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Workshop: Training on Preparing, Presenting, and Defending at Arbitration

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ARBITRABILITY AND FRAMING THE ISSUE

Presented by Maureen Seidel, Esq.

What is “arbitrability”?

- Can the matter be submitted to an arbitrator for decision under the terms of the arbitration clause in the contract.

What is “arbitrability”?

Procedural

- Some condition has not been met:
 - Timeliness
 - Did not follow the pre-grievance process
 - Exhaustion of the grievance process

Substantive

- A/K/A “Subject Matter”
- Does not meet the contractual definition of what can be arbitrated.

Who decides arbitrability?

- General default position is that substantive arbitration is left to the courts and procedural to the arbitrator unless the contract makes it clear otherwise. As always:

What does the contract say?

Can arbitrability be waived?

Procedural

- Yes, if party asserting it fails to raise it.
- Question: is there a waiver if party failed to raise the question earlier in the grievance process.

Substantive

- No. Generally, if an arbitrator had no contractual authority to hear the case, the asserting party's participation in the proceeding will not be a waiver.

The real question:

What has happened between
these parties previously?

When do you frame the issue?

How do you frame the issue?

What has been the issue in the earlier grievance steps?

- Adding to the claims at the arbitration stage may be violative of the contract.
- Has the grievance been resolved in part?
- Have the facts been resolved in whole or in part?

What do you want?

- Can the parties agree to the issues beforehand?
- Is there a usual way that these parties have submitted their issues?

Remember, your
evidence may be
limited to the issue you
frame or agree to!

Ideas for Framing

- Use neutral language (“when the District did not...” instead of “when the District in bad faith failed to...”)
- Identify dates (“when on October 1, 2012, it did not...”)
- Identify the contract provisions you are asking to be reviewed (not “the contract as a whole”)
- Ask for the arbitrator to issue a remedy
 - But know what his/her authority is regarding the remedy.
- Agreeing to the issue will prevent the arbitrator from coming up with his/her own issue or accepting your adversary’s issue. Very perilous!

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TEN STEPS IN TRIAL PREPARATION

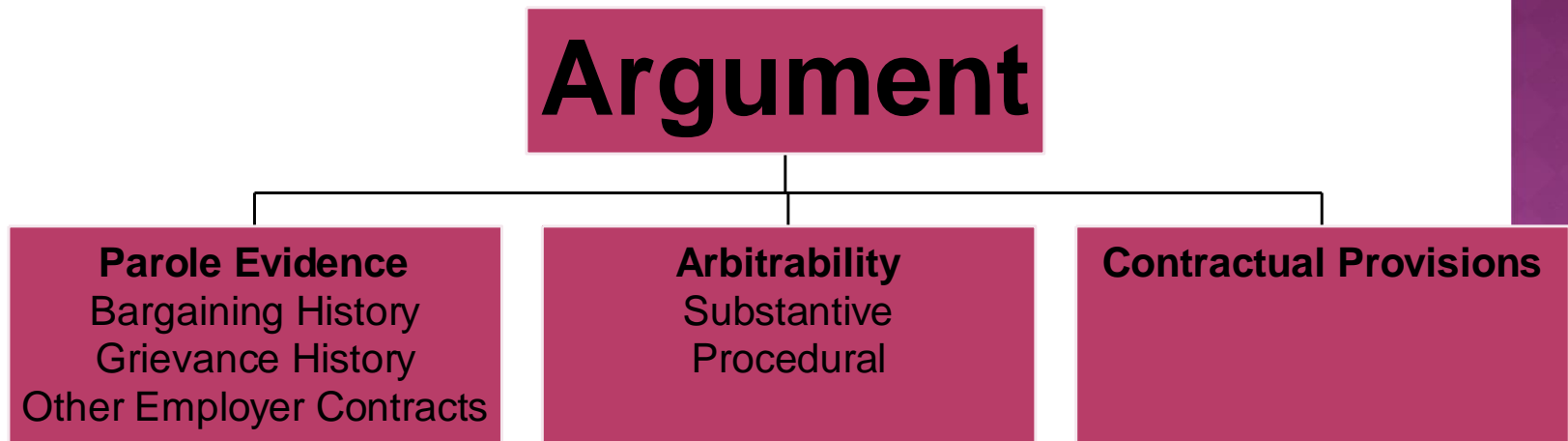
Outline the Theory of Your Case

Drafted by James Greene, LRS (CDRO)
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1. THEORY OF THE CASE

