

WHAT ARBITRATORS NEED FROM THE PARTIES

I. A FEW COMMENTS ON ADVOCACY IN ARBITRATION

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Perhaps because the quality of arbitrators' decisions is necessarily dependent on the quality of the presentations made to them, over the years members of the National Academy have expressed significant interest in arbitral advocacy. Bill Murphy's "The Ten Commandments for Advocates: How Advocates Can Improve the Labor Arbitration Process,"¹ presented at the National Academy's meeting in Atlanta five years ago, is a very thoughtful paper. Especially valuable is Bill's advice that advocates read the *Steelworkers Trilogy*,² "still the best expression of what arbitration is all about."³ Marvin Hill and Tony Sinicropi's "Improving the Arbitration Process: A Primer for Advocates"⁴ not only presents a number of well-reasoned suggestions about how advocates can improve their presentations but also lives up to its title. The paper is indeed a primer of labor arbitration. Another very useful resource for advocates—with contributions from noted advocates for management and labor as well as Academy members—is the book *Labor Arbitration, A Practical Guide for Advocates*.⁵ Arbitrators' interest in effective advocacy is not new. Clarence Updegraff and Whitley McCoy headnoted one section of their book, *Arbitration of Labor Disputes*: "Effective Presentation of Case—Preparation—Attendance

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¹Murphy, *The Ten Commandments for Advocates: How Advocates Can Improve the Labor Arbitration Process*, in *Arbitration 1992: Improving Arbitral and Advocacy Skills*, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1993), 253.

²*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

³Murphy, *supra* note 1, at 254.

⁴Hill & Sinicropi, *Improving the Arbitration Process: A Primer for Advocates*, 27 Willamette L. Rev. 463 (1991).

⁵Zimny, Dolson & Barreca, eds., *Labor Arbitration: A Practical Guide for Advocates* (BNA Books 1990).

of Witnesses—Examination of Witnesses—Depositions and Affidavits—Closing Arguments—Briefs.”⁶ The book was copyrighted in 1946. With the exception of the Updegraff and McCoy book, all of these materials are readily available. Relatively recent entrants into arbitration advocacy, who want to improve the quality of their presentations, and more seasoned veterans, who realize the importance of occasionally reviewing the fundamentals of case presentation, will find the time reviewing any or all of them well spent.

The topic given this panel is “What Arbitrators Need from the Parties.” If my more than 20 years of experience as an arbitrator is characteristic, the short answer to that statement is “not much they aren’t getting.” Representatives of organized labor and management have molded “labor arbitration” into many shapes, and they have made all of those forms work remarkably well. “Labor arbitration” includes “expedited arbitration” of disciplinary grievances short of discharge wherein the primary guideline is that arbitrators do their best to ensure that grievants and first-line supervisors go away feeling they had a fair hearing;⁷ arbitration of discharge grievances in a procedure that prohibits participation by lawyer-advocates and requires the arbitrator to issue a bench decision;⁸ statutorily mandated arbitration of withdrawal liability in accordance with rules allowing for substantial discovery; arbitration of deadlocks among trustees of pension or health and welfare plans; and interest arbitration wherein the wage scales, benefits, and working conditions of hundreds, thousands, or hundreds of thousands of employees and the economic viability of their employers may be at stake. Continued judicial deference to arbitration decisions and continued acceptance of arbitration by employees and employers as a device for resolving such a wide range of issues are evidence that the quality of advocates’ presentations in arbitration is high. An arbitrator can misunderstand even the most skillful presentation and thus reach an erroneous conclusion. Without a presentation of sufficient quality, an arbitrator will likely lack the information needed to reach the “correct” and acceptable decision.

⁶Updegraff & McCoy, *Arbitration of Labor Disputes* (CCH 1946), 104. I am indebted to two friends who found a copy of this book in a library sale and gave it to me. The flyleaf is rubber stamped “From The Office of Senator John Sparkman” and inscribed in longhand “Honorable John J. Sparkman, with the compliments of Whitley P. McCoy.”

⁷Remarks by Ben Fisher, then Vice-President, United Steelworkers of America, on behalf of the Steelworkers and the Coordinating Steel Companies, to members of the Birmingham Area Steel Panel, Birmingham, Alabama, in approximately 1972.

⁸Such provisions are found in a number of collective bargaining agreements between the United Mine Workers of America and operators of coal mines.

