

Summary Table of Contents

Preface	xxxiii
About the Author	xxxvii

Part I. Before the Hearing

Chapter 1.	Overview of the Labor Arbitration Process	3
Chapter 2.	Review and Analysis of the Grievance and Applicable Contract Provisions	23
Chapter 3.	Exploring Settlement	47
Chapter 4.	Selecting an Arbitrator and Arranging the Hearing	67
Chapter 5.	Assembling the Evidence and Evaluating Potential Witnesses	97
Chapter 6.	Preparing Documentary and Other Evidence	119
Chapter 7.	Formulating Arguments and Researching Authorities	149
Chapter 8.	Selecting and Preparing Witnesses	179
Chapter 9.	Preliminary Matters	221

Part II. During the Hearing

Chapter 10.	Opening Statements	255
Chapter 11.	Presenting the Case in Chief	275
Chapter 12.	Rules of Evidence	327
Chapter 13.	Making and Defending Against Objections	395

Chapter 14.	Conducting Cross-Examination	413
Chapter 15.	Redirect and Recross-Examinations and Rebuttal	469
Chapter 16.	Closing Arguments	489

Part III. After the Hearing

Chapter 17.	Post-Hearing Briefs	503
Chapter 18.	Other Post-Hearing Matters	537
Chapter 19.	Challenging the Award	557

Part IV. Advanced Advocacy Skills

Chapter 20.	Advocates' Best and Worst Practices: Arbitrators' Perspectives	587
Chapter 21.	Blueprint of a Grievance Arbitration Case	605
Chapter 22.	Interest Arbitration and Other Labor Arbitration Variations	663
Appendix A	Federal Mediation and Conciliation Service (FMCS) Office of Arbitration Services— Policies & Procedures	699
Appendix B	National Academy of Arbitrators (NAA), AAA and FMCS- Code of Professional Responsibility for Arbitrators of Labor-Management Disputes	713
Appendix C	American Arbitration Association (AAA)— Labor Arbitration Rules	737
Appendix D	Federal Rules of Evidence	765
Index		791

Detailed Table of Contents

Preface	xxxiii
About the Author	xxxvii

Part I. Before the Hearing

Chapter 1. Overview of the Labor Arbitration Process	3
I. Overview	4
II. Selecting the Advocate	4
A. Lawyers versus Nonlawyers	5
1. Cases with Significant Legal Aspects	5
2. Lawyers Representing the Opposing Side	6
3. Advocate's Testimony Is Essential to the Case	6
III. The Hearing Process	7
A. Division between Evidence and Argument	7
B. Significance of the Evidence/Argument Distinction	9
1. Marshaling the Facts and Evidence	10
IV. Structure of the Hearing	11
V. Preliminary Matters	12
A. Determining the Issue	13
B. Other Preliminary Matters	13
VI. Opening Statements	14
VII. The Case in Chief	15
A. Direct Examination	15
B. Cross-Examination	16
C. Redirect and Recross-Examination	16

VIII. Rebuttal	17
IX. Closing Arguments and Post-hearing Briefs	17
X. The Burdens	18
A. Burden of Production	19
B. Burden of Persuasion	20
C. Quantum of Proof	20
XI. Rules of Evidence	21
XII. Finality of Arbitration	22
Chapter 2. Review and Analysis of the Grievance and Applicable Contract Provisions	23
I. Overview	24
II. Arbitrability	24
III. Procedural Arbitrability—Timeliness of Grievance Filing and/or Processing	25
A. When Must the Issue of Timeliness First Be Raised?	26
B. The Operative Dates for Determining a Timely Grievance	27
1. Continuing Violations	27
2. Past Practices Affecting Timeliness	29
C. Timeliness Recap	29
IV. Procedural Arbitrability—Standing	30
V. Substantive Arbitrability	31
A. Reviewing the Subject Matter of the Grievance Concerning Arbitrability	31
B. Arbitrability of Subjects Not Directly Addressed in the Labor Agreement	32
C. Determinations of Arbitrability	35
VI. Importance of Reviewing the Entire Grievance File— The Facts	36
VII. The Labor Agreement—The Contractual Basis for Arbitration	36
A. Considering Sidebar Agreements	37
B. Evaluating Prior Arbitration Decisions	39
C. Considering Previous Grievance Settlements	40
D. Influence of Past Practice	41

