HOW TO WRITE A PERSUASIVE POST-HEARING LABOR ARBITRATION BRIEF

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Your post-hearing brief is an important part of labor arbitration. Your brief should clearly tell and remind the arbitrator of the advocate's viewpoint of the case and exactly how you want the arbitrator to rule.

As indicated by Elkouri & Elkouri, *How Arbitration Works* (8th ed. 2016), pp. 7-36: "The use of post-hearing briefs is quite common. Their purpose is to summarize and comment on evidence and present legal argument." Abrams, *Inside Arbitration* (2013), pp. 137-138, explains that a "clarifying and persuasive brief can be critical" so the advocate "should write a good brief based on the assumption that it might make a difference."

Your brief should let the arbitrator know the advocate's arguments in a clear and easy-to-read fashion with subtitles. I recommend a table of contents that explains your case. Use headings that tell your story. All capitals are hard to read. I think regular type with bolding is best for headings. Your brief should not use invective or too many adjectives. You should tell the arbitrator where the brief is going, where it is, and where it has been.

Your beginning should contain a one-page summary. This summary can have an anchoring effect on the arbitrator because the arbitrator may remember this summary as the arbitrator reads the brief and writes the award. A good summary can be adapted by the arbitrator to provide the advocate's position in the opinion. A summary should be written or re-written after the brief is completed to make sure you capture the key points. The summary should orient the arbitrator so that when he or she reads the rest of the brief they will understand the key facts and arguments.

If you ask for a burden of proof other than the preponderance of the evidence, you should explain why a different burden is appropriate and provide appropriate authority. Your brief should clarify the issues, including any substantive or procedural issues.

Your brief should quote and explain the governing CBA terms, identifying by section and page number. If there is a transcript, point out and quote the most important portions of the transcript.

Your goal is to make the arbitrator's job easier to rule for your client. That is why the brief should thoughtfully outline the "who, what, where, how, and when" of the case.

Your brief can cite Elkouri & Elkouri as well as published arbitration awards to help show the arbitrator that your argument is supported. It helps if you cite the most recent edition of Elkouri & Elkouri. In addition, attach any arbitrator awards you cite if you want the arbitrator to read them. You should read the arbitrator's prior awards. This will help you understand whether the arbitrator cites other awards and how the arbitrator crafts his or her opinions. If you cite an arbitrator's awards, you must show how they apply to your case.

Your brief should address any unfavorable aspects of your case. The arbitrator should not read about unfavorable aspects in the other side's brief. As in presenting a witness, you want to present any potentially problematic facts in the best light or explain why the facts relied by the other side are not relevant or that CBA terms cited are not controlling.

Your brief should not contain new evidence or arguments not raised at the hearing. You should think carefully before raising new arguments or non-cited CBA provisions. "No new evidence should be included in post-hearing briefs." Elkouri at p. 7-36. However, under appropriate circumstances, the arbitrator has the discretion to amend the record to admit appropriate evidence discovered by a party after the conclusion of the hearing. See American Arbitration Association Labor Arbitration Rules, Rule 31.

You should provide a brief to the arbitrator that is easy to use. In *ad hoc* and Federal Mediation and Conciliation Service cases, usually there will be simultaneous filing of a pdf and Word copy of the briefs with the arbitrator. Unless the arbitrator indicates otherwise, size 12 Font, Times New Roman, and non-justified right margins should be used.

An excessive number of arguments can have a dilution effect. It has been said that an advocate submits twenty arguments because the advocate could not think of one good argument. Nevertheless, most arbitrators in their awards will respond to every argument made by the losing party. Abrams, p. 160.

The end of your brief should tell the arbitrator exactly what you want the award portion to say. This includes reminding the arbitrator of any split-fee or loser pays all fee payment CBA provision. After the brief is written, you should try to get it carefully edited by someone else who has fresh eyes.

In conclusion, good writing is the key. Follow the writing tips found in *Lawnotes,* such as the many articles by Stuart Israel. As Stuart reminds, your brief should tell the arbitrator a story that is persuasive with no personal attacks. Your brief should explain why your client should win and why the remedy sough it necessary. ■