Early in my arbitration career I learned that some apparently unskillful presentations were in fact quite skillful but that the advocate was saddled with a very poor case. Any comments I might make about lack of quality or skillfulness with regard to advocates' presentations are necessarily based on what he or she presents. If called on to do so, I could frame an opinion about how that information was presented. For example, I might conclude the advocate made excessive use of leading questions. But what I cannot know is the information that might have been presented or discovered but was not, and without that information I cannot know whether the presentation was deficient or the case was bad or both. Despite that limitation, I join Bill Murphy in stating that "I cannot honestly say I never met an advocate I did not like [but that] [w]ith few exceptions they have been persons of competence and integrity."⁹ I do not know how many arbitration hearings I have conducted, but the number surely exceeds 1,000. On only four occasions have I felt that my obligation to conduct a fair hearing required a cautionary word to an advocate, and three of those situations were related to inexperience and/or overzealousness. Assuming only 1,000 hearings, in the other 99.6 percent, advocates for both parties presented their cases with respect for their obligations to the arbitration process. And I believe that in the overwhelming majority of those cases, the advocates made effective presentations.

Statutory Employment Claims

Again, if my experience is characteristic of the state of labor arbitration generally, there is one arena in which management and labor may want to expend some resources on training advocates. That is the area of statutory employment claims. On a small number of recent occasions, I have been suspicious that the primary reason a statutory claim was not argued was that neither advocate realized the facts of the grievance arguably raised such an issue. By the time of this presentation, other speakers likely will have discussed the arbitration of statutory employment issues at length. In any event, I do not intend to cover that material here. Rather, I would note only that such issues cannot be resolved in the context of a labor arbitration if they are not raised in that forum, and that statutory employment claims will not be raised there

⁹Murphy, *supra* note 1, at 266.

unless advocates first recognize them. If a collective bargaining agreement contains language that can reasonably be interpreted as incorporating by reference an employment discrimination statute, and if the parties to that contract want such issues addressed in labor arbitration, they must ensure that their advocates are well-enough educated about such claims to recognize and argue them.

“Nonrules” of Evidence

The final topic of this minipaper is two “nonrules” of evidence. Arbitrators and advocates have discussed the admissibility of evidence at a number of National Academy meetings.¹⁰ Discussions of admissibility are certainly appropriate in Academy meetings. Evidence may be offered and admitted for reasons unrelated to proving anything, including pacification of a client representative or grievant who feels strongly that a particular bit of information should be placed before the arbitrator. But my very unscientific and nonrandom sampling indicates that at the outset of and throughout an arbitration hearing most advocates are interested primarily in winning the case being presented. If an advocate’s frame of reference is winning, focusing discussions of evidence in arbitration on admissibility may mislead the advocate into thinking that an arbitrator’s admission of evidence is the equivalent of a finding that evidence proves something. Certainly, that is not always the case. An arbitrator’s recitation of the mantra, “I’ll take it for what it’s worth”—or my favorite variation, “I will take the objection as relating to the weight and admit [the offered evidence]”—should immediately trigger a question in the offering advocate’s mind: “Did I just prove anything? Is the arbitrator any closer to the conclusion I want than a moment ago?” My point is simple. Advocates in arbitration should pay attention to at least some of the rules of evidence—not as rules for admissibility but rather as guidelines to facilitate their making a more probative presentation, a stronger presentation, a presentation more likely

¹⁰See, e.g., Murphy, *supra* note 1, at 262–67; Wright, *The Use of Hearsay in Arbitration*, *id.* at 289; Roberts, *Memory and Searching for the Truth: II. Evidence: Taking It for What It’s Worth*, in *Arbitration 1987: The Academy at Forty*, Proceedings of the 40th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1988), 112; McDermott, *The Presidential Address—An Exercise in Dialectic: Should Arbitration Behave as Does Litigation?*, in *Decisional Thinking of Arbitrators and Judges*, Proceedings of the 33rd Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1981), 1, 13–18.

to persuade the arbitrator than would occur if the guideline, the “nonrule,” were ignored.

