

## PANEL THREE

JUDGE BONAPFEL: This final part of our program deals with affirmative dispute resolutions. And we're going to primarily focus on arbitration. We'll touch on some of the others. There's been a lot activity in the arbitration area recently with the intersection of federal arbitration act and the bankruptcy code. To help us explore this topic, we have two excellent panelists. First, Mr. Robert Meade, seated to my right, is a senior vice president for program development of the American Arbitration Association. As such he is responsible for expanding use of AAA services, assisting corporate, legal, and public sector communities in designing dispute resolution systems to meet their needs. Bob received a B.A. Degree from Syracuse University in New York, and then he joined AAA in 1967, and has eventually risen to become the vice president for case administration. In that capacity, he has overall responsibility administration of AAA's caseload, including construction mediation and arbitration. Among his other accomplishments, he has designed and implemented a mediation program to resolve construction insurance disputes arising out of Hurricane Andrew in Florida, which involved mediation of over 3,000 cases.

Marjorie Girth, seated to my left, is a professor and former dean at Georgia State University's College of Law. It has been said that a former dean is a dean who has lost her faculties. That does not apply to Dean Girth. She received her B.A. Degree from Mount Holyoke College and her LL.B from Harvard Law School. Following her graduation from law school, she practiced bankruptcy law in Trenton. She became a research associate with the governmental studies program of Brookings Institution in Washington, served on a team of experts who co-authored a book that reported a nationwide study of bankruptcy law titled *Bankruptcy: Problem, Process, Reform*, which became widely known to bankruptcy professionals and judges as the Brookings Study. She has taught at University of Buffalo in New York Law School, first as an associate professor, then as a professor, and then in 1992, she became the dean at Georgia State's College of Law, where she has been since. She has also taught as a visiting professor and visiting scholar at several law schools, including the University of Virginia, Emory, University of Warsaw (Poland), and Vytautas Magnus University in Kaunas, Lithuania. And she is a noted author and speaker on bankruptcy matters. And, I almost left this out;

she is an appointed roster member of the American Arbitration Association's Commercial Panel, so she is well qualified to talk about both bankruptcy and arbitration.

There are different types of alternative dispute resolutions that people talk about. What are they and what are the differences in them?

MARJORIE GIRTH: Well, the two basic choices are between arbitration and mediation. Arbitration involves a decision by a third-party neutral or perhaps a decision of a panel of three neutrals. It was instituted as a way to resolve civil law disputes more quickly with less formality and with less expense to the parties. And initially parties were often represented by advisors or advocates who were not lawyers. Over time, the lawyers have moved in to this field and Judge Bonapfel says to me, "Look, arbitration is no different from trial. It's just decided by somebody different." I think, depending upon the arbitrator's personal style, that that is not necessarily true. And the extent to which it is true may depend, of course, on the amount in controversy and the number of parties who are involved. But if it is not going to be true, there should be a less adversary, less painful, I would say, process of reaching the truth. Now, the other thing about the arbitrations which makes lawyers, I think, sometimes uncomfortable with them is that the usual rules of evidence do not apply and so the arbitrator can, in fact, pursue anything of interest to him or her as the attempt to reach a decision. But, in the bankruptcy context, as I'll say in more detail in a few minutes, if there is going to be an arbitration, it will be decided without the supervision of the bankruptcy judge. The results may be reported and have an additional issue decided by the bankruptcy judge, but the initial arbitration will occur elsewhere and be decided by someone else.

The contrast is with mediation in which there is not an independent decision maker, but the role of the mediator is supposed to be that he or she facilitates the parties reaching a settlement of their dispute. Theoretically, the mediator is not to get involved in the creation or molding or suggesting business but, of course, we all know those of who have worked with clients that clients often ask and parties to a mediation often ask things like, "Do you think this is the best offer I'm going to get? Or do you think I'm being unreasonable?" And the mediator may stray from what we think of as the classic model of mediation and may, in fact, get involved in fashioning the ultimate settlement. Any such settlement between the parties will have to be approved by the bankruptcy judge so that there is a basic difference in the economic effect and the decision-making effect of the two systems.

