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Some Advocacy Lessons I Learned as a New Labor Lawyer

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I. Introduction

239. Fifty years ago, in my third year of law school, I had the good fortune to be the research assistant to the professor who for many years taught a course on labor law as well as a seminar on labor arbitration. He had studied with the preeminent labor law scholar, Archibald Cox, at Harvard Law School in the 1940s, and he had become a nationally recognized labor arbitrator in the 1950s. He fired me with what Justice Holmes called the "action and passion" of a life in labor law.[2]

240. A labor law practice 50 years ago included occasional employment discrimination cases under Title VII of the Civil Rights Act of 1964,[3] and overtime cases under the Fair Labor Standards Act of 1938 (FLSA).[4] But for the most part, the practice was primarily involved with collective employee rights and union matters before the National Labor Relations Board (NLRB), which arose under the National Labor Relations Act (NLRA)[5], as well as labor arbitration hearings which arose under the terms of a collective bargaining agreement between an employer and a union.

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2 Oliver Wendell Holmes, *Memorial Day Speech, Keene, New Hampshire* (May 30, 1884).

3 CIVIL RIGHTS ACT OF 1964, 42 U.S.C. §2000e et seq. (1964).

4 29 U.S.C. §207(a) et seq.

5 29 U.S.C. §151 et seq. (1938).

241. Upon graduation from law school, I was hired by a solo practitioner with a management-side labor law practice, which allowed me to become immediately immersed in unfair labor practice hearings before NLRB administrative law judges (ALJs). Under the NLRA, formal hearings in unfair labor practice complaints issued by the NLRB General Counsel are conducted by the ALJs. As stated in the leading treatise on the NLRA, the ALJs "function much like trial court judges in non-jury trials, hearing witnesses, ruling on admissibility of evidence, and making initial decisions and findings of fact in unfair labor practice cases." The decision of an ALJ "is final unless excepted to by a party."[6]

242. My labor lawyer's "baptism by fire" also included hearings before labor arbitrators. Such hearings concern grievances filed under collective bargaining agreements and are brought by a union on behalf of a covered employee.

243. The practice (now referred to as labor and employment law) is quite different today. The biggest change is that with the decline of labor unions over the past fifty years, employment law has become the predominant part of a labor and employment law practice. As summarized by the authors of the employment law casebook I use in class, an employment law practice today involves "the statutes and common law governing individual rights at work, ranging from minimum standards legislation to judicially created doctrines based in tort and contract law." More specifically, employment law includes "the common law of wrongful discharge, contract law pertaining to the employment relation, including employee handbooks covenants not to compete, and the law governing pre-dispute arbitration agreements, [and] tort claims of emotional distress and invasion of privacy," as well as wage and hour law issues under the FLSA.[7]

244. I eventually joined a national labor and employment law firm with multiple offices and became the employment litigation manager in my firm's Pittsburgh office (a position I held for the next fourteen years). At that time, one of my partners who practiced labor law admonished, "Don't lose your labor law skills." While I had (somewhat unusually) practiced both labor and employment law for many years, including jury and non-jury employment law trials, a labor law practice involved specialized expertise in NLRB and labor arbitration hearings gained over many years.

245. I appreciate this opportunity to reflect on the many years I practiced in the field of labor and employment law and to share a few lessons that stand out as foundational to my development as an effective advocate.

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6 JAYME L. SOPHIR ET AL., THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT, CH. 31, §31.1.D (2025).

7 Marion Crain and Pauline Kim, *A Holistic Approach to Teaching Work Law*, 58 St. Louis U. L.J. 7, 7–8 n.5 (2013).

II. Overcoming the Habit of Using Leading Questions on Direct Examination

246. Just a few months after my admission to the bar, the attorney who had hired me asked me to accompany him to a labor arbitration hearing and gave me my first opportunity to conduct the direct examination of a witness.

