



Going AWOL

HOW LABOR AND MANAGEMENT ADVOCATES CAN PRESENT AN
ARBITRATION CASE

Who are we?


Richard Bales
Professor and Arbitrator (r-bales@onu.edu)

Charlene MacMillan
Arbitrator (macmillanarb.net)

Sylvia Skratek
Mediator·Arbitrator·Dispute Systems Designer
(Skratek.com)

Page Todd
Arbitrator
(nwarbitrationservices@outlook.com)

Why do we have Labor Arbitration?

- ▶ *“...the habitual willingness of civilized men and nations to submit their differences of opinion to a factual test...”* (Boland, 1943)
- ▶ *“...the tooth and claw of industrial warfare...”* (Steelworkers v. NLRB, 1976)
- ▶ ...the final stage in the relationship between Unions and Management:
 - ▶ Collective Bargaining  Arbitration
 - ▶ And it is the trade-off for the Union's inability to strike during the life of an Agreement...thanks primarily to WWII

Why don't you present a case to an arbitrator?

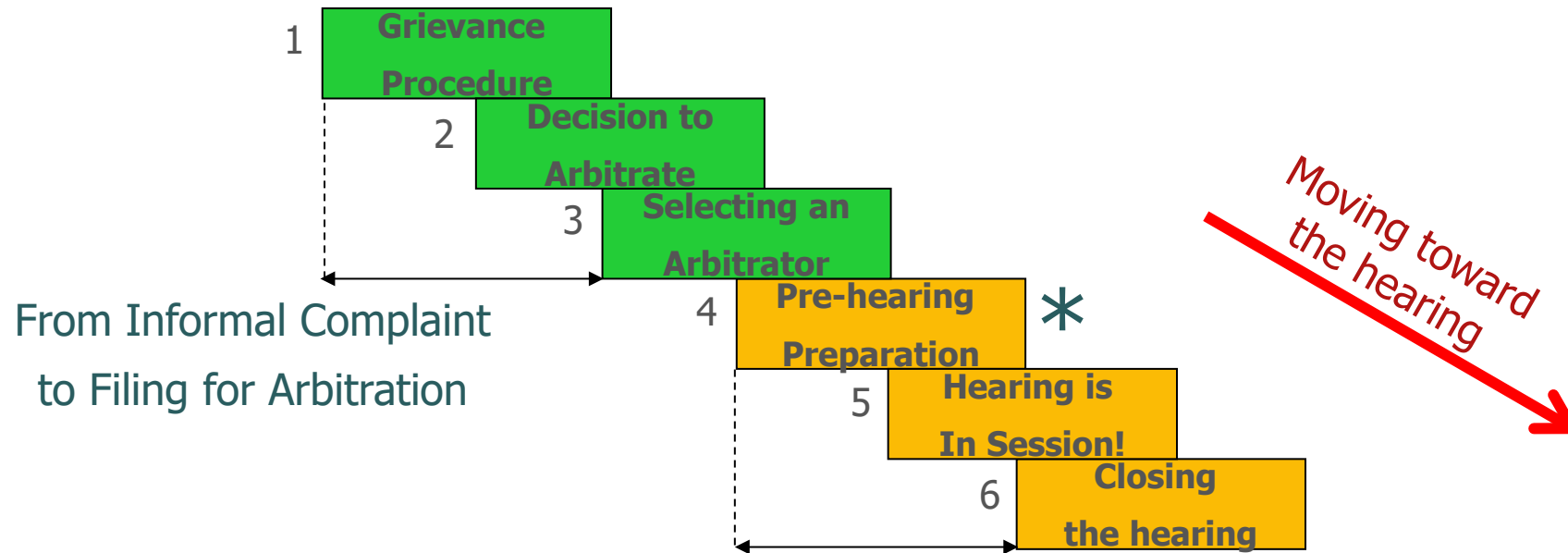
Why should you?

Can you?

- ▶ Do you have Reasoning Ability? Are you a critical thinker? Are you analytical?
- ▶ Do you have an understanding of Labor Relations?
- ▶ Can you make difficult decisions?
- ▶ Do you have the ability to participate in adversarial proceedings?



Where does arbitration begin?