Outline of Case Theory



2. PRIORITIZE YOUR ARGUMENTS

- ◉ Formulate all potential arguments in your favor
- ◉ Disregard all arguments that are unconvincing or trivial
 - One good argument is worth more than 3 poor ones
- ◉ Focus on a concise way to make your arguments

3. OUTLINE YOUR OPPONENT'S THEORY OF THE CASE

- ◉ Formulate all potential arguments your opponent might make
- ◉ Focus on your opponent's strongest arguments
- ◉ Understand your defenses to such arguments

4. DETERMINE THE EVIDENCE YOU NEED AND THE METHOD OF INTRODUCTION

- What witnesses will you need ?
- What order will you present them ?
- What stipulations of fact might you offer ?
 - Prepare them in advance with copies for all sides
- Prepare any demonstrative evidence
- Arrange for any on-site visits that may be necessary

5. INTERVIEW AND PREPARE ALL YOUR WITNESSES

- ◉ Prepare weeks, not hours, in advance
- ◉ When you have the option of choosing from more than one witness, determine the best

6. PREPARE THE ISSUE YOU ARE TO SUBMIT

- ◉ Attempt to get agreement in advance—it will help you prepare!
- ◉ Type and copy (make at least enough for both sides and the arbitrator) the issue you plan to submit.
- ◉ If you can't or won't get agreement ahead of time, anticipate how your opponent will want to frame the issue.
- ◉ Mentally prepare alternative submissions based on legitimate objections.

7. PREPARE ANY STIPULATIONS YOU INTEND ON SUBMITTING

- ◉ Assess whether it is easier to present evidence rather than negotiate a stipulation.
- ◉ Determine whether you want to seek acceptance from your opponent in advance of the hearing (otherwise you won't know what witnesses to bring).
- ◉ Type and copy all prepared stipulations.
- ◉ Resolve all prepared stipulations prior to the actual commencement of the hearing.

8. COPY ALL DOCUMENTS YOU PLAN TO INTRODUCE

- Make sure you have copies for at least the arbitrator, both sides **and the witness**.
 - If there is a arbitration panel make copies for all panel members.
- Arrange the documents in the planned order of introduction.
- Ensure you have all source documents if you are using excerpts or summary documents/charts, etc.

9. OUTLINE YOUR OPENING, DIRECT, AND CROSS EXAMINATION

- ◉ Consider giving an outline of the testimony to all witnesses so that they know where they fit into the hearing and their contribution to it. This will also give you a checklist of witnesses, order, testimony points, etc.
- ◉ Contemplate who the other side may call, and what they will testify to.

10. PREPARE A “TRIAL NOTEBOOK”

- ◉ Use whatever organizational system works for you.
- ◉ The system should organize all documents, exhibits, resource materials.
- ◉ Prepare a list of exhibits - Union, District, Arbitrator, Joint (and in PERB cases ALJ)

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Opening Statement: 10 Keys to a Successful Opening Statement

1. Never Waive An Opening Statement

- You want to set the stage for the arbitrator.
- Also, if you do not have the burden of proof, you have the option of waiting until the conclusion of your opponent's case. Think very carefully if for the entire direct case the arbitrator has not heard from you on what your case will be about.
- Make your opening orally; do not just submit a written opening statement.

2. Prepare the Opening Statement in Advance

- The opening statement should be rehearsed so that you are not just reading it.
- Use an outline, notes, or whatever works, but make eye contact with the arbitrator.

3. Be Concise, Clear and Direct Using Plain English

- Don't bore the arbitrator with a lengthy opening.
- Avoid technical jargon, unless you know the arbitrator knows what you are saying. If jargon will be necessary, define the words (and make sure your witnesses do also).
- Get to the point quickly and clearly.

4. The Opening Should Have a Beginning, a Middle, and an End

- Find the story in your case and tell it to the arbitrator.
- Tell the arbitrator what happened; point him/her to the language in question; state evidence you will present and what it will show.
- End with what you want him/her to do—ASK FOR WHAT YOU WANT.