Now, recently, there has been, and especially in the 11th circuit, a flurry of cases on the question of when can arbitration be compelled in a case that involves a bankruptcy. There are two possibilities, again in terms of timing. Either arbitration may be on going at the time the bankruptcy petition is filed. And in that instance of course the automatic stay goes into effect and the bankruptcy judge will decide whether or not to lift that stay to allow the arbitration to proceed. The other possibility is that after the trustee takes a look at the debtor's situation, he or she may decide that there is a claim that they would like to pursue in the bankruptcy proceeding based on the preexisting contract between the parties, and they may be greeted when they attempt to pursue that claim with a motion to dismiss and a request to compel arbitration under the preexisting contract. So, you have those two separate time sequences under consideration.

Now, in this area where you have two competing federal statutes, the Federal Arbitration Act and, of course, Bankruptcy Code and, so, a judge who is faced with a motion to compel has to decide which statute's policy—provisions are going to be preeminent. We know that Congress has said that it feels strongly in favor of arbitration as a problem solving mechanism. Obviously, the bankruptcy code has its own structure for resolving disputes once the debtor needs to resort to its provisions. And, so, what has happened is the judges have been urged to develop a bright line for litigators to be able to assess in advance when an issue is going to be held in the bankruptcy court and when it is going to be referred to arbitration, when the arbitration is going to be compelled. There have been two efforts and bright lines, and it won't surprise any of you to hear that neither of them has succeeded completely. The first was the position that non-core issues in bankruptcy cases could be referred out to arbitration, but the bankruptcy judges should retain all issues related to core proceedings under Section 15728 USC. And, I think it is fair to say now that, among the circuits, there is a consensus that is pretty firm on the issue of referring out non-core matters to arbitration. However, the situation is still much more open on the question of whether to refer core issues out to arbitrators. And, increasingly, the bankruptcy judges are taking a look at whether such a referral would adversely affect, for instance, the development of a financial plan for a business reorganization in which case they would retain it. They have the discretion, in other words, to decide whether to refer out or to hold. Or in situations where the right itself is derived from the bankruptcy code, they will, of course, retain the matter. Now, I think the easiest right to think about under those circumstances is the bankruptcy discharge. That's not based on a preexisting contract. It obviously comes

from the code itself. It's core, without doubt, and there's very little litigation about bankruptcy discharge, because the judges do retain those issues without a big fight. Now, in addition to the core, non-core distinctions, other litigants have urged that the matter be compelled to arbitration, that the motion to compel arbitration be granted if the right is derived from something that the debtor did before the bankruptcy was filed. And that is referred to as a debtor derived right. Those do tend to be referred out. Again, unless there is some serious adverse affect, one of the cases in this—the material I've given you involves a situation where the party's agreement to arbitration put the tribunal in London, England under the international commercial arbitration rules. Well, this was a debtor that was attempting to reorganize financially under Chapter 11, and the bankruptcy judge said, "Although the right is debtor derived in this instance, allowing it to proceed at such a distance under uncertain circumstances is such that he could not agree to compel the arbitration elsewhere." But, increasingly, for instance, things like proof-in-lending claims under preexisting contracts or other statutory based claims that do not derive in the bankruptcy code are being referred out for resolution in an arbitration tribunal.

I have given you a series of citations at various levels of court in the 11th Circuit. It happens to be since late 2006 the place where these issues have been most actively litigated, and I've also given you recent opinions from other circuit courts of appeal, which impinge upon this question of how much discretion does a bankruptcy judge have to retain an issue or to compel the arbitration. They happen to be from the second, third, and fourth circuits. There are some cases at the bankruptcy judge level in other circuits, but I thought these would be the ones that could be most helpful to you and, in particular, I recommended some readings for you. I tried to restrain my instincts on the recommended reading front, but there is a recent article in the *American Bankruptcy Institute Law Review* by Professor Alan Resnick on the enforceability of arbitration claims in bankruptcy, which is very good, and then we didn't hear about it today in exactly this way, but there are mandatory arbitration clauses now in a lot of consumer contracts and a lot of employment contracts. And I've referred you to three articles: one in consumer finance, one in franchising agreements, and one in misdemeanor medical malpractice, which I think you might find interesting if you are coming up with that kind of context for a dispute about whether arbitration is going to occur. Now, in terms of the medical malpractice, effective January 1st of 2003, the American Arbitration Association decided that it would not accept claims involving an

individual action unless a post-dispute arbitration agreement existed. And I have a personal experience with which I'll close to tell you on that score.

