a danger still exists that the arbitrator will identify with the witness and her testimony. The decision to call the witness follows a serious controversy with one or both parties, and the arbitrator, in an understandable desire to justify a controversial decision, may exaggerate the credibility and importance of the witness. The arbitrator may even have a preordained view of what the witness will say, and may steer the witness toward a particular version of the disputed events. The arbitrator may also protect the witness against cross-examination which threatens the integrity of that version, by, for example, sustaining objections to questions.

On the other hand, a concern for maintaining neutrality (real and perceived) may lead the arbitrator to over-compensate and give less weight to the testimony than it deserves. Further, the arbitrator may be in a very difficult position if a party objects to some of the arbitrator's own questions, for instance, on grounds that they are leading or irrelevant.

In theory, the arbitrator may be able to coolly appraise the credibility and importance of the testimony, even during his own questioning. In practice, though, this may be difficult. Even if the arbitrator believes himself capable of such a role-change, the losing party may not believe in the arbitrator's capacity to do so, especially if the testimony ultimately influences the decision. It is apparent that the arbitrator must carefully consider this real, and perceived, threat to impartiality.

6. Practical Problems

There may be expense associated with calling the "missing witness," such as a fee for an expert witness, or travel for a witness who must come from substantial distance. Normally, each party pays for its own witnesses. If a party objects to calling the witness, will it pay for such witness, or share expenses with the non-objecting party? Will the non-objecting party pay all such expenses? If the problem cannot be worked out with the parties, the arbitrator will have to investigate the subpoena powers to determine whether there is provision for paying witnesses.

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Finality of the Decision

In our police discharge case, failure to call the arrestee could easily result in an arbitral decision to set aside the discharge and order reinstatement of the policemen. That would be a disturbing resolution of the problem. But suppose the arbitrator knows that a criminal action against the policemen is pending. In that event, the arbitrator might rationalize a decision not to go beyond an educational/facilitating role in the arbitration on the ground that the criminal trial is likely to produce a complete record and a just result. That is, the prosecutor in the criminal case will almost surely call the arrestee as a state’s witness, thus making available to the decision-maker (judge or jury) that crucial testimony.

Party’s Legal Duty to Call the Witness

If, for instance, the arbitrator believes that the union’s failure to call the witness may involve a breach of its duty of fair representation, he should seriously consider calling the witness himself. This might save grievant, union, and employer the expense and delay associated with a fair representation suit, as well as promote justice in the arbitration. Gross and Bordoni, in their thoughtful article on the responsibilities of the arbitrator to enforce the duty of fair representation, argue that the arbitrator should call a witness even if the union’s failure to do so might not be so culpable as to involve a breach of its duty of fair representation, so long as the testimony seems critical to protect the grievant’s interest.

We do not go so far as Gross and Bordoni. Even if the arbitrator is convinced that the union has breached its duty of fair representation, he should consider other factors, such as the danger of jeopardizing the fairness of the arbitration proceeding, when deciding whether to call the witness himself. Moreover, the stronger the case against the union, the more likely it is that pointing this out to the union and employer will induce the union to call the witness itself.

Public or Private Status of the Arbitrator

Most arbitrators are “private” in that they are selected by the parties and do not occupy any official role. Some arbitrators, however, by
virtue of their membership in state or federal mediation agencies, occupy governmental positions since they are selected and paid by the state. Government arbitrators may be perceived as similar to judges and thus as having more responsibility for "doing justice" than would be the case for their private counterparts. The importance of this factor is hard to gauge; but public arbitrators ought at least to consider it when confronting a missing witness problem.

10. Misuse of Precedent

Use of a power in one instance may furnish an excuse for misuse of that power by someone else in another case. But this danger seems minimal in the context of arbitration because the need for "acceptability" is a very powerful check on arbitral misuse of power. Indeed, we think there is greater danger of under-use of arbitral power—including even the modest role of educator-facilitator—than there is of misuse of the power. Tenureless arbitrators may sometimes have to show courage and commitment if they are to be faithful to their multiple responsibilities.

11. Reputation of Arbitration

A failure to call the witness may result in a decision perceived as unfair and unjust by those with knowledge of the real facts with attendant damage to the reputation of arbitration.¹⁰⁵ On the other hand, the parties—or at least the losing party—may deeply resent the arbitrator's "taking over the case." The parties may regard arbitration as a less attractive form of dispute resolution. It may be that the first argument favoring the arbitrator's decision to call a missing witness will prove more persuasive; observers of the process, including the public, may tend to judge arbitration more by its results than by its procedures.