E. Researching Precontract Negotiations and Bargaining History	42
F. Ascertaining Previous Positions and Contractual Theories	44
Chapter 3. Exploring Settlement	47
I. Introduction	47
II. Evaluating Settlement Possibilities	48
A. Estimating Win–Loss Potential and Considering All Impacts	48
B. Assessing Potential Liability and Remedies	53
C. Relationship to Other Proceedings	54
D. Tactical and Intangible Considerations	56
III. Potential for Settlement	57
IV. Strategy and Timing of Settlement Efforts	57
V. Use of a Third Party to Facilitate Settlement Discussions	59
A. The Selected Arbitrator as Mediator	60
B. Mediator Who Will Not Be Serving as the Arbitrator	60
VI. The Importance of Confidentiality	62
VII. Crafting the Settlement Agreement	63
A. No Precedential Effect	63
B. No Admission of Contract Violation	64
C. Time for Performance	64
D. Allocation of Costs of Cancelled Arbitration	65
VIII. Resolving Difficult Discharge Cases	65
IX. Overview	66
Chapter 4. Selecting an Arbitrator and Arranging the Hearing	67
I. Overview	68
II. Board of Arbitration Compared with Single Arbitrator	69
A. Role of Partisan Arbitrators	69
B. Selecting Partisan Arbitrators	69
C. Disadvantages of Tripartite Boards	70
III. Methods of Selecting an Arbitrator	71
A. Sole Permanent Arbitrator	71

B.	Preselected Panel	73
1.	Assigning from a Preselected Panel	73
2.	Advantages and Disadvantages of Preselected Panels	74
C.	Federal Mediation and Conciliation Service (FMCS) Panel	75
D.	American Arbitration Association (AAA) Panel	80
E.	State Arbitrator Referral Services	81
F.	Strategy of Selecting from a Panel	81
G.	Ad Hoc Selection of a Single Arbitrator	83
IV.	Researching Arbitrators and Analyzing Their Suitability for the Case	84
A.	Resumes and Decisions	84
B.	Reports from Colleagues and Other Advocates	90
C.	Weighing the Information and Making a Selection	91
V.	Scheduling the Hearing	92
A.	Multiple Cases in a Single Hearing	92
1.	Motives for Multiple Cases	93
2.	Means of Resolving Multiple Case Disputes	93
B.	Hearing Site and Room Arrangements	94
C.	Stenographic Record of the Hearing	95
Chapter 5.	Assembling the Evidence and Evaluating Potential Witnesses	97
I.	Importance of the Evidentiary Case	98
II.	Completeness of the Record to Date	99
III.	Defining the Issues and the Theory of the Case	100
A.	Focusing on the Issues	100
B.	Focusing on the Theory	101
IV.	Determining the Facts That Need to Be Proven	102
A.	Types of Facts	102
1.	Background Facts	102
2.	Essential Facts	103
3.	Rebuttal Facts	103
B.	Outlining the Facts and the Supporting Evidence	104
C.	Chronology	105
D.	Undisputed Facts—Stipulations	106