I am, as I suspect a number of you are, a patient at the Emory Clinic, and I usually have routine appointments late in the day so that I don't come here and downtown, and back here and back down in the course of any one day. And one day I, feeling really quite well, went to the desk as I checked out and, as I was doing so, the person said to me, "Oh, there's just one other piece of paper that I want to you sign." And it was one 8 x 11 sheet and she said, "You don't have to read it just sign."

JUDGE BONAPFEL: Kind of like bankruptcy schedules.

MARJORIE GIRTH: Just sign. And, of course, it would have been my consent to refer any disputes that I had in the future with the Emory Medical Clinic to arbitration. And I said, "What's going to happen if I don't sign?" And she said, "Oh, nothing, but, I mean, you really would be the first one not to sign." I did not sign in case you have any doubt about that—that gives you some idea about how these consumer arbitration clauses may be presented and encouraged.

JUDGE BONAPFEL: Does that provide a basis for resisting arbitration? Suppose that I've signed a mortgage and, in that mortgage clause, it has this type of thing that I don't need to read because everybody signs it. And then I get into bankruptcy and as Howard Rothbloom, I don't know if he is still here, but is he going to be able to file a lawsuit to control that problem or are we going to get involved in arbitration?

MARJORIE GIRTH: Well, he may want to file a lawsuit. Increasingly, as long as these clauses are presented in plain English, they are defeating efforts to avoid them as unconscious able and, therefore, they become enforceable, and it's that concern which is reflected in the recommended readings that I gave you in the three contexts where there are high volume uses of arbitration clauses in underlying contracts.

JUDGE BONAPFEL: What if the debtor can't afford to pay for the arbitrator? Does that make a difference?

MARJORIE GIRTH: Well, I think we're going to have Bob talking about the details of how these cases proceed, but there are differentiated fee schedules now for consumers that are really quite manageable.

JUDGE BONAPFEL: Okay. I can't give you the citation to this, which is not very helpful I know, but there is a case, I think it's in Pennsylvania, where a bankruptcy judge did compel arbitration, but basically concluded that it would be prohibited for the debtor to have to pay for it, so he ordered arbitration to proceed, but provided that that the creditor would have to bear the cost of it if they wanted to proceed on that basis.

MARJORIE GIRTH: Well, the cost can always be shifted. I should have said that sooner. So that's not surprising to have that kind of result.

JUDGE BONAPFEL: Okay. Well, Bob, if I'm a bankruptcy lawyer and I'm representing the debtor, and the bankruptcy judge has said I got to go arbitrate this matter, how do I go about doing that as a practical matter? I don't even know where to find an arbitrator. Maybe the lender's going to find one for me or there's something in the contract that says according to the rules of the American Arbitration Association, where do I find those and where do I file discovery and stuff like that?

BOB MEADE: Well—

JUDGE BONAPFEL: That's a lot of questions.

BOB MEADE: I had a simple answer in my mind before Marjorie got into the end of her speech, because you raised the idea that consumers would be coming in perhaps and I think everybody knows that if you have a credit card in your wallet, there's an arbitration clause. If you have a cell phone, there's an arbitration clause. If you have a land-line phone, there's an arbitration clause, so there's a whole group of different kinds of people coming into arbitration and as Marjorie indicated, there is a reduced fee schedule for consumer cases. And, getting back on point, I just want to make that before we get into how does arbitration work.

In Paul's scenario, the case is now with us. The court has either referred it, and somehow it's in our hands. And we would treat it basically as either a consumer or commercial arbitration depending on whether it's an individual or a B2B relationship.

JUDGE BONAPFEL: B2B is?