And where does arbitration end?

* Weeks (not days) before

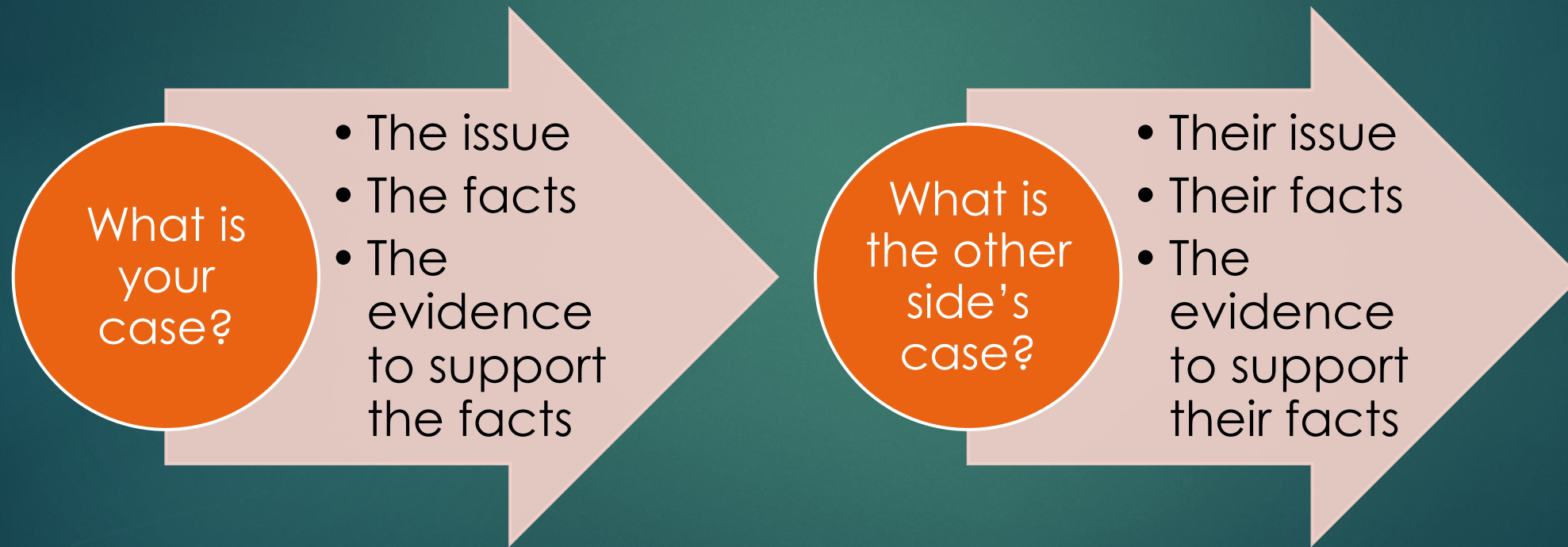
The Grievance Procedure

- ❑ Grievance definition-Is the issue covered?
- ❑ Steps of the procedure-has each step been fully utilized?
- ❑ Time limits-have the time limits been followed at each and every step?

Avoid Misuse of the Process

- ▶ Union Representative who wants to get re-elected
- ▶ Supervisor who does not want to lose face
- ▶ Union wants to amend the contract
- ▶ Company wants to centralize decision-making
- ▶ First level representatives who are not trained

Decision to Arbitrate



Pre-Hearing Considerations

Selecting the Arbitrator

Actual contract language

- ▶ “...qualified non-industry arbitrator...shall be a non-attorney/lawyer who meets certain minimum standards, including no prior affiliation [with the Employer or the Union] and on the FMCS or AAA labor arbitrator rosters”



Making the Selection

Mechanics

What does Contract say?

- a) Talk with Employer-Agree?
- b) Jointly notify Arbitrator

Request list: AAA or FMCS

- a) Alternate strikes, numbered lists or whatever...
- b) Notify AAA, FMCS of selection

Review awards

Find them

- a) Google search
- b) Repository: Union/Management
- c) Word of mouth

Read them

- a) Tell a story?
- b) Only relevant facts?
- c) Can you tell why they ruled as they did?