V.	Interviewing Potential Witnesses	107
A.	Timing	107
B.	Thoroughness	108
C.	Individual versus Group Interviews	109
D.	Questioning Format	109
E.	Questioning Techniques	110
F.	Refreshing Recollections	112
VI.	Evaluating Witnesses	112
A.	Characteristics of Marginal Witnesses	113
1.	Overly Eager and Non-percipient	113
2.	Inarticulate	114
3.	Easily Led	114
4.	Explosive or Argumentative	114
5.	Garrulous	114
6.	Inconsistent or Forgetful	115
7.	Unpersuasive	115
8.	Excessively Protective or Defensive	115
B.	Adapting to Marginal Witnesses	115
C.	The Unavailable or Uncooperative Witness	116
 Chapter 6. Preparing Documentary and Other Evidence		 119
I.	Gathering and Preparing Documentary Evidence	120
A.	Relevancy and Authenticity	120
B.	Types of Documentary Evidence	121
1.	Communications—Digital and Paper	122
2.	Notes and Logs Prepared by Supervisors and Others	124
C.	Obtaining Documents in the Other Party’s Possession	125
1.	Written Request	126
2.	Subpoena or Motion to Produce	127
3.	Unfair Labor Practice Charge	130
4.	Other Means of Obtaining Evidence	131
5.	Potential Adverse Impact of Nondisclosure	132
II.	Preparing Exhibits	132
A.	Charts and Graphs	133
B.	Photographs, Videotapes, and Computer Graphics	133
1.	Still Photos and Videos	134

2.	Visual Evidence of Actual Conditions and Events	134
3.	Computer Graphics	137
4.	Integrity of Graphics	137
5.	Other Practical Issues Regarding Graphics	138
C.	Diagrams, Blueprints, and Other Graphic Representations	138
D.	Multiple Visuals	139
III.	Obtaining Real Evidence	139
A.	Site Visitations	140
B.	Demonstrative Evidence	143
IV.	Use of Expert Witnesses	144
A.	Appropriateness	144
B.	Use of Fact Witnesses as Expert Witnesses	146
V.	Organizing Exhibits and Other Materials	147
 Chapter 7. Formulating Arguments and Researching Authorities		 149
I.	Introduction	150
II.	Framing the Arguments	151
A.	Arguments—Employer’s Side	152
B.	Arguments—Union’s Side	153
C.	Anticipating the Other Side’s Arguments	154
D.	Relying on Marginal Arguments	154
III.	Linking Arguments and Evidence	155
IV.	Analyzing Labor Agreement Language	155
A.	Operative Language of the Agreement	155
B.	Review All Possible Provisions	156
C.	Analyze Rationale of the Relevant Provisions	157
V.	Researching Contract Language Background and Precedent	157
A.	Previous Similar or Analogous Cases	158
1.	Arbitration Awards	158
2.	Grievance Settlements	160
3.	Informal Grievance Dispositions	160
4.	Past Practice	162
VI.	Bargaining History	165
A.	Evolution of Contract Clauses	166
B.	Analyzing Proposals and Counterproposals	166

C.	Contemporaneous Circumstances	167
D.	The Unaccepted Change	168
E.	Communications during Negotiations	169
VII.	Outside Authorities	170
A.	Published Arbitration Decisions	171
1.	Influence of Decisions Involving Other Parties	171
2.	Value of Reported Decisions in Preparing a Case	172
B.	Unpublished Arbitration Decisions	173
C.	External Law	174
D.	Scholarly Texts	175
E.	Industry and Professional Practices	176
VIII.	Prehearing Briefs	177
Chapter 8.	Selecting and Preparing Witnesses	179
I.	Overview	180
II.	Selection of Witnesses	181
III.	Preparing Witnesses to Testify	181
A.	Timing of Preparation	182
B.	Efficient Use of Time	183
C.	Initial Briefing of Witnesses	183
D.	Putting Witnesses at Ease	184
E.	Refreshing Recollections	185
F.	Preparing Direct Examination	186
1.	Outline of Witnesses and Points to Be Covered	186
2.	Method of Recording and Using Questions and Answers	187
G.	Reviewing Personal Information about Each Witness	187
H.	Order of Questions	189
1.	Laying a Foundation	189
2.	Chronological Order	190
3.	Order of Importance of Other Factors	191
I.	Molding the Questions and Answers	192
1.	Framing Questions	192
2.	Structuring Answers	194
IV.	Guidelines for Witnesses	196
A.	Dress, Decorum, and Demeanor	197
1.	Clothing and Grooming	197
2.	Decorum	197