BOB MEADE: Business to Business rather than consumer. And, essentially, you mention Marge is one of our arbitrators, we have a national panel of about 8,000 people around the country that are all required to go through training and

come back every year and go through training so that they know how to manage cases once they're assigned to them. But, when we receive a case, in one of our four case management centers, and the vice president of our Atlanta case management center is up in the back of the room, John Bishop, it's assigned to a person who looks the demand for arbitration over, and the demand need only be a simple statement of the nature of the dispute and the remedy sought, the name of the parties involved, the name of counsel, if there's an attorney involved, there may not be an attorney representing a party. The case manager then usually will have a conference call with the counsel or the parties just to go over the procedures and will make up a list of proposed arbitrators from the geographic region where the matter is to be heard and, by the way, Marjorie mentioned the case that was going to have to go to London, if the arbitration clause is silent as to the locale of the hearing, where it would be held, and the parties disagree, one wants Atlanta and one wants London, the AAA has the authority under the rules to make the decision as to where the case will be held based on several factors: location of the parties, location of witnesses, where the transaction took place, if it's a construction project, location of the project, applicable law and other considerations. If the person can't travel, if they're medically unable, so locale could be an issue up front. Once that is determined, the parties receive this list of arbitrators with full biographical information, work history, education, 80-hour experience—80-hour meaning arbitration mediation, training, and any other professional degrees, publications and things of that nature. They receive really a full biographical sketch on the person. And, again, if you have a question, you can call the AAA office and say is this the person who did that or whatever, so we provide all that information. You then, when you have the list in your possession, would go over and strike names and leave those remaining that you feel are acceptable and it would then come back to us. We compare the two lists and we go for the mutual choices. If there is no mutual choice, we have the authority to appoint without sending any additional names. Let me mention on that list of arbitrators, lawyers will be people who have expertise in the area of the dispute. So even though one of the parties may be in bankruptcy, if it's construction or commercial finance or consumer, the arbitrator will likely have that kind of experience. If bankruptcy law is at issue, more than likely we would probably propose an arbitrator or arbitrators with that sort of background if that's an issue in the case. So that the arbitrators that are proposed have expertise in the area of the dispute. Many of them are attorneys, but we have industry people; we have former judges, so that we look the case over and try to give the names of people who will be

acceptable. At that point in time, too, when you're looking at the list, if you have a conflict of interest and you're the bankruptcy lawyer getting this list, any of the proposed arbitrators, you would also, by the way, run it by your client. Do you know Arbitrator Margie and you would hopefully strike at that point?

Once you've agreed on someone, we call that person and say, "You've been selected as an arbitrator in the case involving ABCDEF and do you have any disclosures to make at this point?" This is one of the most important steps that we take in the process. Getting any disclosures out to the parties for their consideration if they want to move to disqualify or waive their objection. We would then go back to the parties again, if there is a disclosure, and make it known. At that point in time, the arbitrator also goes through his or her law firm records or business records to make sure there's no relationship with counsel or the parties and, if we have a list of witnesses, with any of the witnesses. So there's a very thorough search of the records in the arbitrator's office. And if you're a member in a law firm with 500 partners, it's quite a chore, but it's got to be done. Because, if at any point in time it comes out the arbitrator had a relationship with counsel or party, it was not disclosed, and that could subject the award to vacature at a later point. We sometimes have cases where we'll have two or three days of hearing. A witness comes in and the arbitrator says, "I used him as an expert in a case three months ago and we have an objection." We'll have to decide whether or not to remove the arbitrator and begin all over again and go forward with a new one. So the disclosure process is extremely important. Once the arbitrator is appointed and we get the arbitrator and the parties on the telephone, and immediately start talking about dates for hearings and the big "d" word.

