FLORIDA EDUCATIONAL NEGOTIATORS
39TH ANNUAL CONFERENCE

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Effective Arbitration Advocacy: Preparing to Win
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Mediator/Arbitrator/Special Magistrate

I. Selection of the Arbitrator

- What do you want in an arbitrator?

- How do you find the one you want?

(Some say the case is decided when the arbitrator is selected)

II. Preparing the Case *(Do you need a lawyer?)*

A. What's the Issue?

Use *extreme* care in drafting the issue - the issue agreed upon by the parties (or determined by the arbitrator) will bind the arbitrator whose sole responsibility is to decide *the issue presented.*

- *e.g.*, Discipline cases: Whether the employer had just cause to discipline the employee. If so, what should the remedy be?
- e.g., Contract interpretation cases: union will seek broadest possible issue and employer will seek the narrowest.

(*What is the definition of a grievance in the cba - why does it matter*?*)*

B. Is There a Question About Arbitrability

If there is a question of whether the grievance is arbitrable - i.e., whether the arbitrator may hear the case, *decide <u>NOW</u> how and when you want this question resolved.*

- STIPULATE IF THERE IS <u>NOT</u> A QUESTION OF ARBITRABILITY!

C. Theory of the Case

The theory of the case is a short, simple rationale for why your side should prevail *(You should be able to state the theory of your case in 3 sentences.)*

- It will be the theme of your case throughout
- Review chronology of facts/events and relevant contract language
- Assess the strengths and weaknesses of your case *and of the other side*

D. Selecting *and Preparing* the Witnesses

- Interview all prospective witnesses to determine what they know, and determine the strength and weaknesses of each witness.
- Determine which piece of documentary evidence will be introduced and authenticated by the witness, and then *practice the introduction of the evidence* with the witness.
- Prepare written questions for each witness.
- Practice both direct *and cross* examination with the witnesses.
- If possible, conduct a group conference with all witnesses and explain your theory of the case so they understand the importance of their testimony
- advise witnesses to avoid immaterial and irrelevant testimony
- advise witnesses to avoid opinions, arguments, feelings and beliefs - stick to the facts
- advise witnesses to avoid volunteering information
- encourage strong positive testimony
- discuss proper attire and demeanor
- explain the rule of sequestration
- prepare witnesses for cross examination;
    - do not show hostility
    - do not volunteer information
    - do not argue with opposing advocate *or the arbitrator*
    - ask for clarification if a question is not understood
    - stick to the facts
    - think before speaking
    -attempt to explain answers if a "Yes" or "No" answer is misleading

PRACTICE!

E. Decide on location of hearing *(home field advantage?)*

F. Discovery

This subject should be addressed in the preliminary hearing. The amount of discovery permitted is within the arbitrator's discretion. (If the arbitrator does not schedule a prehearing conference, you should request one.)

- Submit written request for documents with timeline for compliance
- Exchange witness lists (timeline)
- Exchange exhibit lists (timeline)
- Subpoenas?

G. Prepare Exhibits

- Organize, number and label your exhibits, make a master list, and place them in individual files or a three-ring binder.
- Prepare a set of exhibits for the arbitrator, opposing counsel and court reporter.

- Agree to as many **Joint Exhibits** as possible

H. Decide whether to use Court Reporter - verbatim transcript

Why use one - advantages and disadvantages?

I. Seek stipulations to the issue, and to evidence regarding "undisputed facts"

Stipulations should be carefully worded to avoid ambiguity.

III. Sequence of Events at Hearing

- Notice of appearances
- Stipulate that the case is properly before the arbitrator *(unless that is at issue).*
- Stipulation of issue *(if possible)*
  Why is this important?
- Introduce Joint Exhibits
- Who goes first?
  Which advocate has the burden of proof?
- Opening statements

  The purpose of the opening statement is to provide the arbitrator with an overview of the dispute form your point of view. It is like a road map of the case. In it, the advocate should inform the arbitrator of the theory of his/her case, the evidence to be introduced, the witnesses who will testify, the facts the advocate intends to prove and the reasons why the advocate should prevail.

  Do not ignore the strengths of the opposing case
  - *Should Defensive party reserve opening statement until conclusion of opposing advocate's case in chief?*
  - Moving party introduces evidence and testimony through direct examination.
  - Cross examination *(<u>only</u> if necessary! . . . and make it "surgical.")*
  - Moving Party rests
  - Defense introduces evidence and testimony through direct examination.
  - Cross *(only if necessary!)*
  - Rebuttal testimony and evidence
  - Cross *(only if necessary!)*
  - Closing argument, or waive pending filing of briefs *(This should have been decided before the hearing)*

IV. "Short Shots"

Ex Parte Communications - DON'T!

If you communicate by email with the arbitrator, <u>always</u> simultaneously cc: the opposing party

Contract interpretation - YOU GET WHAT YOU WROTE, NOT WHAT YOU MEANT!

Evidence

- Formal rules of evidence do not apply

What is the "Best" evidence?

Objections

Use them sparingly

V. Closing Arguments/Post Hearing Briefs?

Closing argument, or waive pending filing of briefs *(This should have been decided before the hearing)*

In what kind of a case would a closing argument and bench decision be appropriate?

VI. Briefing

A. State the issue to be decided

B. List the relevant CBA provisions

C. State the facts that are material and relevant to the resolution of the issue *(make references to the transcript if verbatim transcript is available)*

Organize facts either chronologically or by topic.

D. Present your argument *and rebut opposing party's argument.*

E. Clearly state the decision you assert should be reached by the arbitrator - typically the employer will simply ask that the grievance be denied in its entirety.

G. If this is a discipline case, management should ***strongly consider*** the fiscal impact if the decision is for the grievant.

- *The union will always ask for a make whole remedy - what does this mean?*
- Consider asking the arbitrator to retain jurisdiction for a period of time (60 days) to consider and resolve disputes regarding the implementation of the remedy.

Considering the potential fiscal impact of a decision may encourage management to consider settlement. (Examples)

QUESTIONS?

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