* * *

Depending on the facts in the particular case, some of the above factors will push the arbitrator toward calling the witness, while others will push in the opposite direction. We suspect, though, that it will be the rare case in which the arbitrator will feel constrained to call the witness himself. We think that an educational-facilitating approach will usually succeed in producing the witness or some acceptable substitute. When this does not occur, and the arbitrator is still persuaded that the testimony is critical, the factors arguing for deferring to party objections may often outweigh the factors arguing for calling the witness.¹⁰⁶

¹⁰⁵. See supra text accompanying note 82.
¹⁰⁶. Not to be overlooked is an arbitrator's self-interest in not upsetting the parties with his interventions. "Acceptability" may influence the arbitrator in not calling the witness. However,
B. Examples

Finally, to shed further light on how these factors might operate in concrete cases, we offer the following three illustrations.

1. The case involves only a small amount of money. No important third-party or public interests are involved. The decision will have no precedential value. If the witness is not called, it is unlikely that either party would be criticized or penalized in some other forum (a court, a union membership meeting, a newspaper editorial, etc.) for having failed to do so. While the missing testimony is very important, the cost in dollars to obtain it is almost as great as the amount in dispute. Moreover, calling the witness would mean another hearing and thus additional expense and delay. The arbitrator discusses the matter with the parties and one party strongly opposes calling the witness; the other party is indifferent.

Given facts like these, the arbitrator should not call the witness; the price of perfect justice would be too high.

2. The case is our police discharge case, and the missing witness is the arrestee, who is also the plaintiff in the civil rights suit against the city. The overall performance of the city’s lawyer during the hearing has not been impressive, and his argument for the city’s refusal to call the witness—that it would prejudice the city’s defense in the other litigation—is of doubtful validity. The local prosecutor has decided not to criminally prosecute the two policemen.

The hearing has gone on for several days, and the arbitrator, a member of a public arbitration tribunal, has not had a chance to appraise and weigh the mass of testimony. His tentative judgment, however, is that the case is a close one, and could come out either way. Thus, the testimony of the arrestee could conceivably be the decisive factor. If the arrestee’s story stands up under cross-examination, the discharge will probably be upheld. On the other hand, if the arrestee’s story is weak, in all likelihood the policemen will be found innocent of wrongdoing. In that event, a great injustice to the officers and their families would have been prevented. The arbitrator is reasonably confident that, if he calls the witness, the city will undertake the questioning, or if not, that he can perform the task without seriously compromising his neutrality.

The city has not argued that lenience towards the officers is essen-
tial to maintaining good relations with the union or with individual officers, nor does the arbitrator believe that this is a hidden goal of the city. The arbitrator is satisfied that if he chooses to protect the civil rights of the arrestee, at the possible cost of exposing the city to liability in the civil rights suit, such a choice would reflect the importance our society places upon the legal and personal protection of arrestees. On facts such as these, the arbitrator would be justified in calling the witness himself, even if such action would anger the city and its advocate.

3. The case arises in a small town, in which there is only one hospital. The hospital has discharged a maintenance man for allegedly making an indecent proposal to a 16-year-old female patient, while she was in her hospital room. There were no other eyewitnesses. The girl gave a full statement to the hospital authorities within a few minutes of the incident and this statement has been introduced in evidence.

The employee has testified and has denied everything. The hospital's advocate has asked the girl to appear and testify, but she declines because she does not want to be further involved. The arbitrator (selected from an American Arbitration Association panel) has suggested that the hospital subpoena the girl, but the hospital's advocate declines. He gives two reasons for this action: (1) The hospital does not want to offend the girl, a member of a prominent family which has given strong financial support and leadership to the hospital, and (2) forcing this patient to testify might discourage other patients (or even employees) from coming forward with derogatory information about employees in sensitive situations.

On facts like these, the arbitrator's choice is a perplexing one. Considerable merit inheres in both the hospital's arguments. On the other hand, without the girl's testimony, the employer's case is weak and the discharge unlikely to be sustained. If the employee is reinstated, and if he had indeed been guilty of misconduct, he might repeat

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108. Arbitrators sometimes are called upon to make a choice between competing values or goals, even though their choice is different from that of a public sector employer, and therefore arguably an interference with the democratic process. Suppose, for instance, that a city discharges an employee because he filed a worker's compensation claim. At the arbitration the city claims that its interest in employee "loyalty" and in saving money outweighs the individual's right to pursue a legal right. No one would fault an arbitrator who disagreed with the city, and held that the discharge, because it conflicted with an important individual right, was not for "just cause."

Though our problem is procedural rather than substantive, the analogy is clear: arbitrators may occasionally refuse to defer to the value choices of elected public officials, and such refusal is appropriate.

In the instant case, the choice between competing goals would be more difficult if the arbitrator knew, or suspected, that the city's motive was to avoid creating difficulties with the police force. Under those circumstances, the efficiency of the police force would be implicated, and the arbitrator might decide to let the responsible elected officials make the difficult choice between two important goals.
the misconduct, or even do something far worse. Calling the witness might prevent harm to some future hospital patient. But it might also harm the hospital; the girl and her family might blame the hospital, not the arbitrator, for involving the girl in the arbitration. And other employees might hesitate to "turn people in." Should either occur, the hospital's view of arbitration will not be enhanced. Of course, the hospital could rescind the discharge and moot the arbitration once it learned of the arbitrator's intention to call the girl. But this might embarrass the hospital, and could lead to public criticism.