More to consider

Economy

- a) Length commensurate?
- b) Simply stated?
- c) Stray beyond issue?

Sensitivity

- a) To parties' relationship?
- b) Neutral language
- c) Does the losing party understand & accept the loss?

Things to think about

Remedies

- I. Is the remedy clear or general?
- II. Did the Arbitrator retain jurisdiction if the award was not self-executing?

Tendencies and Perspectives

- I. Split the Baby?
- II. Strict Constructionist?
- III. View of Past Practice?
- IV. How are discharges treated? Industrial capital punishment? Higher burden of proof-beyond a reasonable doubt?
- V. Weight given to Mgt's decision? Presumption of correctness?

Ask your colleagues

- I. Would you choose them again?
- II. Do they make evidentiary rulings? Or leave you guessing?
- III. Do they control the hearing?
- IV. To what degree do they participate?
- V. Do they understand technical facts?
- VI. Timely award?
- VII. Fair Billing?





Key Principles

If you meet the high level, clear and convincing, you have met all lower levels

A finding by one tribunal is not binding on another tribunal

Gathering Information

- ▶ From the union:
 - A well written grievance
 - Everything and anything remotely related
- ▶ From the employer:
 - Submit written request early
 - Will you need a subpoena?

The Hearing Procedures

- ▶ Stipulation of the Issue and perhaps the uncontested facts
- ▶ Opening Statement
- ▶ Presentation of Case by the Initiating Party
 - ▶ Discipline/Discharge: Management goes first
 - ▶ All other matters: burden of proof is on the Union
- ▶ Calling of Witnesses

The Hearing- continues

- ▶ Opposing Party's Presentation
 - ▶ Rebut the evidence presented by the *Moving Party*
- ▶ Questions by the Arbitrator
- ▶ Closing the Hearing
- ▶ And the Opinion and the Award arrive!
 - ▶ An Opinion states the reasoning behind the Award
 - ▶ The Award is the actual decision

Opening Statement

- ▶ Develop the blueprint of your case
 - ▶ Relevant Facts
 - ▶ Relevant Issues
 - ▶ How do your exhibits relate to your theory of the case?
 - ▶ How do your witnesses relate to your theory of the case?
- ▶ Provide the Arbitrator with a thumbnail sketch:
 - ▶ What the case is about
 - ▶ What the issue is
 - ▶ What resolution is being sought

Stipulations

- ▶ Statement of the Issue: what are you asking the Arbitrator to decide?
- ▶ Relevant Contractual Provisions
- ▶ Joint Exhibits
 - ▶ CBA
 - ▶ Grievance
 - ▶ Grievance trail (may be combined with the grievance)
 - ▶ Others that the parties can agree upon
- ▶ Relevant, undisputed facts

Your Witnesses are telling the story of the Case

- ▶ Prepare them for the hearing
 - ▶ Review their testimony with them
 - ▶ Tell them what to expect at the hearing

Witnesses should...

- ▶ Answer all questions fully and truthfully
- ▶ Refrain from offering information not asked for in the questions
- ▶ If there's an objection, wait for the arbitrator's ruling before responding
- ▶ Remember 'I don't know' is a valid response, if true
- ▶ Willingly cooperate with cross examination
- ▶ Maintain decorum throughout their testimony

Witnesses Credibility

- ▶ NOT reliant on demeanor
- ▶ All evidence weighed
- ▶ Consistency is crucial
- ▶ Inconsistency is damaging