Margie mentioned in passing how arbitration early on was basically a business tribunal where business people came together to resolve business disputes without counsel. Well, it's changed, and discovery is a factor in arbitration. And the arbitrator's part of the—a large part, an important part—of the training we do is our arbitrators can manage the discovery process, not let it get out of hand, because, you know, all due respect, counsel, in arbitration, tend to get carried away in discovery. And, so, the arbitrator's job is to set out a discovery schedule that's reasonable, doable, and appropriate to arbitration, not discover the books and records of all 25 locations of your factories and things of that nature. Once the discovery schedule is out there, if there's an issue, they can come back to the arbitrator for determination. The matter is scheduled for hearings and the hearings go forward. At the hearing,

counsel come prepared with opening statements, their witnesses, their evidence, and the experts they want to bring, and it goes forward in a very orderly way. It's not as formal as a court proceeding. An arbitrator can accept evidence the arbitrator feels is relevant and material, which may not have been accepted in a court of law. But, again, keeping within the bounds of the intent of the arbitration process, there's cross examination. At the end there may be cross examination by the arbitrator, but the arbitrator is cautioned not to take over counsel's case or to try, you know, do the arbitrator's own discovery. The responding party puts on its case with evidence, witnesses, testimony, etc., cross examination, and once the matter is closed, if it's a business case or something a little more complex, the parties may file briefs, reply briefs, and then when that is done the arbitrator has exactly 30 days to render a decision. And typically the arbitrator's authority extends to any remedy that would be available in the court of law or by statute, so that the arbitrator has a broad authority to grant remedies. Margie mentioned employment cases. If you have an employment case, and there's an allegation you violated a statutory right, the arbitrator has to write a findings of fact as to how that arbitrator found under the applicable statute and the arbitrator is authorized and, indeed, must award that individual any remedy that he or she could have gotten in a court of law or by statute. So the arbitrator has to observe statutory law if it's involved in the case.

Let me back up a little bit. You asked me specifically to address who pays. We haven't had any discussion about that. The filing party typical pays a case fee based on the dollar amount of money in dispute. If the respondent comes back with a counter claim, the respondent pays a fee on the counter claim. Arbitrators charge, usually, an hourly or daily rate anywhere from \$350 to \$400 an hour for commercial cases, usually. The parties are billed for that. They split it, and they pay as the case processes or proceeds. We collect that money. We pay it to the arbitrators. So there is a case processing fee to the AAA, and arbitrator's compensation, based on the number of hours or days of hearing, plus, if necessary, study time for writing the award. And if the—

JUDGE BONAPFEL: Could we get that adopted for judges?

BOB MEADE: We have a lot of former judges on the panel, you know. But if the arbitrator has to right an award with an opinion or, God forbid, findings of fact and conclusions of law, which some clauses call for, the parties have to pay for that arbitrator's time in writing that decision. So once the decision is rendered, it goes to the parties. Our rule ends. We're over, and the arbitrator's

role is over. The arbitrator is *functus officio*, no longer holds office. The parties can come back to the arbitrators, arbitrator or arbitrators, for clarification of the award if there is a miscalculation of figures or if there's a description that isn't correct, but the arbitrator cannot amend or change the basis of his or her own decision. It may be remanded back to the by port for clarification, but the arbitrator cannot later, even if there's a miscalculation, change the basis of the award—the merits of the award. It can be clarified but only clarified not rearbitrated. I will add a footnote just to really confuse you. In some cases now, parties who want to have the right of an appeal, because they enjoy that in court, can provide in the arbitration clause for an appellate step to an appellate panel of arbitrators, former federal judge, however they structure it. And generally what happens though is the party seeking that appeal pays the entire cost of the appellant stat. We don't encourage that. It just drains the process out, but if the parties have a \$20,000,000 thing at stake, they may want to have the right to appeal. It's done in a very limited number of cases.

JUDGE BONAPFEL: Do you have anything to add (to Marjorie)?

MARJORIE GIRTH: No. That's all right.

JUDGE BONAPFEL: If the—once the arbitrator makes the award, what happens? Can I take that to court? Can I ask the court to look it over and say, you know, they didn't apply the bankruptcy law properly or they didn't apply the Georgia State law properly and they also misconstrued and didn't get this fact right. Can a court do anything about that?

