

# Labor Arbitration Opening Statement

by Lee Hornberger



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This article reviews giving an effective opening statement in a labor arbitration case.

The opening statement in a labor arbitration case is given in what may be a unique adjudicative environment. In court or civil litigation or employment arbitration, the parties will have provided information, including pleadings and briefing, to the adjudicator well prior to the evidentiary hearing. That is not usually the case in a labor arbitration. Usually the labor arbitrator will know little, if anything, about the case before the opening statement is given. At best, the arbitrator will know whether the case is a discipline or a contractual interpretation case; and moments before the opening statement, the arbitrator will for the first time learn the wording of the issue. This means that the opening statement is extremely important in a labor arbitration case.

The opening statement should be carefully prepared and practiced ahead of time.

In a discipline case, the employer will give its opening statement first. In a contractual interpretation case, the union will give its opening statement first. This reflects both tradition and which party has the burden of proof. If the advocate in the post-hearing argument is going to ask for a burden of proof other than the preponderance of the evidence, the advocate should seriously consider giving the arbitrator warning of that in the opening statement.

In order to overcome this hurdle of no advance knowledge on the part of the arbitrator, the advocate must effectively promote the interests of the advocate's client, whether the employer or the union. The advocate should be careful not to overpromise.

The opening statement must clarify the issues for the arbitrator. This will include both the substantive and procedural issues. In addition, the opening statement must clearly inform the arbitrator of the applicable sections of the collective bargaining agreement (CBA) and the page numbers of the CBA where those sections can be found. It is crucial that the arbitrator know exactly where in the CBA, including page numbers, the arbitrator can go in order to better understand the case and the parties' viewpoints.

The advocate should observe whether the arbitrator is writing notes during the opening statement. The speed with which the opening statement is delivered should be adjusted by paying careful attention to the note taking speed and depth of the arbitrator. The goal of the advocate, and especially the pace at which the advocate delivers the opening statement, should be to help make the arbitrator's job easier. Sometimes pauses can be helpful. The arbitrator's hearing notes are ultimately the record upon which the arbitrator's memory of the hearing will largely be made.

The opening statement should, in a concise thoughtful fashion, outline the "who, what, where, how, and when" of the case. After the opening statement is completed, the arbitrator should have a clear understanding of who the main actors are, what happened to give rise to the grievance, where the situation occurred, how the situation unfolded, and the time line of the situation.

Elkouri & Elkouri, *How Arbitration Works* (8<sup>th</sup> ed. 2016), p. 7-30, states that:

An opening statement is a brief and general outline of what the dispute is about and what the advocate intends to prove. Even if the advocate prepares a written opening statement, it should be presented orally.

The opening statement should address unfavorable aspects of the case. The arbitrator should not hear these unfavorable aspects for the first time during the other side's opening statement. This gives the advocate the opportunity to present adverse facts in the best light.

The advocate in the second opening statement (for example, the union's opening statement in a discipline case) should typically respond to issues raised in the first opening statement rather than waiting for the evidentiary portion of the hearing in which to respond. For example, if the employer argues for the first time ever in its opening statement, that the grievance or demand for arbitration is untimely, the union should tell the arbitrator, if true, during its opening statement that this issue was never previously raised by the employer. The arbitrator should know about these contested procedural issues before the end of the opening statements.

The opening statement should be a concise presentation of the case in a nonargumentative, professional, and courteous fashion. It will summarize in a convincing way the advocate's main arguments, including what happened and precisely what the advocate expects to prove.

The opening statement should also tell the arbitrator the relief that the party is seeking. If the arbitrator knows what remedy the party is seeking, it is easier for the arbitrator to understand the evidence as it comes in.

Occasionally in discipline cases, the union will refrain from making its opening statement until after the employer presents its evidence and rests. There are those who think that this prevents the arbitrator from having a balanced or full understanding of the case at the beginning. On the other hand, there are others who believe that the union advocate can better serve the interests of the grievant by not playing the advocate's hand until after hearing all of the employer's evidence. Deciding to delay giving the union's opening is an important decision that should not be made lightly.

In a virtual arbitration hearing via Zoom or other platform, the advocate must give consideration to the different methods and characteristics of communication during a virtual arbitration. Depending on the settings of the observer person's monitor, the screen might display the advocate's face on the entire screen. In addition, there might be a short delay between the advocate's speaking and when the speaking is actually heard by the arbitrator. In that event, the advocate should speak more slowly.

The advocate should also consider using Screen Share during the opening statement in order to help emphasize the relevant CBA provisions and the more important documents. Pre-sharing of exhibits will occur much more frequently in virtual arbitration than in in-person arbitration. By using Screen Share, the arbitrator can see the relevant exhibit and the advocates at the same time. Power points and exhibits can be displayed via Screen Share to the arbitrator during the opening statement.

In all virtual arbitrations, there should be cooperation and mutual respect.

In conclusion, the opening statement should tell the arbitrator in a concise, courteous fashion exactly how the advocate wants the arbitrator to rule on the issues and exactly what relief is being requested. The advocate's use of Screen Share during a Zoom arbitration can help make for a powerful opening statement. ❄️

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## About the Authors

*Lee Hornberger is a former Chair of the Alternative Dispute Resolution Section of the State Bar of Michigan. He has received a First Tier ranking in Northern Michigan for Arbitration by U.S. News – Best Lawyers® Best Law Firms in 2019 and 2020. He is included in The Best Lawyers of America 2018 and 2019 for arbitration, and 2020 for arbitration and mediation; and on the 2016, 2017, 2018, and 2019 Michigan Super Lawyers for alternative dispute resolution.*

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