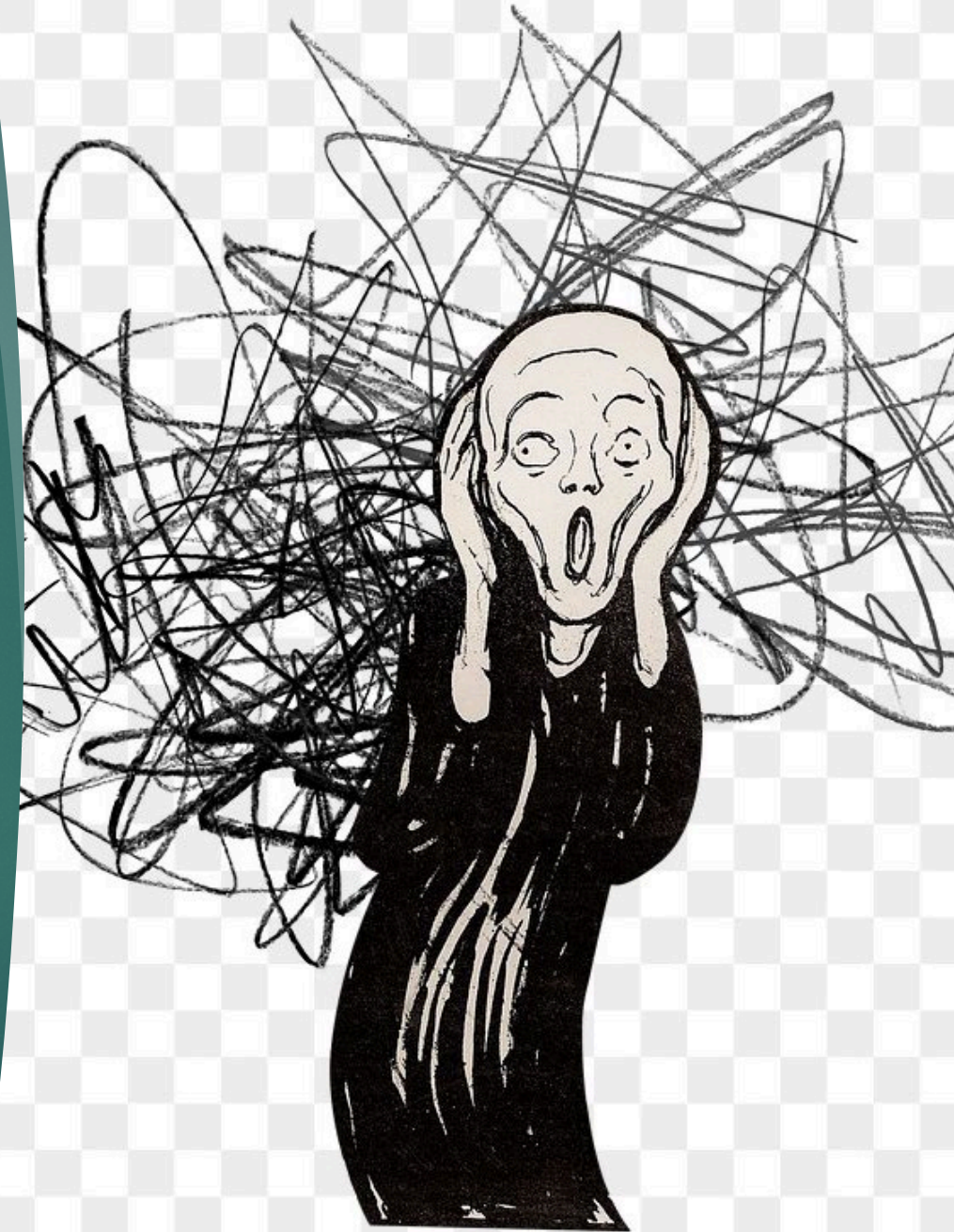


1. Direct Examination
2. Cross-Examination
3. Re-Direct
4. Re-Cross

What is the usual order of testimony?

Cross Examination!!!!

- ▶ Strikes terror in everyone
 - ▶ The witness is terrified
 - ▶ The advocate is terrified
 - ▶ The Arbitrator is terrified





Cross-
Examination
...Not as
scary as you
think...

One train of thought among Arbitrators...

**You should be
telling your story
through your
witnesses**

**And not relying on
the other side's
witnesses**

**You will be opening
the “door” for an
adverse witness to
strengthen their
direct testimony**

Another train of thought: Use cross-exam *strategically*!

To get what you need:

- Facts favorable to your case
- Witness admissions against their other party's case

To undermine what you don't need:

- Inconsistencies
- Establishing bias or prejudice (does this witness have an independent reason to not like the grievant?)
- Use the “pause” for facts that are not credible

In any case...

DON'T bully the witness!