5. Don't Say Anything You Can't Prove

- At the end of your case you will be held accountable for what you have said in your opening statement. Tell the Arbitrator what you will prove ("The Union will show ...").
- If in doubt as to whether you can prove something; do not mention it in your opening statement.

6. Consider Whether to Admit to Problems With Your Case

- Every arbitration has some problems. It may be better to admit these up front unless you believe the problem will not arise.

7. Help the Arbitrator Understand Your Case

- If technical terms will arise, tell this to the arbitrator.
- Tell the arbitrator specifically what contract language is in dispute and the reasons that your interpretation favors your side.
- Make sure your pace is not going beyond his/her to understand your points or to take notes.

8. Have a Conclusion, Including Remedy

- Conclude by telling the arbitrator what the scope of his authority is under the agreement, and what specific remedy you want.

OPENING STATEMENT ESSENTIAL INGREDIENTS

1. What is the case about?
2. What is the party's position?
3. Who will be called?
4. What will they say?
5. Cite the contract language in dispute without argument.
6. Bring out weak points and neutralize if sure it will sure it will be raised by other side.
7. State what you want.

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Order of Proceeding

1. Joint Exhibits
Put into evidence joint submissions, such as the contract and grievance record.
2. Stipulations of Fact
Enter into the record any joint stipulations of fact.
3. Statement of the Issue
Submit a written statement of the issue for consideration. Resolve any arbitrability or other procedural issues.
4. Sequestration of Witnesses
Resolve any sequestration issues.
5. Opening Statement
Resolve any burden of proof or burden of going forward issues. Make your opening statement first if you have the burden of going forward on a preliminary issue (such as arbitrability) and have that issue resolved before getting to the merits of the case. If there are no preliminary issues, go first if you have the burden of proof on the merits.

CASE IN CHIEF

6. Direct Examination
Call your witnesses in a logical order if possible. If a witness has to be taken out of order, make sure that all necessary predicate evidence has been established in the record.
7. Cross Examination
Consider whether you should cross a witness; has the witness hurt your case or impeached credibility? Try to avoid a break in the hearing to another day after direct examination of your witness. Object to evidence outside the scope of the direct examination.
8. Redirect Examination
Rehabilitate any testimony damaged through cross. Redirect is limited to those issues raised in cross.
9. Recross Examination
Recross is limited to issues raised on redirect.

The Respondent's Case

The respondent now proceeds. The advocate could make a motion asking for a dismissal without going forward if s/he can argue that the burden of proof on the case-in-chief was not met. Know whether your contract speaks to the issue of resolving a failure of proof on the case-in-chief prior to taking testimony on the merits or if the arbitrator can reserve on the motion and continue with the respondent's case. If such a motion is raised, REMEMBER TO ADDRESS IN THE CLOSING STATEMENT OR THE CLOSING BRIEF.

If the Respondent is moving forward on the merits and if s/he did not make an opening statement, s/he may do so now. The order is the same as the case-in-chief.

10. **Rebuttal**

In some cases, it may be necessary to rebut elements of the opponent's case. This is the time to do rebuttal, and there is the same direct, cross, redirect, recross order.

11. **Sur Rebuttal**

Your opponent may rebut your rebuttal, provided there are new elements raised.

12. **Closing Argument or Briefs**

Verbal closing arguments are made at the end of the hearing unless there is an agreement to do closing briefs. If verbal, the rule is whoever opens first, closes last (just like baseball). If doing briefs, establish a schedule and determine if the briefs will be exchanged simultaneously or in some other order.

TECHNIQUES TO MAKE A CLEAR RECORD

1. Speak clearly and loudly enough to be heard.
2. Use exhibit numbers for every reference.
3. Spell proper names when first introduced.
4. Allow one person in the room to speak at a time.
5. Do not "echo" answers.
6. Treat numbers carefully.
7. Verbally describes physical gestures.
8. Avoid off-the-record colloquies.
9. Any material to be read into the record must be read slowly.
10. Make sure any significant errors in the transcript are corrected.