Some of the factors we have discussed, such as the precedential value of the decision, seem irrelevant to this case. Other factors are relevant. These include the importance of the testimony, the strength of the hospital's reasons for refusing to call the witness, non-parties' interests, the effect on the fairness of the hearing, and possible damage to the reputation of arbitration, as well as doubt about the relative weight of these factors. The arbitrator's decision is indeed a very difficult one. In making that decision, she may wish to consult not only the parties but other arbitrators.

IX

SHOULD THE ARBITRATOR DISCUSS THE "MISSING WITNESS" ISSUE IN THE OPINION?

When the arbitrator writes the opinion, he will have to consider whether to discuss the "missing witness" issue. The answer will vary with the circumstances.

If the arbitrator decided to call the witness over party objection, he should discuss the issue and his reasons for calling the witness in the opinion. Such discussion, at minimum, would tend to convince the parties that he took their arguments seriously. Moreover, it might persuade the objecting party or parties of the wisdom of the decision, and might fend off criticism from others who learn about it. Moreover, a thorough, reasoned discussion in the opinion will help build a body of precedent, of value to other unions, employers, and arbitrators.

At the other extreme, if the parties and the arbitrator find a solution which meets his standards, e.g., he is persuaded that the testimony is not really crucial, or that the costs (monetary and otherwise) exceed the benefits of the testimony, he may choose to mention the matter only briefly or ignore it altogether. At all costs, he should avoid embarrassing either party or praising himself. On the other hand, if he and the parties have arrived at an imaginative solution to a particular problem, others may benefit if it is mentioned in the opinion.

In the middle of the spectrum will be those cases in which the arbitrator is dissatisfied with the outcome. For instance, he may still
consider the testimony crucial or believe that the union has violated its duty of "fair representation" by failing to call the witness. Nevertheless, for other reasons, he may still decide against calling the witness himself.

To safeguard the reputation of arbitration, as against readers of the opinion disturbed at the apparent failure of anyone (party or arbitrator) to perceive the absence of crucial testimony, the arbitrator should explain the reasons for his refusal to call the witness. On the other hand, he should not mention the relationship between the "missing witness" problem and a possible fair representation suit. To do so would invite an even angrier reaction from the union than if the arbitrator had simply called the witness at the arbitration. Moreover, given the sophistication of many employees about their union's duty of fair representation, it would seem unnecessary to mention this in the opinion. But a full account of the importance of the testimony and of his unsuccessful attempts to play the educational-facilitating role, might help resolve any fair representation claim, by providing an objective and freshly-recorded account of the events surrounding the missing testimony.

If possible, the arbitrator should raise with the parties his intention to discuss the missing testimony issue in the opinion. Parties might be embarrassed by such a discussion, no matter how carefully written; they should have an opportunity to present their concerns to the arbitrator. Moreover, there is always the possibility that a stated intention to discuss the issue in the opinion will finally persuade a recalcitrant party to call the witness.

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SUMMARY AND CONCLUSIONS

The missing witness creates a serious and complex dilemma for the labor arbitrator. As a practical matter it forces him to confront the question of his relationship to the parties before him as well as the question of the propriety of his calling the witness. There is no quick and easy answer to this dilemma. We have examined three possible simple solutions—to ignore the problem and rely on acceptability to the parties, to follow the law, and to do as judges do—and found them all wanting.

It is perhaps not surprising that no simple solution is apparent, for the problem involves fundamental questions about the goals of arbitration and the place of the arbitrator in effectuating these objectives. The arbitrator's response is necessarily premised—whether explicitly or not—on some conception of the role an arbitrator does and should play in the process. Rejecting the case for passivity, we argue for a modestly
active approach by the arbitrator—what we have called the “educator-facilitator” role. Through the use of concrete examples designed to illustrate what this role entails in practice, we have attempted to clarify the parameters of the approach and its implications for the missing witness situation.

Throughout our analysis we have attempted to account for the risks which our approach entails. But, we conclude that on the whole this approach serves the goals of arbitration. It makes for a more informed decision by the arbitrator and makes meaningful the parties' right to offer proofs and arguments for their positions. We find justification for it in terms of party self-interest, the social interest in regulating employee-employer relationships, and the maintenance of an effective and creditable dispute-resolution process which achieves just results.

Ultimately, if the parties do not call the missing witness, the arbitrator must confront the option of calling the witness himself. While we are quite cautious about this option, we do think there are circumstances, rare though they may be, in which the arbitrator should call the witness. While we are unable to offer a hard and fast line, we have identified and discussed in considerable detail a number of considerations which should be brought to bear on the decision and the directions in which they point. Our analysis here, we think, should provide significant guidance to the arbitrator faced with this difficult question. More broadly, we hope our effort in this article will stimulate thought about the various problems which confront not only arbitrators, but judges and other decision-makers as well.