247. Labor arbitration hearings are unlike employment arbitration hearings. As the Eleventh Circuit recently put it, an employment arbitration agreement is "better thought of as a sort of choice-of-forum clause" in which an individual employee and an employer agree to arbitration as an alternative to employee rights litigation arising from the subject matter of employment law.[8]

248. A labor arbitration hearing, as noted above, arises under a collective bargaining agreement between an employer and a union. A labor arbitrator is limited to deciding matters arising under a collective bargaining agreement, and the process is controlled by the employer and the union as the parties to the agreement. The Supreme Court noted many years ago that while employment arbitration is "the substitute for litigation," labor arbitration is "the substitute for industrial strife."[9]

249. My first labor arbitration hearing involved a grocery store employee who was discharged for theft. I conducted the direct examination of our client, the owner of the store. I recall very little about what occurred, except that the attorney for the union consistently objected to leading questions I directed to the witness. And while the rules of evidence are usually more relaxed in labor arbitration hearings, the arbitrator mutually selected for this case was a retired state court trial judge. As I recall, the arbitrator sustained the union attorney's objections to my leading questions.

250. After the hearing had ended, the union attorney saw that I was a bit flustered. He came over to me and said, "I knew this was your first case and I wanted you to learn the right way about when to use leading questions on direct." It was a lesson I never forgot.

251. Rule 611(c) of the Federal Rules of Evidence provides, "Leading questions should not be used on direct examination except as necessary to develop the witness's testimony." The purpose of the rule, as a court recently noted, is that "questions which suggest or presume an answer inherently risk eliciting testimony that 'substitut[es]. . . the

8 *Gherardi v. Citigroup Global Markets, Inc.*, 975 F.3D 1232, 1237 (11th Cir. 2020).

9 *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

attorney's language for the thoughts of the witness'. . . ."[10] Judge Mark W. Bennett identified "leading on direct" as one of the common errors of judgment which attorneys regularly make.[11]

252. The problem is that "leading on direct" becomes a habit that is hard to break when it goes beyond preliminary questions which may, as Rule 611(c) states, help "to develop the witness's testimony." Over my next 43 years of practice, which included NLRB and labor arbitration hearings as well as federal and state court employment litigation, the only way I learned to avoid the habit was to regularly remind myself, before I began, only to use such questions for undisputed preliminary matters. This was particularly difficult in situations where the rules were relaxed and the presentation of evidence was less formal, as it was in my first labor arbitration hearing, and as it can sometimes be in a hearing before an NLRB ALJ.

253. A useful and succinct admonition about the proper use of leading questions is in the Bench Book which is prepared by the Judges Division of the National Labor Relations Board for use by its ALJs in unfair labor practice hearings and found on the public website of the NLRB, www.nlrb.gov.[12] While the NLRA only requires that the rules of evidence be followed "as far as practicable", the ALJ Bench Book provides the following guidance regarding the use of leading questions on direct and the consequences:

> If counsel improperly uses leading questions, the judge should caution counsel against doing so, either on objection from opposing counsel or on the judge's own motion. Where a witness has answered an improper leading question, the answer is admissible but entitled to 'minimal weight.'[13]

254. Two examples I encountered about opposing counsel's habit of improperly using leading questions, both of which occurred in federal district court cases rather than at an NLRB hearing before an ALJ, show what can happen when the habit is challenged.

255. In one case, which was a non-jury hearing, my opponent simply could not ask his witness a non-leading question on critical factual matters, no matter how hard he tried. I did what that union attorney did to me in my first case: I continually objected and the judge continually admonished counsel regarding his leading questions. What happened was perhaps not unexpected, which was that opposing counsel grew visibly frustrated and eventually simply said, "I have no further questions," and sat down. As I

10 *McFadden v. City of Columbus*, 2022 U.S. DIST. LEXIS 100240, AT *2-3 (S.D. Ohio, June 3, 2022), quoting Am Jur. 2d Witnesses §659 (2022).

11 Mark W. Bennett, *Eight Traits of Great Trial Lawyers: A Federal Judge's View on How to Shed the Moniker "I am a Litigator,"* 33 REV. LITG. 1, 40 (2014).