3.	Demeanor	198
4.	Decorum and Demeanor when Not Testifying	198
5.	Focusing on the Questions	199
B.	Manner and Style of Testifying	206
1.	Vocabulary	207
2.	Addressing the Arbitrator and the Advocates	207
3.	Articulation	207
4.	Significance of Word Selection in Answers	208
5.	Eye Contact	209
C.	Correcting Errors in Testimony	209
D.	Assisting the Advocate when Not Testifying	210
V.	Special Instructions to Witnesses Regarding Cross-Examination	211
A.	Controlling One's Temper	211
B.	Dealing with Leading Questions	211
C.	Stopping for Objections	212
D.	Listening to Objections	213
VI.	Checklist of Instructions to Witnesses	214
VII.	Additional Ways to Enhance the Testimony of Witnesses	217
A.	Role Play Cross-Examination	217
1.	Questioning by a Different Advocate	218
2.	Prepare in the Actual Hearing Room	218
3.	Video Record the Witness's Testimony	219
Chapter 9.	Preliminary Matters	221
I.	Overview	222
II.	Compliance with Requests for Production of Evidence	222
A.	Applicability of Discovery to Labor Arbitration	223
B.	Compliance with Information Requests or Orders	223
III.	Stipulations	224
A.	Matters Suitable for Stipulation	225
1.	Issue(s) to Be Decided by the Arbitrator	225
2.	Facts	226
3.	Applicable Agreement Provisions and Limits on the Arbitrator's Authority	227
4.	New Documents and Other Recently Discovered Evidence	228

5. Other Matters Suitable for Stipulations	229
6. Timing of Stipulations	229
7. Stipulations during the Hearing	230
8. Consent Awards	231
9. Caveats Concerning Stipulations	231
IV. Special Arrangements Concerning Witnesses	232
A. Witnesses Unavailable to Testify in Person	232
B. Witness Testifying Out of Order	234
C. Sequestering Witnesses	235
1. Rules Concerning Sequestration	235
2. Strategy of Requesting Sequestration	236
D. Swearing of Witnesses	237
E. Use of Interpreters	238
F. Failure of a Subpoenaed Witness to Appear	238
V. Procedural Matters	239
A. Arbitrability and Timeliness	239
B. Collateral Proceedings	240
C. Site Visitation	241
D. Bifurcation of the Hearing	243
E. Continuance	244
F. Expedited or “Bench” Decision	245
VI. Issues Related to the Arbitrator	246
A. Arbitrator’s Impartiality and Suitability to Hear a Case	246
1. Undisclosed Relationship with the Other Party	246
2. Personal Relationship with a Party’s Principal or Representative	247
3. Ex Parte Communications between a Party and the Arbitrator about the Case at Hand	248
B. Decision and Procedure to Challenge an Arbitrator	248
C. Publication of Decision and Award	250

Part II. During the Hearing

Chapter 10. Opening Statements	255
I. Introduction	256
II. Purposes of an Opening Statement	256
A. Orienting the Arbitrator	256

B.	Influencing the Arbitrator—The Three Rs	257
C.	Influencing the Witnesses	258
III.	Key Elements of an Effective Opening Statement	259
A.	Theme	259
B.	Summarization of Facts	260
C.	Principal Persons Involved	261
D.	Technical Terminology and Technical Processes	262
E.	Relevant Contract Provisions	263
F.	Remedy Sought	264
IV.	Strategic Issues	265
A.	When to Make the Opening Statement	265
B.	Waiving the Opening Statement	266
C.	Substituting a Written Opening Statement or Prehearing Brief for an Oral Opening Statement	267
D.	Revealing Weaknesses in the Advocate’s Evidence or Arguments	267
V.	Form and Manner of Presentation	268
A.	Length	268
B.	Prepared Statement versus Notes	269
C.	Style	269
VI.	Sample Opening Statements	271
A.	Sample Employer Opening Statement	271
B.	Sample Union Opening Statement	272
Chapter 11.	Presenting the Case in Chief	275
I.	Overview	277
II.	Order of Presentation	277
A.	Burden of Going Forward	277
B.	Sequencing the Evidence	277
1.	Leading from Strength	277
2.	Chronological or Other Logical Order	279
3.	Meshing Testimony with Other Evidence	280
4.	Maintaining Arbitrator Interest	280
III.	Examining Witnesses	281
A.	Admissible Evidence	281
B.	Procedure for Offering a Witness	282
C.	Facts versus Opinion and Argument	283