BOB MEADE: If the arbitration clause requires the arbitrator to be bound by and follow the applicable law, no matter what that law is, and the arbitrator writes a decision that clearly goes against the law, a court could possibly overturn and there's a recent case where an arbitrator wrote a decision saying, "I understand you want me to apply this law but, and I understand the law, and I took that into account, but I'm overruling it, and I'm ruling this way," then that decision would be upheld. If the arbitrator pays attention to and decides and clearly indicates that he paid attention to it, but if an arbitrator was unaware of it, totally ignored it, whatever, it might be overturned, so I can't give you a black and white answer. If there's no provision that the arbitrator must follow a law and, you know, an arbitrator can be wrong on the facts, an arbitrator can be wrong on the law, and the decision will still be upheld. Because when you agree to arbitrate, you bought that forum to resolve your disputes. And that's basically the language that the courts use in reviewing

arbitrators' decisions. Can a decision be taken to court? Sure. Anybody can try to overturn. Will you be successful? Only in a very, very, few cases.

JUDGE BONAPFEL: Is that the manifest disregard law standard?

BOB MEADE: In the violation of public policy.

JUDGE BONAPFEL: What about, you mentioned discovery. Am I bound—how much discovery can I get, I guess is my question? Under the federal rules of civil procedure and the bankruptcy rules, it specifies what I can get in discovery and it's pretty broad. Do I have those same rights in an arbitration matter?

BOB MEADE: Well, if the clause is—the arbitration clause is written such that you require that the federal rules of discovery or the rules of discovery of New York State or whatever, be followed, an arbitrator will follow those rules, and you'll get yourself a, you know, a private court hearing with all the expense and delay based on the extent of discovery. If it doesn't specify that, it says the parties, you know, mandates a discovery to the scope determined by the arbitrator, language to that effect, you can argue both parties will argue their case with respect to the extent of discovery they want to the arbitrator and the arbitrator will make a decision which will be final, and that's done fairly frequently. And that's done in a preliminary telephone conference call, so you don't have to schedule everybody to come together.

JUDGE BONAPFEL: So if I got that right the arbitrator basically decides how much discovery there will be?

BOB MEADE: Absolutely.

MARJORIE GIRTH: Well, in making that decision, though, the arbitrator is listening to the parties' version, summary versions of what the dispute entails, and often they can reach agreement about the extent of discovery—

JUDGE BONAPFEL: The parties?

MARJORIE GIRTH: Yeah, the parties. Encouraged to do so by the arbitrator, but they can simplify the situation many instances.

BOB MEADE: There are may be, you know, employment is a whole different ballgame and if you are alleging violation of a statutory right—discrimination based on age, sex, etc.—you may need a fair amount of discovery to get those issues because it's very difficult to prove. If it's straightforward commercial

transaction, commercial loan for \$30, \$40 thousand dollars, that just isn't being repaid, you don't really need that much discovery.

JUDGE BONAPFEL: What about you mentioned each party has to pay the arbitrator, and it sounded like that's a pay-as-you-go situation. What if I run out of money and I can't pay the next installment? Do I get a decision or what happens?

BOB MEADE: We first would ask the other party, as Margie mentioned, if they—we would say, “Look. They've run out of money. They can't pay. Do you want to pay to go forward?” If they say we will, fine. If they say, “No, we won't pay,” the arbitrator has the authority to say, “We're not going forward. I'm suspending the hearings for failure to pay.” In one case I know one of the parties went back to court, because the court had sent them to us, and got the judge to order the party to pay within 20 days. That was an unusual circumstance. I don't believe that involved the bankrupt party. They just stopped paying. So if they—for failure to pay, and this in the rules, the matter can be suspended, either permanently or until such time they've agreed upon. Now, if the party has money wants to get a decision, and thinks they're going to win; they make come up with the money. But if they think, you know, if I get a decision the other side is going to file bankruptcy, why should I file good money—you know, bad money with good money.

JUDGE BONAPFEL: Are there different rules for business cases?

BOB MEADE: Yes.

JUDGE BONAPFEL: And are there different rules for different types of cases or are all business cases the same?