Hearsay Evidence

Especially important are the nonrules regarding avoiding hearsay evidence and leading questions during direct examination of one’s own witnesses. For purposes of our discussion, we can define hearsay as being secondhand (or worse) testimony offered to prove the truth of the matter spoken about or simply as evidence that is not subject to cross-examination.¹¹ “Why does an arbitrator give so much more weight to firsthand evidence than hearsay?” you ask. If you were in the arbitrator’s shoes, you would probably do the same thing. For example, if you had to decide whether Richard had hit Rachel, whose testimony would you find more significant: Ralph’s—assuming Ralph just happened to be in the area and saw what happened—or Roger’s—assuming Roger’s testimony is based on what Regina told him Rachel had said to her (“double” hearsay)? One can only cross-examine Roger about whether Regina had in fact told him what Roger testified Regina had said; Roger cannot be cross-examined about whether Richard did or did not hit Rachel because Roger was not there and has no firsthand knowledge of the event. The unfairness many feel is inherent in testimony that cannot be cross-examined as well as the likelihood that a story will be modified as it is retold cause factfinders to avoid basing decisions on hearsay testimony. Therefore, to maximize the strength of the advocate’s case, to maximize the probability of persuading the arbitrator to adopt the advocate’s version of the case, the advocate should avoid hearsay to the extent that he or she can.

The Leading Question

A leading question may be defined as one that provides the arbitrator not with the witness’s testimony but rather with that of the advocate. In a case in which the frequency of a particular event was considered important, an experienced advocate once asked his own witness, “Isn’t it true they did this 97.6 percent of the time?” The witness was not unintelligent. His “Yes, sir” was not only clear and concise but was delivered with real gusto. But had I not heard

¹¹Bloch, *The Applicability of Legal Rules Including Evidence*, in *Labor Arbitration: A Practical Guide for Advocates*, eds. Zimny, Dolson & Barreca (BNA Books 1990), 120, 128.

the advocate's and not the witness's testimony? If one believes, as I do, that the parties to a collective bargaining agreement that provides for final and binding arbitration of grievances expect and intend that arbitrators resolve disputed facts on the basis of the testimonies of the witnesses and the other evidence presented, and not based on advocates' opening statements, one reason advocates should avoid relying on leading questions to establish important elements of a case is self-evident. A leading question may result in an arbitrator's deciding that while you may have repeated or clarified your opening statement, you have done nothing to prove the point in question.

Elizabeth F. Loftus, a professor of psychology, identified more subtle but nonetheless weighty problems associated with the use of leading questions in an excellent paper presented to the Academy during its 1987 Annual Meeting in New Orleans.¹² Rather than paraphrase her succinct discussion, I will quote from it:

This brings us to the relationship between language and memory. We found from a very simple study that the way a question is worded affects the answer. Again, we brought people into a laboratory situation, showed them an event, and then questioned them about it. For example, in an accident scene, when we asked whether they had seen *the* broken headlight, more than twice as many answered yes as when we asked whether *a* headlight was broken. It seems that use of the indefinite article reduced their assumption of fact. In fact no headlight had been broken.

...

In other work I have actually changed people's memories by the way I asked a question. If, for example, the car in an accident was green and we suggest that it was blue, when people look at a color chart later, they will usually pick a color that is somewhere between blue and green.

...

Why do these distortions in memory occur? We really don't know why; we only know they do happen.¹³

Even without intention, an advocate's asking a leading question may distort a witness's response. Because the arbitrator will likely be reluctant to base a decision on distorted recollections, advocates interested in persuading the arbitrator should avoid leading questions to the extent possible.

¹²Loftus, *Memory and Searching for the Truth: I*, in *Arbitration 1987: The Academy at Forty*, Proceedings of the 40th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1988), 107.

¹³*Id.* at 110-11.

II. MISCELLANEOUS MUSINGS

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This paper has been prepared for use in conjunction with a roundtable discussion among several labor arbitrators on the subject of "what arbitrators need from the parties." It poses several questions that, while not necessarily profound, surfaced during "stream of consciousness" attempts to identify experiential situations that may at once (1) lend themselves to such discussion of varied perspectives, (2) avoid topical areas exhausted by previous coverage and about which nothing new or useful will be said, and (3) evoke discussion that will give advocates some insight into arbitral thinking in the areas addressed and from which, by inference, they may draw some guidance. The following questions and answers came to mind.

1. At the outset of the hearing, how much time should the parties be allowed to attempt to mutually frame the issues for resolution?