RULES FOR FRAMING THE ISSUE

- 1. Do not include in the issue any facts that are in dispute.**

Did the District violate the Agreement when it transferred elementary teacher B.L from 3rd grade to 1st grade -when the dispute is whether movement from one grade to another in the same building is a "transfer" or "reassignment"

- 2. Do not make any admissions in the statement of issue that are admissions of facts in dispute.**

Did the District properly excess employee A under the terms of the Agreement -when the union contends that the employee was fired and not "excessed"

- 3. Do not give the arbitrator any less jurisdiction that he is entitled to under the agreement unless there is a clear motive for doing so.**

Did the District violate the Agreement in its application of the salary schedule to teachers A, B, and C; And if so the remedy granted by the Arbitrator shall be confined to remedies available under the terms of the Agreement.

- 4. Decide whether the issue you present is broad or narrow:**

Did the District violate the class size provision of the agreement as it relates to 1st grade teachers A, B, C, and D 2005-06 classes?

And if so what shall the remedy be?

-OR-

Does the class size provision of the agreement require the District to maintain a limit of 23 in 1st grade classes;

And if so what shall the remedy be for teachers A, B, C and D?

- 5. Do not concede arbitrability issues lightly.**

6. If there is a legitimate arbitrability issue limit it to- specifically what the issue is.

Is the grievance arbitrable?

Worst

Is the grievance procedurally arbitrable?

Slightly better

Was the grievance processed consistent with the requirement of the contract?

Not much better

Was the grievance timely filed?

Getting there

Was the grievance timely filed at step 1 of the grievance procedure?

Best

7. Make sure all affected grievants are included in the stipulated issue:

In a case that involves many but not all employees, some of which the identities are not known to the union, the issue should not be limited to only the known employees, unless the contract clearly limits the scope of the grievance to the specific individuals listed in the grievance.

8. In a multiple issue case make sure each issue is specifically delineated.

Was employee A entitled to use all of his accrued vacation immediately and consecutively prior to his date of retirement?

If not, was employee A entitled to be paid for all such accrued vacation at the time of his retirement?

If employee was not entitled to use his accrued vacation immediately and consecutively prior to his date of retirement, but was entitled to be paid for all such time at the time of retirement, was employee A entitled to be paid at his pay rate at the time of accrual of such leave or was such employee entitled to be paid at his pay rate at the time of retirement?

9. Do not include a legal defense in the stipulated issue.

An employer contends that the provision of the contract, while violated, was illegal under the law (e.g., a provision that restricts hourly employees from receiving compensatory time off in lieu of overtime pay under the Fair Labor Standards Act where the union insists that the practice of compensatory time in lieu of overtime pay should continue.)

Employer Proposed Issue -Does the Arbitrator have authority to decide entitlement of compensatory time in lieu of overtime pay for hourly employees when the FLSA act does not permit such compensatory time?

Better -Did the employer violate the agreement when it changed the past practice and Article 4.1 (Compensatory Time) when it substituted overtime pay in lieu of compensatory time off for hourly employees.

10. Be careful of leaving the issue to the arbitrator or merely stating "What shall the disposition of this grievance be".

Employer Issue

Did the Agency have the right to restrict the employee's access to its property in light of the employee's past misconduct?

Union Issue

Did the Agency violate the long-standing practice and provisions of Article IIL2 when it prohibited employee A from access to Agency property when it has never restricted such access to other employees, including employees who have been suspended without pay?

Arbitrator

Was employee A entitled to use Agency property given the employee's past employment record?

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OBJECTIONS

PURPOSES

1. To keep improper evidence out of the trial.
2. An objection preserves a point for appeal (usually not applicable in arbitrations).
3. An objection may be used solely for the purpose of breaking the concentration of the opponent. This is not to suggest that it should be used for this purpose often but one should be aware that your opponent may be attempting to do this.
4. An objection allows you to talk to the arbitrator (or administrative law judge).
5. An objection allows you to talk to the witness who is being cross examined.