Evidence

- ▶ At arbitration, rules of evidence are relaxed.
- ▶ Your exhibits should include any materials on which a reasonable person could rely.
- ▶ Don't exclude the difficult or unflattering evidence.
- ▶ Make every effort to present the 'best evidence' at the hearing.



Types of Evidence:

- ▶ Material: Is the testimony/exhibit *reasonably related* to this case?
- ▶ Relevant: Does the testimony/exhibit tend to prove the issue(s) to which it is being directed
- ▶ Competency: Are your witnesses competent to testify?
 - ▶ Age, mental impairment, privilege



Evidence

- ▶ Organize your exhibits --whatever works for you. Notebooks, folders, etc., You must be able to find your exhibits!
- ▶ Options for organizing the exhibits:
 - ▶ In the order that you plan to enter them
 - ▶ Chronological order
- ▶ If the Arbitrator held a pre-hearing conference, what directions did they give for exhibits?
- ▶ Make certain that you have copies for:
 - ▶ Yourself
 - ▶ Witnesses
 - ▶ Opposing advocate
 - ▶ Arbitrator

Entering the Exhibits

- ▶ Hand the document to the witness

- ▶ [To witness] “Have you seen this document before?” Yes.
 - ▶ [To witness] “How are you familiar with this document?”

The witness's answer is the foundation – it shows the witness knows something about the document.

- ▶ [To Arbitrator] “Please enter this document as Union Exhibit 1.”

Other potential types of evidence:

- ▶ Site tour
- ▶ Video or Audio
- ▶ Witness requiring an interpreter



Objections to evidence

Hearsay

- Something, said or written outside the hearing, that is being offered as true. “My mechanic told me the brakes on my car were defective.”
- An affidavit offered in lieu of testimony is inherently hearsay.

Document speaks for itself (when having witness read a document into evidence).

Not the best evidence



Objections to Testimony

The form or substance of the question

- ▶ Ambiguous
- ▶ Compound
- ▶ Argumentative
- ▶ Repetitious
- ▶ Confusing
- ▶ Leading*

More objections...

Calls for speculation

Assumes facts not in evidence

Badgering the witness

Nonresponsive Answer



1. Witness must cease testimony
2. Arbitrator may offer other advocate to respond
3. Arbitrator will make a ruling:
 - “Sustained” (or)
 - “Overruled”

What (should) happen after an objection is raised?



True or False?

What objection(s) would you raise?

#1

- Discipline case
- Employer advocate attempts to elicit testimony from HR rep re: grievant's misconduct at former place of work.

#2

- CBA states ee layoffs based on least seniority based on date of hire
- Union seeks to intro a seniority list, prepared by HR, through U. Steward testimony.

#3

- HS Student texts Mom at lunch: *"In class, Teacher called the Principal a 'f-*ing A-*hole.'"*
- Mom forwards text to Principal
- Principal fires teacher
- At hearing, District's advocate asks why Principal fired Teacher and tries to introduce the forwarded text message.

Past Practice

- ▶ Involves or affects a benefit
- ▶ Consistency/predictability
- ▶ Intentionality
- ▶ Mutuality

Past Practice

- ▶ Proving the existence of a past practice is a heavy burden
- ▶ Type of proof required will depend on the nature of the practice
- ▶ The evidence should demonstrate all four essential elements were present

Past Practice

- ▶ Does not supplant clear, unambiguous contract language, BUT
- ▶ Can clarify or give meaning to ambiguous language
- ▶ Fill gaps in the contract language
- ▶ Binding practice cannot be unilaterally changed.



Richard Mittenenthal

*His word is not “law” but it may as well be.
No one has seriously challenged this as the
foundational article on past practice.*

Past practices and the administration of collective
bargaining agreements – NAARB



Oral Closing Arguments

- ▶ Prepared before the hearing starts
 - ▶ Should know the other party's evidence through the lower steps of the grievance procedure
- ▶ This is your Last Chance to Persuade
 - ▶ Identify key undisputed facts
 - ▶ Identify key disputed facts
 - ▶ How do the key facts support your side's theory of the case
- ▶ Last Chance to attack the other side's facts and theory of the case and
 - ▶ Highlight their weaknesses



Oral Closing Arguments

- ▶ Tell a Story
 - ▶ Chronological Order
- ▶ Who are the parties
 - ▶ The Employer
 - ▶ The Grievant-personalize
- ▶ Tie your arguments to the CBA
- ▶ And tell the Arbitrator what you want him or her to do

Oral Summation

1

Make it Clear

2

Make it
impossible for
the Arbitrator to
misunderstand

3

Make your
requested
remedy clear

4

Rehearse,
Rehearse,
Rehearse...