It is always refreshing to open a hearing where the parties already have mutual understanding and agreement regarding the issues in the case and can promptly state what issues they wish to submit for resolution. Often, however, they are not in such a state of readiness and seem poised to embark upon a course of intense and protracted negotiations, which suggests that defining the issues is the ultimate purpose of their appearance at the hearing. While mutual agreement on the matter ensures that the parties themselves define the parameters of their dispute, their inability to agree precisely upon how the issues in the case should be framed is not a fatal problem. It is also not particularly surprising, given varying strategies and philosophies about the matter. For example, one party may desire to frame the issues narrowly and the other may desire a broad statement of issues, or the parties (unwittingly sometimes and at other times by design) include in their proposed statements of issues various admissions that, in truth, are questions of fact to be resolved during the hearing. Unless one party is clearly obdurate at the outset regarding how the issues should be framed, a brief period of indulgence by the arbitrator is warranted. Even if no agreement is reached, their discussion may give the arbitrator

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a preview of the most controversial portions of the case, or if nothing else, an idea about the level of stress to be surmounted during the course of the hearing. However, when it becomes obvious that the discussion is not moving expeditiously toward agreement, there is no compelling reason to prolong the inevitable. The arbitrator should terminate the parties' attempt to mutually frame the issues and request a separate issues statement from each party, with the understanding that the task of framing the issues will devolve to the arbitrator.

2. Does the arbitrator need an opening statement from the parties?

In labor arbitration cases, the arbitrator usually arrives at the hearing with no knowledge of the case other than the case caption showing the names of the parties and perhaps the name of the individual grievant (if applicable) and some indication of the general subject matter of the case. When the hearing begins, only the parties have intimate knowledge of the case as a whole, assuming they have used the grievance procedure to its fullest potential and have prepared well for the hearing. Further, although one party is sometimes eager to summarize the other party's case "for the benefit of the arbitrator," each party alone is in the best position to articulate its position and to highlight the evidence it intends to elicit to support its own case or to rebut the other party's case. The opening statement is the first real opportunity each party has to acquaint the arbitrator with its case, to point the arbitrator's attention and thinking in a particular direction, or to identify (or characterize) the evidence that it believes will cause the arbitrator to find in its favor at the conclusion of the hearing. Therefore, the decision of either party to waive an opening statement and thereby forego an opportunity to influence the arbitrator's thinking about the case and to point the arbitrator in a certain direction should not be made lightly. Moreover, the arbitrator certainly appreciates being able to place evidence in a particular context as it is being presented. For that reason, it is helpful to have opening statements from both parties prior to the receipt of evidence. Particularly where the moving party waives the opening statement, the arbitrator begins without a full framework for the dispute. Additionally, the party that waives the opening statement, whether it is the moving party or the responding party, runs the risk that the arbitrator will make subconscious judgments about the strength of its case or the competence of its advocate. On the other

hand, it is possible that the advocate, knowing more about the case than the arbitrator, has sound strategic reasons for waiving the opening statement and believes that the benefit to be gained by waiving the opening statement clearly outweighs the possible disadvantage of "keeping the arbitrator in the dark" about the nature of the dispute and the party's position regarding various issues. If such an *informed* choice has been made, who is the arbitrator to quarrel with it?

3. Should the arbitrator encourage parties to enter into stipulations of fact?

Where it appears, as a result of the arbitrator's participation in prehearing discussion with the parties or as a result of information gleaned from listening to the parties' opening statement, that various matters are not in dispute, the arbitrator should inquire of the parties why such information could not be the subject of stipulation between the parties. If it is clear from their responses that there is no dispute over the matter, that a stipulation can be devised within a very brief period of time, and that the weight to be given the undisputed information would not be enhanced by eliciting it instead through testimony from a particular individual who "makes a great witness," the parties should be encouraged to stipulate to the information so that precious time is not devoted to an uncontested matter. Frequently, the parties have not previously realized the extent to which they are in agreement over various factual matters and are, therefore, quite willing to enter the information into the record via stipulation. However, if either party is wary of stipulating to information and cannot be assuaged, there is no reason to browbeat the party into submission on that point. If gentle prodding toward entering into stipulation has failed, the arbitrator should allow the party to call its intended witness to present the undisputed information. While doing so may lightly bruise the arbitrator's ego and slightly prolong the hearing, none of the arbitrator's central authority or power is surrendered. More significantly, such an accommodating approach will allow the parties to place relevant and competent information before the arbitrator in the manner they wished to present it, thereby inspiring confidence in the integrity of the process. Although the arbitrator could insist upon receiving the evidence by stipulation, in this instance, there is no gain if expediency is achieved at the price of loss of confidence in the process.