BOB MEADE: We have, and this is all on ADR.org web site. There are the general commercial rules and then to the commercial rules there is a consumer supplement, so that if the matter comes in to our case management center, and it's a consumer case, we automatically apply the commercial rules with the consumer supplement. There are construction rules. There are trust and estate rules. There are some commercial finance rules. There are rules for the accounting industry. There are separate employment rules for employment cases. I can go on and on. And there are separate, distinct panels for each of those areas. You mention the employment. The employment arbitrators all have to have significant employment law to get on that panel.

JUDGE BONAPFEL: So, if you're drafting a contract, and you actually get to draft it instead of being handed one like Marjorie was, you could specify which rules apply and which panel apply?

BOB MEADE: Yes.

JUDGE BONAPFEL: And all that other stuff?

BOB MEADE: And location of hearings, if that's an issue; extent of discovery; you could spell out in there that you want your arbitrator to be a bankruptcy lawyer with no fewer than 20 years practice. You can get a former federal judge. You can get fairly deep into how you want it structured.

JUDGE BONAPFEL: You mentioned that finding of fact in the opinion or in the reward, are those typically done, typically not done, do arbitrators state reasons for their award?

BOB MEADE: Typically not done, except in larger commercial cases or employment where you have statutes involved or securities where you may have a statute involved. However, if you have a more complex case with several different issues in dispute, an arbitrator will write up an opinion with a break down, as an example in construction, if there's an electrical, heating, venting, air conditioning subsale surface, the arbitrator usually writes on each point how the arbitrator found and then attach a dollar amount to that. That's not findings of fact; that's an opinion. If the parties all request and if the arbitrator agrees or if it's in the contract, in the arbitration clause, calling for findings of fact and/or conclusions of law, the arbitrator will do it. But if you use—

JUDGE BONAPFEL: It may not matter because they can't be reviewed any way.

BOB MEADE: That's right. That's correct. Except, you know, even experienced counsel, you know, think about writing findings of fact and conclusions of law, it's very difficult not to run afoul of some law, and somebody will take that to court and ask the judge to overturn it based on that. More than likely, the judge won't, but, you know, they'll do it.

JUDGE BONAPFEL: Feel free to chime in at any time. (to Marjorie)

MARJORIE GIRTH: One additional thing. If a particular law or sections of law is of interest to the parties at that preliminary telephone conference, one of the things that can be agreed upon is if there will be pre-hearing briefs limited

to the particular issue that they see as highly contested. So, I think the flavor that we're trying to give you here is one of real individualized processing of the dispute in a way that keeps the focus where the parties think it is most serious and which also moves the decision-making process along.

BOB MEADE: Let me mention one other thing. It's interesting but not exactly on point. Many of those contracts that Marge referred to, the health care, the consumer, the employment also attempt to bar class actions in the arbitration clause. And there's a real question as to whether or not that's illegal. And we have a policy in place, and this is published policy, that if the arbitration clause bars class actions and a party attempts to file class action arbitration, we will not process that case; we say it's up to the court to decide whether or not that will apply. If a party seeks to file an arbitration, a class action arbitration, and the clause does not bar class actions and there's a dispute as to whether or not it will be a class action arbitration, we have established a national panel of experts that handle those cases and decide, first, whether there will be a class action arbitration, and if they do decide there will be one, it then goes on to a different panel of arbitrators to handle the dispute. Then all of those cases are published on our web site with the names of the parties, their counsel, the issue, and the outcome just as if it were a class action in court, because it affects public policy. It may affect public policy. They're all published along with the outcome. I think we have something like 1,900. I mean it's really grown.

JUDGE BONAPFEL: If I have a case where I've got a letter from somebody who's not a party to the case, not other side, but it's important to my case, can I give that letter into evidence without bringing the author of the letter? What is in the hearsay in the rules of law?

BOB MEADE: There would be an objection and the arbitrator would have the discretion to accept or not accept or to say produce the witness. The arbitrator can accept affidavits. So the arbitrator may say, "Well we need an affidavit," or something like that. But broad discretion.

JUDGE BONAPFEL: What if I can't get the witness, how do I get the witness?