D. Opinion Testimony	284
E. Properly Framed Questions	285
F. Questions Calling for Narrative Answers	286
1. Leading versus Open-Ended Questions	288
2. Use of Notes by Witnesses	289
3. Exceptions to the Rule Prohibiting Witness from Using Notes	289
G. Defining Transitions	291
H. Ensuring That the Record Reflects Nonverbal Testimony	291
I. Revealing Weaknesses	292
J. Assisting or Rehabilitating the Forgetful or Misspeaking Witness	293
1. The Forgetful Witness	294
2. The Misspeaking Witness	295
3. Delayed Rehabilitation	298
K. The Hostile Witness	299
IV. Introducing Documents and Other Exhibits	301
A. Steps in Introducing Exhibits	301
1. Have the Exhibit Marked for Identification	302
2. Present a Copy of the Exhibit to the Opposing Advocate	304
3. Present a Copy of the Exhibit to the Witness	304
4. Ask the Witness Sufficient Questions About the Exhibit in Order to Lay a Foundation for Its Introduction	305
5. Offer the Exhibit into Evidence	307
B. Voir Dire	308
V. Use of Exhibits in Direct Examination	309
VI. Examining Expert Witnesses	313
A. Establishing Qualifications	313
B. Vulnerabilities of the Expert Witness	314
1. Possible Bias	314
2. Remuneration for Testimony	315
3. Previous Writings and Testimony	315
C. Eliciting Opinion Testimony from the Expert Witness	316
D. Testifying from Personal Observations	317
E. Testifying from Information Supplied by Others	318

VII. Examining Adverse Witnesses	319
A. Strategy of Calling Adverse Witnesses	319
B. Calling the Grievant as an Adverse Witness	320
C. Method for Establishing a Witness as Adverse	321
VIII. The Advocate as a Witness	321
IX. Calling Witnesses Out of Order	322
X. Examination by the Arbitrator	323
XI. Site Visitation by the Arbitrator	324
 Chapter 12. Rules of Evidence	 327
I. Overview	331
II. Admissibility Based on Substance versus Form	333
A. Admissibility Based on Form	333
III. Substantive Admissibility	335
IV. Rules of Evidence Based on Substantive Admissibility	336
A. Relevancy	336
1. Statement of the Rule	336
2. Rationale	336
3. Discussion	338
4. Linking Up	339
B. Opinion Testimony	340
1. Statement of the Rule	340
2. Rationale	340
3. Discussion	343
C. Best Evidence Rule	344
1. Statement of Rule	344
2. Rationale	344
3. Discussion	345
D. Parol Evidence Rule	345
1. Statement of Rule	345
2. Rationale	345
3. Discussion	346
E. Privileged Communications	347
1. Statement of the Rule	347
2. Rationale	348
3. Discussion	348
F. Offers of Compromise and Settlement	350
1. Statement of the Rule	350

2. Rationale	350
3. Discussion	351
G. Beyond the Scope of Direct Examination	351
1. Statement of the Rule	351
2. Rationale	351
3. Discussion	352
H. Hearsay Rule	353
1. Statement of the Rule	353
2. Rationale	353
3. Discussion	354
I. Nonhearsay versus Exceptions to the Hearsay Rule	356
J. Exceptions to the Hearsay Rule	357
1. Declaration or Admission against Interest	357
2. Spontaneous or Excited Utterance	358
3. Past Recollection Recorded	360
4. Business and Public Records	361
5. State of Mind	363
6. Prior Testimony	364
7. Statements Having Independent Legal Significance	365
8. Prior Inconsistent Statement	367
9. Other Hearsay Exceptions	368
10. Concluding Note Concerning Hearsay Exceptions	369
V. Rules of Evidence Based on Form of Questions	370
A. Lack of Foundation—Lack of Competency	370
1. Statement of the Rule	370
2. Rationale	371
3. Discussion	372
B. Leading Questions	372
1. Statement of the Rule	372
2. Rationale	373
3. Discussion	373
C. Assumes Facts Not in Evidence; Misquotes Testimony	374
1. Statement of the Rule	374
2. Rationale	374
3. Discussion	375
D. Hypothetical Questions	375
1. Statement of the Rule	375