4. *Are there situations in which offers of compromise or settlement should be received in evidence? Should alleged admissions and alleged prior inconsistent statements made during the grievance procedure be received in evidence?*

The rule that offers of compromise or offers of settlement may not be received in evidence *to prove the validity or invalidity of a claim* is well established and enforced in arbitration. A recent review of reported labor arbitration cases from the earliest to the most recently reported cases yields only a very limited number of instances in which an issue involving the rule has arisen at all. Among those labor arbitration cases where such an issue was involved, if evidence of offers of compromise or settlement was received, it was received for some purpose *other than proving the validity or invalidity of a claim that prompted the offer of settlement or compromise*, for example, there was an assertion that the alleged offer of compromise was no longer an offer of compromise but, in fact, an accepted offer that had become a contract between the parties. For instance, in *Hillbro Newspaper Printing Co.*,¹ such evidence was received because the issue in the case was whether an offer of compromise or settlement (in the form of a letter) had been accepted and had, therefore, become a binding contract between the parties. Thus, the offer of compromise was itself the crux of the dispute in the case. The arbitrator explained, as follows, the rationale for receiving evidence of the offer of compromise:

At the time of the arbitration hearing, the Company objected to the introduction in evidence of the correspondence [claimed to be an offer in compromise]. It based its objection upon the following language appearing in Section 5 of the "Code of Procedure" of the International Agreement:

The parties to the dispute shall not be permitted to introduce in evidence or argument any reference to any offer submitted in compromise prior to convening of the local Board of Arbitration. . . .

The difficulty with the position the Company has taken as to the admissibility of the letters, however, lies in the fact that the Union contends that the offer of settlement of the sweeping dispute (as expressed in the August 15, 1966 letter of the Production Manager) was thereafter accepted. If such an acceptance actually took place, the compromise was consummated between the parties and may here be

¹48 LA 1166 (Roberts 1967).

enforced by the Union. Section 5 of the "Code of Procedure" clearly contemplates the rejection of offers of compromise only in those situations where the attempted settlement of a dispute proved to be unsuccessful. In the case at hand, however, the Union asserts that the parties have entered into a binding modification of their Collective Bargaining Agreement and that the Company now seeks to renege on that amendment. For that reason, the correspondence referred to [as an offer to compromise] is found to be admissible in evidence.²

Unlike at common law,³ the rule against admissibility of offers of compromise or settlement in arbitration was initially interpreted broadly enough to exclude statements that were technically not offers of settlement or compromise but could arguably be viewed as admissions or prior inconsistent statements made during the course of negotiations, that is, during the grievance procedure.⁴ In that regard, one distinguished law professor and former president of the National Academy of Arbitrators noted:

The accepted exceptions to the hearsay rule hold admissions and declarations against interest to be reliable enough to pass the barrier of the hearsay rule. They are, nonetheless, barred in a number of jurisdictions, as for example, under the new California Evidence Code, when they involve negotiations and offers leading to a possible compromise. The rationale is that otherwise "the complete candor between the parties that is most conducive to settlement" would be penalized, thereby frustrating the public policy favoring settlement of disputes by the parties without recourse to litigation.

In a labor arbitration, where the advocates frequently will not object solely because of lack of knowledge of what is objectionable, the arbitrator may well regard negotiations for settlement in the earlier stages of the grievance procedure so vital to the success of collective bargaining that he may himself interpose objection, indicating to the proffering party why this kind of evidence really ought not to be heard by him. Indeed, there is widespread conviction among experienced arbitral participants that an arbitrator is warranted in excluding this kind of proffered evidence on his own motion. Of course, facts typically pop out in the informality of arbitral hearings when the parties are not represented by counsel. An arbitrator may well elect in these situations to ignore the settlement maneuvers without explaining the incomprehensible for the benefit of the uncomprehending.⁵

²*Id.* at 1170.

³Hjelmeset, *Impeachment of Party by Prior Inconsistent Statement of Compromise Negotiations: Admissibility Under Federal Rule of Evidence 408*, 43 Clev. St. L. Rev. 75, 97 (1995) (quoting Saltzburg & Redden, *Federal Rules of Evidence Manual* 190, 3d ed. (1982), at 188): "In most common law jurisdictions, a line is drawn between offers to settle and admissions of fact during settlement negotiations. Factual admissions can be introduced against the party making the admissions unless they are inextricably bound up with offers to settle").