WHEN TO OBJECT

1. Object when the question is objectionable UNLESS the answer doesn't hurt (or may actually help) your case.
2. Object when you are reasonably sure the answer to be given will hurt you.
3. Object you are relatively sure that the ruling will be in your favor.
4. Object when you absolutely must signal your witness.
5. Object to make a point with the arbitrator.
6. Object when you want to preserve the right to appeal.
7. Consider making the objection outside the hearing of the witness.
 - If the explanation of the objection is such that your case will be hurt by the witness hearing it, ask that the witness be excused.
8. Alternatively, one can object without raising a formal objection.
 - In arbitrations, one can inform the arbitrator that a question is improper, but that you don't need to have the question withdrawn, but rather the arbitrator should give little weight to the answer, because of the nature of the question.

The 20 Most Common Objections

1. Relevance

- Does the evidence advance the inquiry?
 - A person's character is generally not admissible to prove how he acted at a particular time.
 - Subsequent events or remedial measures are typically not admissible.
 - "Materiality" is a similar objection.

2. Patrol Evidence Rule

- Evidence to shed light on disputed language generally not admissible if the language is clear and unambiguous.
- Patrol evidence may take the form of narrative testimony, documentary evidence intended on illuminating mutual intent.

3. Best Evidence Rule

- Originals should be provided when available, though in arbitration this is not necessary if photo copies are accurate, and the originals are available for comparison.

4. Insufficient Foundation

- Preliminary facts you must prove before you can introduce the evidence you wish to offer.

5. Hearsay

- Be aware of the numerous exceptions to the hearsay rule. Arbitrators have the discretion to accept hearsay, but it cannot exclusively be relied upon to determine the outcome of a case. Question: is the hearsay reliable?

6. Leading

- A leading question is one that suggests the answer. Be aware of the permissible use of leading questions: for example, on preliminary matters. Leading questions should not be permitted on direct when the questions concern the subject at-issue.

7. Opinion Testimony

- The witness does not state a fact, but rather makes a statement not rooted in the witness' perception, or recollection.
- A similar objection is "calling for a conclusion." The witness should not testify to his inferences, conclusions, feelings, assumptions.
- Caution should be exercised against asking a witness to render legal opinions.

8. Repetitive or "Asked and Answered"

- On cross, asking a witness to repeat his direct testimony is permissible.

9. Cumulative

- Redundant testimony, i.e., essentially the same testimony by multiple witnesses is generally not permitted.

10. Assumes a Fact not in Evidence

- Certain facts must be established before they can be used as a predicate for a witness' testimony.

11. Misstates or Misquotes the Evidence

- It is objectionable for the advocate, in questioning a witness, to mischaracterize, misstate, misquote narrative or documentary evidence.

12. Misleading, Confusing, Ambiguous, Overly broad, Unintelligible, or Vague

- If you do not understand a question, you may object, but if the arbitrator (ALJ) understands the question, and the witness understands it, you may be out of luck.

13. Speculative

- A witness should not be permitted to guess at facts.
- Often this objection is based on witnessing a hypothetical question.
- Hypothetical questions are also objectionable.

14. Compound

- A question such as "Did you then go to the City, buy a camera, and return home to find your husband dead of toxic poisoning brought about by a low tolerance to the product "Kill a Rat"? is probably objectionable!

15. Argumentative

- "Now, come on Mr. X, you don't really believe that now, do you?" is likely argumentative.

16. Non-responsive

- A witness is supposed to answer the question put to him. If the answer is not responsive to the question, it is objectionable.

17. Beyond the Scope of Direct or Cross

- Cross should be based only on evidence produced on direct, redirect should only be based on evidence produced from cross.
- Similarly, rebuttal testimony cannot be used to put into evidence something the advocate forgot to put in on direct; it is limited to either the direct or cross that preceded it.

18. Privilege Communication

- Attorney -client discussions are generally not admissible.
- A client who uses an attorney to do a disciplinary investigation may be questioned about such investigation, unless the attorney also rendered legal advice to that client regarding such investigation.
- Non-attorney representatives may have some privilege.

19. Document Speaks for Itself

- A witness should not be entitled to answer a question such as, "What does Article VI of the CBA provide with respect to right to use family sick leave on days before holidays?"

20. General Objections

- There is just something not right with the question -- you can't figure out specifically what to characterize your objection is, but you make a general objection to the question. You probably won't be sustained unless the arbitrator has the same view!
- Great objection when you haven't a clue!