2. Rationale	375
3. Discussion	376
E. Compound Questions	377
1. Statement of the Rule	377
2. Rationale	377
3. Discussion	378
F. Questions Calling for Speculation	378
1. Statement of the Rule	378
2. Rationale	378
3. Discussion	379
G. Ambiguous, Vague, Misleading, and Unintelligible Questions	380
1. Statement of the Rule	380
2. Rationale	380
3. Discussion	381
H. Argumentative, Harassing, or Badgering Questions	381
1. Statement of the Rule	381
2. Rationale	381
3. Discussion	382
I. Questions Calling for a Conclusion	383
1. Statement of the Rule	383
2. Rationale	383
3. Discussion	383
J. Questions Calling for Explanation or Interpretation of a Document	384
1. Statement of the Rule	384
2. Rationale	384
3. Discussion	384
K. Questions Previously Asked and Answered	385
1. Statement of the Rule	385
2. Rationale	385
3. Discussion	386
L. Cumulative Testimony	386
1. Statement of the Rule	386
2. Rationale	386
3. Discussion	387
M. Questions That Call for a Narrative Answer	387
1. Statement of the Rule	387

2. Rationale	387
3. Discussion	388
VI. Special Evidentiary Issues	388
A. Nonresponsive or Volunteered Testimony	388
1. Statement of the Rule	388
2. Rationale	389
3. Discussion	389
B. Judicial/Arbitral Notice	390
1. Statement of the Rule	390
2. Rationale	390
3. Discussion	391
C. Offers of Proof	391
1. Statement of the Rule	391
2. Rationale	391
3. Discussion	392
VII. Understanding and Using the Rules of Evidence	393
Chapter 13. Making and Defending against Objections	395
I. Overview	396
II. Purposes of Making Objections	396
A. Excluding and Diminishing the Impact of Evidence	396
B. Protecting the Record	397
C. Interrupting the Flow of Testimony	397
D. Signaling or Instructing the Witness	398
III. Deciding to Object	399
IV. Timing of Objections	399
V. Making the Objection	401
A. Sensing when Objectionable Questions Are Being Asked	401
B. How to Make a Proper Objection	401
VI. Dealing with Overruled Objections	403
A. Pursuing the Objection	403
B. Excepting to an Adverse Ruling and Registering a Continuing Objection	405
C. One Rationale for Contesting Adverse Evidentiary Rulings	406

VII.	Defending against and Defeating Objections	406
VIII.	Bases for Responding to Sustained Objections	407
	A. Substantive Grounds	407
	B. Common Sense, Fairness, and Reliability of Evidence	408
	C. Rephrasing the Question	410
	D. Offer of Proof	410
Chapter 14. Conducting Cross-Examination		413
I.	Overview	415
II.	Objectives of Cross-Examination	416
	A. Attack the Credibility of a Witness	416
	B. Attack the Reliability of a Portion of a Witness's Testimony	417
	C. Elicit Favorable Testimony	417
	D. Elicit Contradictory Testimony	418
	E. Elicit Foundational Testimony	418
III.	Preparation	419
	A. Research Witnesses	419
	B. Anticipating the Witness's Testimony	420
	C. Script the Cross-Examination of Key Witnesses	421
IV.	Voir Dire versus Cross-Examination	421
	A. Strategic Value	422
	B. Prelude to Objecting to Testimony	422
	C. Prelude to Objecting to Other Evidence	424
	D. Reasons for Deferring to Cross-Examination	425
V.	Tracking Direct Examination to Prepare for Cross-Examination	426
	A. Careful Listening and Observation	426
	B. Note Taking	427
	C. Obtaining Input from Others on the Advocate's Team	428
VI.	Deciding Whether to Cross-Examine a Particular Witness	429
	A. Damage Report	429
	B. Assessing the Strength of the Witness	430
	C. The Nominal or Superficial Cross-Examination	431
	D. Opening New Areas of Inquiry	432
VII.	Style of Conducting Cross-Examination	433
	A. A Gracious and Respectful Manner	433