⁴Jones, *Evidentiary Concepts in Labor Arbitration: Some Modern Variations on Ancient Legal Themes*, 13 UCLA L. Rev. 1241 (1966).

⁵*Id.* at 1279.

Like the situation regarding the admissibility of evidence of offers of compromise or settlement, only a dearth of arbitral precedent exists regarding the admissibility of evidence of alleged admissions or alleged prior inconsistent statements made during the course of negotiations. In *Harshaw Chemical Co.*,⁶ a case decided 40 years ago, the arbitrator unequivocally rejected the contention of the union that “the Company is bound by the statements made during the grievance procedure and cannot vary its position at the arbitration hearing.”⁷ The essence of that issue in the case is explained in the following excerpt from the opinion and award:

During the course of the grievance procedure the union claimed that the reason for the discharge was personal animosity by Krugman toward Mellon. This allegation was dropped and not offered at the hearing although the undersigned inquired thereon. The company during the grievance steps contended that the “question as to whether Mr. Mellon actually swore at the supervisor and company *** is somewhat immaterial and of secondary importance.” The company then proceeded to point out Mellon’s past work record and the insubordination of his disobeying Krugman. At the hearing the latter two contentions were again raised but the question of profanity was raised to the same level.

...
The union . . . contends that the Company is bound by the statements made during the grievance procedure and cannot vary its position at the arbitration.

...
[The company] contends that it is not bound by any arguments raised during discussion of the grievance and that neither is the union which has materially altered its position with respect to the discharge.⁸

In rejecting the union’s contention, the arbitrator agreed with the company’s position that “neither party is bound by its statements or actions during the grievance procedure” and ruled as follows:

Insofar as the question of shifting positions during the grievance procedure is concerned, it would seem that the well established rule on settlement discussions should apply here. That rule is to the effect that the discussions on settlement of a legal action are not admissible on trial. Any other rule would effectively prevent any discussions leading to settlement for fear that positions of the parties would be prejudiced thereby. The same is true if grievance discussions were admissible. Such a rule would compel the parties to refuse to discuss the grievance or attempt to settle it or even to shift their positions because at an arbitration hearing any such variance would be used against the party

⁶32 LA 23 (Belkin 1958).

⁷*Id.* at 24.

⁸*Id.*

making it. I shall therefore rule that any evidence as to discussions on the second and third steps of the grievance procedure are [sic] inadmissible.⁹

However, it appears that the view espoused in the quotation immediately above is not presently firmly entrenched in arbitration. Although the rule against receiving offers of compromise or settlement in evidence for the purpose of supporting or disproving a grievance is still viable and enforced in today's arbitration setting, such an unconditional declaration is not true regarding the admissibility of evidence of alleged admissions, alleged prior inconsistent statements, or alleged actions during the grievance procedure. There is no uniform view regarding that aspect of the rule either in civil law or in arbitration.

Many state jurisdictions, including California, currently provide that admissions and statements made during the course of settlement negotiations in civil litigation are not admissible in evidence. However, the federal rule on the subject includes a number of exceptions to the rule that leave considerable latitude for admissibility of such evidence. California Evidence Code, §1152, Offers to Compromise, provides:

(a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statement made in negotiation thereof, is admissible to provide his or her liability for the loss or damage or any part of it.

Federal Rules of Evidence, Rule 408, Compromise and Offers to Compromise, provides:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

⁹*Id.* at 25.

Given the differences between the federal and California rules governing the subject in civil litigation, the absence of any clear policy against admissibility of such evidence in arbitration hearings is not surprising.

