The Successful Opening Statement in a Labor Arbitration

by: Lee Hornberger*

The opening statement is a crucial part of a labor arbitration. The opening statement gives the advocate the opportunity to successfully put their client's case in the most favorable light to the arbitrator at the very beginning of the arbitration hearing.

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.

Furthermore, "[t]he opening statements set the stage for the testimony to come. ... They should explain to the arbitrator what each party's case is about."

In a labor arbitration case, the opening statement is given in a unique adjudicative environment. This environment differs from court litigation or employment arbitration where the parties will have provided information, including pleadings and briefing, to the adjudicator prior to the evidentiary hearing. That is generally not the case in a labor arbitration. The labor arbitrator will usually know little, if anything, about the case before the opening statement. At best, the arbitrator will know whether the case is a discipline or a contract interpretation case. Only moments before the opening statement will the arbitrator learn the wording of the issue. This highlights the opening statement's extreme importance in a labor arbitration case.

The opening statement should be carefully prepared and practiced ahead of time before it is given to the arbitrator.

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

To overcome the hurdle of no advance knowledge of the facts of the case on the part of the arbitrator, the advocate must effectively promote the interests of the client, whether the employer or the union. Further, the advocate should not overpromise. The advocate should remember that what is said during the opening statement is not evidence.

The opening statement must tell the arbitrator what the issues in the case are. 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 pertinent documents, including the collective bargaining agreement (CBA), employment manual, established policies, and other operative documents as well as the page numbers in the documents where those sections can be found. It is extremely important that the arbitrator know ex-

actly where in these documents, including page numbers, the arbitrator can go in order to better understand the case and the parties' viewpoints.

It is best for the advocate to observe whether the arbitrator is taking notes during the opening statement. The pace 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 is to help make the arbitrator's job easier. Sometimes the pace at which the advocate delivers the opening statement, including pauses, can be helpful. The arbitrator's notes are ultimately the record upon which the arbitrator's memory of the hearing will largely be based.

The opening statement should, in a concise clear fashion, outline the "who, what, where, how, and when" of the case. Once 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 those events occurred, how the situation unfolded, and the timeline of events.

The opening statement should also 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. The advocate should use this opportunity to present adverse facts in the best light.

The second opening statement (for example, the union's opening statement in a discipline case) should usually respond to issues raised in the first opening statement rather than waiting for the evidentiary portion of the hearing. 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 be told about these procedural issues before the end of the opening statements. By careful planning of the opening statement, including the use of the grievance procedure, the advocate should be able to anticipate the other side's arguments and be able to effectively respond to them.

The opening statement should be a careful, non-argumentative presentation of the case in a professional and courteous fashion. It should summarize in a convincing manner the advocate's main arguments, including the facts and precisely what the advocate intends to prove.

The opening statement should also spell out 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.

In discipline cases, the union will occasionally refrain from making its opening statement until after the employer offers 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 start. 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 one's opening is an important decision that should not be made lightly. One risk of delaying one's opening statement is that such delay might allow the other side to win the rule of primacy. The rule of primary means that the side that is heard first will be more persuasive than the side that is heard later. One possible benefit of delaying one's opening is to hold back on one's presentation until after the other side has played its cards.

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'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. It is important that the advocate speak more slowly.

The advocate should also consider using Share Screen in order to help emphasize the relevant CBA provisions and the more important documents. Share Screen is a tool that is available on the Zoom platform which allows the user to share the user's documents on the monitor to be seen by other participants in the hearing. As with other portions of the opening statement, the advocate should prepare and practice the Share Screen procedure ahead of time. The hearing is not the place to be doing Share Screen for the first time.

Pre-sharing of exhibits will occur much more frequently in virtual arbitration than in in-person arbitration. By using Share Screen, the arbitrator can see the relevant exhibit and the advocates at the same time. Power Point presentations and exhibits can also be displayed in the arbitration via Share Screen during the opening statement.

In all arbitrations, there should be cooperation, professionalism, and mutual respect. The watch words for virtual arbitrations are "be kind."

In conclusion, an effective opening statement will tell the arbitrator in a concise, courteous fashion exactly what the factual situation in the case is, what the issues are, how the advocate wants the arbitrator to rule on the issues, and exactly what relief is being requested. In addition, with virtual arbitration, the advocate's effective use of Share Screen during a Zoom arbitration can create a powerful opening statement.

ENDNOTES

1 Elkouri & Elkouri, How Arbitration Works (8th ed. 2016), p. 7-30.

2 Roger I. Abrams, Inside Arbitration: How an Arbitrator Decides Labor and Employment Cases (2013), p. 133.

3 Most other video conferencing platforms offer a similar function.

Lee Hornberger is a former Chair of the State Bar's Alternative Dispute Resolution Section, former Editor of *The Michigan Dispute Resolution Journal,* former member of the State Bar's Representative Assembly, and former President of the Grand Traverse-Leelanau-Antrim Bar Association. He is a member of Professional Resolution Experts of Michigan (PREMi) and a diplomate member of The National Academy of Distinguished Neutrals. He has received the ADR Section's George N. Bashara, Jr. Award. He 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 in *The Best Lawyers of America* 2018 and 2019 for arbitration, and 2020 for arbitration and mediation. He is on the 2016, 2017, 2018, and 2019 Michigan Super Lawyers lists for ADR. He holds his B.A. and J.D. cum laude from the University of Michigan and his LL.M. in Labor Law from Wayne State University.