GIVING AN EFFECTIVE OPENING STATEMENT IN A LABOR ARBITRATION

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This article provides a toolkit for giving an effective opening statement in a labor arbitration case.

In a labor arbitration case, the opening statement is given in what may be a unique adjudicative environment. It differs from court litigation or employment arbitration where 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. 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 thoroughly 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 is going to ask for a burden of proof other than the preponderance of the evidence in the post-hearing argument, the advocate should seriously consider giving the arbitrator warning of that in the opening statement.

To overcome the 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. Furthermore, the advocate should not 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 pertinent documents, including the collective bargaining agreement (CBA), employment manual, established policies, and other operative documents and the page numbers in the documents where those sections can be found. It is of extreme importance that the arbitrator know exactly where in these documents, 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 should be 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 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 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 the main actors, 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 (8th 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 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. 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 precise nonargumentative presentation of the case in a professional and courteous fashion. It will summarize in a convincing manner the advocate's main arguments, including what happened and precisely what the advocate intends to prove. The 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.

In discipline cases, the union will occasionally 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 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 giving the one'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'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, it is important that the advocate speak more slowly.

The advocate should also consider using Share Screen during the opening statement and other parts of the arbitration hearing 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.

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 points and exhibits can be displayed via Share Screen to the arbitrator during the opening statement.

In all arbitrations, there should be cooperation, professionalism, 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 Share Screen during a Zoom arbitration can help make for a powerful opening statement. ■