Additionally, how that aspect of the rule is regarded in any particular arbitration case may also hinge upon the parties' perception of the overriding purpose of their grievance procedure. Where settlement of the underlying grievance is the primary objective of their grievance procedure, the parties themselves are unlikely to intentionally offer evidence of their dealings during the grievance procedure. Thus, if an issue somehow arises regarding the admissibility of evidence of alleged admissions or prior inconsistent statements during the grievance procedure, the issue quickly fizzles. Commonly, however, in today's labor relations setting, the grievance procedure, as administered by the parties themselves, may be less a "course of negotiations" between the parties (whereby settlement is the primary objective) than a multilayered process of discovery and disclosure (which incidentally may lead to settlement). In such a context, the parties jointly offer into evidence detailed statements of their positions and detailed summaries of their presentations at each step of the grievance procedure with the expectation that the arbitrator, in accordance with their mutual wishes, will confine the hearing to matters raised during the grievance procedure. While in theory such an approach seems reasonable, problems arise in the arbitrator's attempt to enforce it, including the need to invade the sanctity of the grievance procedure. Most ironic among the problems is that the parties themselves frequently disagree about whether an issue arose during the grievance procedure. If the arbitrator is forced to resolve that issue, both parties then offer evidence of their presentations during the grievance procedure in an attempt to prove whether an issue was or was not raised there. In the process of making their case on that issue, evidence of alleged admissions and alleged prior inconsistent statements and other evidence of that nature that may otherwise be excluded is necessarily received, irrespective of the potentially negative effect upon the parties' continuing relationship. Fortunately, in some instances, the start of a "minihearing" regarding what happened during the grievance procedure brings such discomfiture that the parties come to their collective senses, drop the controversy over this procedural matter, and ask the arbitrator to resolve the grievance that was filed rather than a dispute about what happened during the grievance procedure.

III. THE END IS NEAR: A NOTE ON EFFECTIVE CLOSURE

I.B. HELBURN*

My slice of the panel pie concerns posthearing briefs. It is my hope that you will find the ideas herein food for thought.

Why File?

Several years ago Byron Abernethy, one of our founding members, gave a presentation at a regional meeting about the nascent days of arbitration. Byron had kept statistics that none of us would dream of keeping. He could recount the issues presented, the number of witnesses each side called (usually very few, if the hearing even progressed beyond a roundtable discussion), the amount of time each hearing took, and whether briefs were filed. Of course, briefs were a rarity. Arbitration has come a long way since then, or regressed significantly, depending on your view of these things. The Federal Mediation and Conciliation Service (FMCS) fiscal year 1996 statistics show that briefs were filed in 3,500 cases and waived in 916 cases, a filing rate of 79 percent.

In reality, many cases present no novel fact situations or considerations. Once the facts and the relevant contract language are in the record, such cases could be argued orally with effectiveness equaling that of posthearing briefs. In truth, this must be stated as a hypothesis, since I have not seen research studies that would prove the point, but my experience tells me the hypothesis is sound. While the brief may protect an advocate from Monday-morning quarterbacking by a client on the losing end of a decision, or worse, a client looking longingly at a suit for inadequate representation, I suspect that often the time spent writing the brief could be better spent "prepping" the next arbitration case.

As arbitrators are fond of pointing out, it is primarily the parties' responsibility to address the concerns about the increasing cost and length of the arbitration process. One way to do that would be to agree to forgo posthearing briefs in many cases. In this regard I commend to you the language that appears for the first time in the 1994-1998 National Agreement between the U.S. Postal Service and the American Postal Workers Union. Article 15.5.B.7 states:

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Normally there will be no transcripts of arbitration hearings or filing of post-hearing briefs in cases heard in Regular Area level arbitration, except that either party at the National level may request a transcript. Either party at the hearing may request to file a post-hearing brief in contract arbitrations. In Regular Area level discipline/discharge arbitrations, post-hearing briefs will be permitted only by mutual agreement of the parties or by direction of the arbitrator. However, each party may file a written statement setting forth its understanding of the facts and issues at the beginning of the hearing and also shall be given an adequate opportunity to present argument at the conclusion of the hearing.

The Brief It/Argue It Conundrum

How many times have we been in a hearing when one party wishes to file a brief, the other party wishes to argue orally, and invariably both parties brief the case? I have adopted a procedure in these instances that, while possibly controversial, is useful. The individual who wishes to close orally has the option of asking that the brief-writing opposing advocate be excluded from the hearing room during the closing argument.

When briefs are filed by both parties, they are filed simultaneously if exchanged by the parties and held by the arbitrator until both are received if the arbitrator is to cross-file the briefs. This way neither party has the benefit of reading the other's brief before writing its own. My procedure maintains the level playing field. I have found that those preferring oral argument are more likely to act on the preference under these conditions. Of course, there are also advocates who are not the least concerned that the brief writer will have heard their oral closing. I will not speculate on the reasons for the lack of concern.

The controversy engendered by this approach comes about because it involves ex parte contact during the oral closing. The trade-off is that an "oral advocate" is no longer forced to choose between playing on what is perceived to be a tilted playing field with the brief-writer in the room and writing a brief to keep the field level. After due consideration, my conclusion is that curing the latter problem is worth the former. My experience in the Atlanta post office has been that even if both advocates choose to sum up orally, without my saying anything they allow the opposing advocate to close privately.