Why Oral?

- ▶ Case is ready for decision making immediately after the hearing
- ▶ Everything is fresh in everybody's mind
- ▶ Justice is not unreasonably delayed
- ▶ Eliminates the formality of filing a written brief
- ▶ Cost efficient

And if the other side prefers a post hearing brief....let them write it...but you can still do an oral closing—without the other side present

Written Closing Arguments

1. Focus on the Issue
2. Provide the controlling provisions of the Agreement
3. Then provide an analysis

This is the issue, these are the controlling provisions, this is why the facts and provisions support our position

Are there any sub-issues? If so, repeat 1-3

Then provide the Conclusion that you want the Arbitrator to reach



Written Closing Arguments-no different than oral closing...

- ▶ Prepared before the hearing starts
 - ▶ Should know the other party's evidence through the lower steps of the grievance procedure
- ▶ This is your Last Chance to Persuade
 - ▶ Identify key undisputed facts
 - ▶ Identify key disputed facts
 - ▶ How do the key facts support your side's theory of the case
- ▶ Last Chance to attack the other side's facts and theory of the case and
 - ▶ Highlight their weaknesses



Resources

- ▶ PERC provides training on collective bargaining and grievances and can also customize training for your organization. <https://perc.wa.gov/training-labor-relations/>
- ▶ The Negotiation Project: a specialized subset of PERC training. Innovative conflict prevention program that explores how academic theories and research apply in Washington state public sector labor relations. Through online and eventually in-person discussions, advocates can improve their skills and better manage conflicts. [TRAINING NEGOTIATION PROJECT – Washington State Public Employment Relations Commission](#)

Resources


- ▶ Dooley, Andrea L. The Beginner's Guide to Labor Arbitration Practice *Tips & Strategies for Improving Your Case* (2020) ThriftBooks, www.thriftbooks.com. \$19.95
- ▶ Champions of Conflict: *Learn how to be a better advocate in collective bargaining, grievance handling, and labor arbitration from an experienced arbitrator, mediator, and former advocate.* Welcome to Champions of Conflict - by Andrea Dooley (substack.com)
- ▶ Hill, Marvin F. Hill, Jr. and Sinicropi, Anthony V. *Improving the Arbitration Process: A Primer for Advocates.* Willamette Law Review, Volume 27, Number 3. (A bit tough to find but worth looking for!) Available for a price through HeinOnline.

Resources

- ▶ National Public Employer Labor Relations Association (National PELRA): training in labor-management relations, collective bargaining, negotiation and the grievance arbitration process. Also offers a labor relations certification CLRP, or certified labor relations professional.
<https://npelra.org>
- ▶ FMCS Institute: training to both management and union practitioners, including a course called *Arbitration for Advocates* for experienced advocates looking to develop their skills at presenting cases at arbitration.
<https://www.fmcs.gov/services/education-and-outreach/fmcs-institute/>
- ▶ [ABA Labor and Employment Law Podcast Podcast - Legal Talk Network](#)

Resources

- ▶ [Labor Education and Research Center | Georgetown \(southseattle.edu\)](https://southseattle.edu/labor-education-and-research-center)
- ▶ [Labor Education and Research Center Courses - University of Oregon \(uoregon.edu\)](https://uoregon.edu/labor-education-and-research-center/courses)
- ▶ University of Michigan, Center for Labor and Community Studies: Grievance and Introduction to Arbitration
- ▶ Wayne State University-Advanced Grievance Handling, Labor@Wayne, Walter P. Reuther Library
- ▶ [Cornell University Certificate | Labor Relations Courses](https://cornell.edu/labor-relations/certificate)



“ *For the things we have to learn
before we can do them, we
learn by doing them.* ”

Aristotle

WOODHAVEN, 1979

Going AWOL

Goingawol.org