12 NAT'L LABOR RELATIONS BD. DIV. OF JUDGES, BENCH BOOK, AN NLRB TRIAL MANUAL (May 2025).

13 NAT'L LABOR RELATIONS BD. DIV. OF JUDGES, BENCH BOOK, AN NLRB TRIAL MANUAL §§16-109 AND 16-611.4 (May 2025).

recall, that judge did not have to assess the weight to be given to the testimony elicited by the witness's mostly "yes" and "no" answers. However, in a recent case where such "yes" and "no" answers were used by a witness's counsel on direct, the NLRB ruled that "[a]nswers given in response to leading questions from a party's own counsel are admissible but entitled to 'minimal weight'"[14]

256. In another case, this time while opposing counsel was examining her client, the plaintiff in a jury trial, I faced a different dilemma when I objected to a continual series of leading questions. I was concerned that the jury would think that I was improperly interfering with the testimony of the plaintiff. After a number of objections which had no effect, I asked for a sidebar conference with the judge, who formerly was an experienced trial lawyer. The judge told opposing counsel that if the leading questions continued, he would sanction her in front of the jury.

257. In both cases, it was apparent to me that neither opposing counsel, both of whom I knew quite well, were aware of the extent to which they were substituting their language "for the thoughts of the witness," or were suggesting the answer which their witness should give.[15] I am quite certain that neither one ever had the teachable moment I had when the union attorney in my first case taught me a lesson which I would never forget.

III. Cross-Examining Without the Benefit of Discovery in NLRB Hearings

258. An employment law court case or an employment arbitration hearing involves the availability of pretrial discovery. Professor John Langbein has noted that with courts "ever more oriented to pretrial resolution," the deposition "has in important respects replaced the trial as the primary occasion for probing sworn testimony about matters of fact." Documents and responses to interrogatories, as well as deposition testimony, provide litigants "a detailed view of what the issues and evidence would be (on both or all sides) were the case to go to trial."[16]

259. The "detailed view of what the issues and evidence would be" after taking depositions is unavailable in an unfair labor practice hearing before an NLRB ALJ. As the ALJ Bench Book states, "It is well established that pretrial discovery does not apply in Board proceedings." This includes the taking of depositions, which are not allowed

14 *ODS Chauffeured Transportation*, 367 NLRB No. 87, SLIP OP. AT 1 N. 1 (2019) (quoting *H.C. Thomson,* 230 NLRB 808 (1977)).

15 *McFadden v. City of Columbus*, 2022 U.S. Dist. LEXIS 100240, at *3 (S.D. Ohio, June 3, 2022).

16 John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 551 (2012).

in "ordinary circumstances".[17] Depositions are only allowed upon a showing of "good cause" defined as instances where discovery is needed "for the preservation of evidence, usually because the witnesses will not be available to testify at the hearing."[18]

260. What this means is that while ALJs "function much like trial court judges in non-jury trials,"[19] the party defending against an unfair labor practice complaint is faced with a "trial by ambush" since it does not learn of the other side's case until trial.[20]

261. Judge Mark Bennett noted in his useful article about trials that a civil trial lawyer who is able to depose the plaintiff before trial "can become lazy": "Take their depositions away and few would have any effective cross-examinations." He contrasts that with criminal trial lawyers, who "do not have the crutch of taking depositions for impeachment purposes" and who are "forced to be more resourceful and to think much faster on their feet."[21]

262. The lack of pretrial discovery in NLRB hearings means that like the criminal lawyers described by Judge Bennett, a labor lawyer representing an employer is also forced to be more resourceful and certainly must learn to think much faster on their feet. In addition, the right to cross-examine adverse witnesses in an NLRB ALJ hearing must be conducted under very limited circumstances.

263. One of the twentieth century's greatest advocates, John W. Davis, wrote the following about cross-examination:

> Undoubtedly cross-examination is among the most difficult of all of the arts of the advocate. It is also one of the most valuable.... Just where the line lies between a cross-examination that it helpful and one that is harmful only experience can teach.[22]

264. Judge Bennett adds that, "Cross-examination requires practice, practice, and more practice...."[23]

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17 NAT'L LABOR RELATIONS BD. DIV. OF JUDGES, BENCH BOOK, AN NLRB TRIAL MANUAL §§7-200 & 7-300 (May 2025).

18 *Kenrich Petrochemicals v. NLRB*, 893 F.2d 1468, 1484 (3rd Cir. 1990).

19 JAYME L. SOPHIR ET AL., THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT, CH. 31, §31.1.D (2025).

20 Walter E. Oberer, *Trial by Ambush or Avalanche—The Discovery Debacle*, J. DISP. RESOL. 1, 4 (1987).

21 Mark W. Bennett, *Eight Traits of Great Trial Lawyers: A Federal Judge's View on How to Shed the Moniker "I am a Litigator,"* 33 REV. LITG. 1, 40 (2014).