I believe that the major objection to the ex parte closing is that it deprives the absent advocate of a chance to be assured that no new evidence has been included in the closing statement. I would

be comfortable drafting the position of the party closing orally as I would draft that section of the opinion and award and sending it to the brief-writer on the day the brief was filed. Hopefully this would provide the necessary assurance that the oral closing was within proper bounds.

The Use of Published Awards in Briefs

There seem to be advocates who would sooner appear in a loincloth at the Academy's closing dinner dance than submit a brief devoid of citations to published awards. Yet, citations may serve no useful purpose and at times may actually be harmful. I cannot imagine an Academy member who needs references to published awards to be convinced that management bears the burden of proof in a discipline case. And I wonder how many of the cited cases are read. Yet, it is not that unusual to see the citations.

If a case is to be quoted, it should be read in full by the advocate who contemplates using it in the brief. Headnotes are deceptive. If I had collected five dollars over the years for each case cited to me that was not on point, or worse, that contained language more supportive of the opposing advocate's position than the brief-writer's, I might be contemplating a far more extensive summer vacation than that currently planned.

Several years ago I heard a case involving the discharge of a refinery operator with 39 years' seniority and an absolutely spotless disciplinary record. This was not a case of no active discipline—it was a case of none at all. Our grievant had nonetheless been discharged when, after absorbing a stream of vicious and profane insults that lasted 10 minutes by some estimates, he got in a scuffle with his much larger tormentor. In the midst of the scuffle the grievant pulled a penknife of the variety used to clean under fingernails, opened the blade, and said "I ought to cut you with this." No gesture was ever made with the knife, the scuffle was halted, and the grievant left work and on his way home stopped by his foreman's house to report the incident, omitting details about the knife and the related verbal threat. Both men were subsequently discharged. My impression is that the purveyor of the insults may not have grieved.

The knife owner grieved, and the case went to arbitration. In the posthearing brief, the management attorney quoted from several distinguished arbitrators to the effect that where a fight was concerned neither long service nor a clean record was sufficient to

mitigate the discharge. I remember distinctly that one of the quotations was from Whitley McCoy, "St. Whitley" to some management advocates who rely heavily on his 11th Commandment—"Thou shalt not substitute thy judgment for that of management." Much to my surprise, when I read the cases in full many grievants had been reinstated for reasons that had not found their way into the brief, Whitley McCoy's grievant included, and those that were not could be distinguished easily from the case at hand. I suspect that I would have reinstated under any circumstances, but the management brief made a difficult decision much easier. Over the years the experience has repeated itself with regularity. One would think advocates would know better.

Another problem with the use of citations and submissions is that too often cases are used as a substitute for a well-developed theory of the case and cogent argument. My friends on both sides of the table in the Postal Service have developed this approach to a high—or maybe a low—art, but they are not alone. The record will be made, some argument is advanced, and arbitration awards are submitted to convince the arbitrator to "do the right thing." Awards may support a well-reasoned theory of the case, but they do not show how the evidentiary pieces of the case under review fit with the theory. My strong impression is that time might be used more productively working with the case at hand rather than looking for supporting awards.

The Brief Itself

Here, I begin with the directive that I have given to students in my labor arbitration classes. When you strike a panel, you want the arbitrator whom you believe is fair, one with a good mind and a quick understanding of the evidence presented. Thereafter you would be wise to assume that your arbitrator is lazy and a bit dimwitted and your posthearing brief should be written with this in mind. Several implications follow. Structure the brief to draw attention to its main points. The use of headings, bold print, and bullets draw the eye to the paper and reduce the likelihood that the arbitrator will miss what you believe is a critical point. A stream-of-consciousness brief that lacks organization and skips from point to point in an illogical manner risks losing impact because critical pieces of evidence and critical arguments may be minimized or lost. And, even if the arbitrator teases out all the points that the advocate wishes to make, it may be difficult to distinguish the most

critical arguments from those that the advocate had never expected to carry the day.

Whether the closing is oral or in written form, it is your last shot at the arbitrator—the last opportunity to convince the trier of fact of the righteousness of your cause. Here, advocacy is nothing more than persuasion wrapped around contract language and facts. If a closing statement of any kind, whether done orally or in writing, is worth making, then it is worth the time and energy to construct that closing statement so as to be as persuasive as possible.