BOB MEADE: Well, there is subpoena power in arbitrations, either by the attorney of record or by the arbitrator, depending on the state. You would have to look at the state, the state statute regarding subpoena power. Getting a person from out of state is another issue. It's more difficult.

JUDGE BONAPFEL: Can I go to get the court to compel somebody to show up for a hearing?

MARJORIE GIRTH: No. What does happen sometimes, if you've got a witness at a long distance and it starts with the document and the other party is objecting to just the existence of the document, the witness can be heard by telephone conference.

BOB MEADE: Yes.

MARJORIE GIRTH: If there's some reason why they cannot be brought in.

JUDGE BONAPFEL: What if the witness says, "I'm not going to say anything? I'm not going to talk. I'm not going to be on the phone."

BOB MEADE: Well, the broadest power that the arbitrator has is to say, "You can't get them here, I'm going to draw a negative inference."

MARJORIE GIRTH: Yeah.

BOB MEADE: And that's about as far as you can go.

MARJORIE GIRTH: That's right.

JUDGE BONAPFEL: Even if the testimony would be helpful to me?

MARJORIE GIRTH: Yes, because you really are in a different forum. I think that's the hardest thing for lawyers who are used to operating in judicial context to take into their style; that the forum is really very different and the amount of discretion which the arbitrator can use is extensive. And, so, the process of selecting the arbitrator is a crucial one because if the parties can agree that should indicate that they have some confidence in the arbitrator and that they know that that arbitrator may have to exert a lot of discretion.

BOB MEADE: Well let me anticipate a question that I think the direction is going in. Can I read prior decisions by this arbitrator before I choose him, you know? The answer is basically no and yes. In the general commercial area, arbitrator's decisions are not published and you can't access them. However, with respect to employment decisions, a labor management decisions, and consumer decisions, arbitrator's decisions are published and they're accessible. There's a law in California that requires us to post all arbitrator's decisions with the name of the arbitrator that involves consumer disputes, which is very broadly decided. And if you go to our web site, you can go and you can see, this will all be California cases, arbitrator's decisions in the consumer area. So

that employment and in certain areas they are published, but generally they're not. So you can't see prior decisions by that arbitrator.

MARJORIE GIRTH: And it might not be very useful even if you did see them because the classic arbitrator's decision is going to be, "I find for the claimant for a million dollars. Or the claimant has failed to prove its case; therefore, the respondent does not owe the complainant anything," or something in between. People are concerned that arbitrators split the difference. That is not the way theory works. It is tempting sometimes, of course, it's always tempting, but you could get very clear decisions in one direction or the other with absolutely no rationale expressed.

JUDGE BONAPFEL: Are you sure that's not in bankruptcy court?

BOB MEADE: That does not imply irrationality.

MARJORIE GIRTH: No. No. The other thing is there's this variation in the consumer decisions because although you don't go to very specific findings of fact you are required as an arbitrator to explain in language that the consumer can understand what the basis of your decision was. So that's an interesting assignment. As in any litigation, emotions can run high and, so, the extent to which you explain your decision takes into account a lot of factors.

JUDGE BONAPFEL: How long would it take and how much would it cost a consumer, think of some example, because I don't know exactly what might be arbitrated. What kind of cost would a consumer be looking at in a required arbitration?

MARJORIE GIRTH: Well, you need to look in the other direction because that's—

JUDGE BONAPFEL: Bob?

BOB MEADE: We routinely will try to schedule consumer arbitrations if the consumer wants to by telephone and that and submission of documents without the individual having to show for hearing. So the individual will send us the documents and will tend to prove her or his case and the other side, the company, let's say it's a credit card dispute, will provide their documentation. We would appoint an arbitrator, and the arbitrator will review the material and have a brief telephone conference call, and that would be done in less than 30 days, as soon as the parties can agree to get on the phone. They can do it on documents alone. And everything can be filed with us electronically, so you

can go on line, file your case, pay your fee, select an arbitrator, submit your documentation, and haggle back and forth. Arbitrators have their own part of our web site that they go into. It's private and accessible only by them. Margie has a case; she's got her site and can look at documents, schedule hearings, look at her schedule, so it can all be done electronically, very quickly.