22 JOHN W. DAVIS, FOREWORD, IN FRANCIS L. WELLMAN, THE ART OF CROSS-EXAMINATION, 15 (1997 ED.).

23 Mark W. Bennett, *Eight Traits of Great Trial Lawyers: A Federal Judge's View on How to Shed the Moniker "I am a Litigator,"* 33 REV. LITG. 1, 40 (2014).

265. Given the need to think fast on one's feet in these circumstances, I decided many years ago that continually practicing cross-examination without the benefit of discovery was the best way to learn how to do it. Another commentator stated that cross-examination "is a skill that can be learned with practice. . . [involving] a great deal of work and even more concentration."[24] This can best be done at both labor arbitration hearings and administrative proceedings like unemployment compensation hearings, neither of which generally allows for prehearing discovery documents or the right to take depositions. Both forums provide what is most critical, which is to cross-examine at a "trial", defined by the Administrative Office of the United States Courts as "a contested hearing at which evidence is presented," which includes "adjudicatory bodies based within administrative agencies."[25]

266. Under the NLRA, an unfair labor practice charge is initially investigated by an NLRB agent. Sworn statements may be taken from individuals who may later be called by the NLRB General Counsel as witnesses after a complaint is issued and a hearing is held. Such statements are not subject to production by subpoena before an ALJ hearing. Also, the NLRB's longstanding rule is that "such statements or affidavits are producible only after the witness has testified and for use on cross-examination of the witness."[26]

267. Such statements are called *Jencks* statements, after the Supreme Court case in which the rule originated.[27] The General Counsel will, upon such a request, furnish a copy of the *Jencks* statement, and the ALJ decides how much time counsel will have to review the statement before cross-examining the witness. More specifically, the witness statement must be requested at the close of the direct examination of the witness. The NLRB has held that a failure to make such a request until well into cross-examination, or until cross-examination is complete, is a waiver of the right to review the statement.[28]

268. I learned the NLRB rule about requesting a witness statement the hard way in my early days as a labor lawyer at my first NLRB ALJ hearing. After the General Counsel's primary witness had testified, I immediately proceeded to cross-examine him without first asking the ALJ to require the General Counsel to produce any sworn statement of the witness. I cannot recall, almost 50 years later, whether I was aware of whether there was such a statement, or if there was, what it meant to treat it as a *Jencks* statement.

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24 G. Fred Metos, *Cross-Examination: Methods and Preparations*, 3 UTAH B.J. 11 (1990).

25 Herbert M. Kritzer, *The Trials and Tribulations of Counting 'Trials,"* 62 DEPAUL L. R. 415, 427 (2013).

26 NAT'L LABOR RELATIONS BD. DIV. OF JUDGES, BENCH BOOK, AN NLRB TRIAL MANUAL §8-445 (May 2025).

27 NAT'L LABOR RELATIONS BD. DIV. OF JUDGES, BENCH BOOK, AN NLRB TRIAL MANUAL §8-445 (May 2025).

28 *Longshoremen ILA Local 20 (Ryan Walsh Stevedoring)*, 323 NLRB 1115, 1120 (June 30, 1997).

269. This taught me another lesson I would never forget: At every one of the many NLRB ALJ hearings I had after that first one, I would write the following at the top of the page where I kept a few notes about what the witness had said on direct: "ASK FOR THE PRODUCTION OF ANY STATEMENT BY THE WITNESS BEFORE BEGINNING TO CROSS-EXAMINE!"

IV. Conclusion

270. These lessons from my early days as a labor lawyer, avoiding the habit of using leading questions on direct examination and developing the ability to cross-examine without the benefit of discovery, remain relevant today, almost fifty years later. Judge Bennett was right on point when he wrote that honing these skills "takes persistence,. . . and an insightful introspection to learn from your mistakes."[29]

29 Mark W. Bennett, *Eight Traits of Great Trial Lawyers: A Federal Judge's View on How to Shed the Moniker "I am a Litigator,"* 33 REV. LITG. 1, 20 (2014).