B.	Noting Transition Points	434
VIII.	Sequencing Questions	435
A.	Easing into the Critical Areas	435
B.	Following a Circuitous Path	437
IX.	Do's and Don'ts of Cross-Examination	437
A.	DO Use Leading Questions	438
B.	DON'T Ask Open-Ended Questions or Questions That Ask "Why?"	441
C.	DO Ask Short, Direct, and Clear Questions	441
D.	DON'T Ask Questions Whose Answers You Do Not Know	443
E.	DO Control the Witness	444
F.	DON'T Ask More Questions than Necessary	446
G.	DON'T Argue with a Witness	448
H.	DO Test the Witness's Powers of Perception, Recollection, and Estimation	448
I.	DON'T Ask the Witness about Recollections or for Approximations	451
J.	DO Challenge the Testimony of Witnesses Who Appear to Be Giving Rehearsed Testimony	453
K.	DON'T Allow the Opposing Advocate to Coach or Instruct the Witness	455
L.	DON'T Extend Cross-Examination Longer than Necessary	457
X.	Impeaching Witnesses	458
A.	Tips on Impeaching Witnesses	458
B.	Specific Areas to Attack	458
1.	Veracity	459
2.	Prejudice or Bias	459
3.	Character and Reputation	461
4.	Interest or Motive	461
5.	Recollection	462
6.	Perception	463
7.	Discrediting Conduct	464
C.	Steps to Impeach	465
D.	Summary of Impeachment Techniques	467

Chapter 15. Redirect and Recross-Examinations and Rebuttal	469
I. Overview	470
II. Preemptory Motions: Motions to Dismiss and Motions for Summary Judgment	470
A. Procedure for Making a Preemptory Motion	471
B. Value of Preemptory Motions	473
III. Recess after Completion of Cases in Chief	474
IV. Redirect Examination	475
A. Damage Assessment	475
B. Damage Repair	476
C. Routine Redirect Examination	478
V. Recross-Examination	479
VI. The Rebuttal Case	481
A. Damage Assessment and Damage Repair	481
B. Sandbagging with New Evidence	481
C. The Witness in Waiting	483
D. New Theories	484
E. Calling Witnesses from the Other Side	485
F. Using a Stronger Witness and Other, More Persuasive Evidence	486
G. Deciding when Enough Is Enough	486
Chapter 16. Closing Arguments	489
I. Overview	489
II. Oral Argument versus Written Briefs	490
A. Strategy of Oral or Written Arguments	490
B. Opting for Oral Argument	492
C. Alternative Forms of Briefing	493
III. Oral Argument	493
A. Order of Oral Argument	494
B. Preparation for Oral Argument	494
C. Carrying through the Theme of the Opening Statement	495
D. Organization of Oral Argument	495
1. Issue-Oriented Presentation	496
2. Evidence-Oriented Presentation	496

E. Dealing with Adverse Evidence and Arguments by the Other Side	497
F. Advantage of the Party Arguing Last	498
G. Closing the Argument	500

Part III. After the Hearing

Chapter 17. Post-Hearing Briefs	503
I. Overview	504
II. Arrangements for Written Briefs	504
A. Reply Briefs	505
III. Preparing to Write a Brief	505
A. Reviewing the Transcript	506
B. Organizing the Brief	508
1. Cover Page	509
2. Introduction	510
3. Issues Presented	510
4. Summary of the Facts	512
5. Pertinent Contract Provisions	514
6. Arguments	516
C. Use of Reported Case Authorities	518
D. Conclusion	519
IV. Additional Points to Remember in Writing Briefs	521
A. Keep It as Brief as Possible	521
B. Include Detailed References to Evidence in the Record and to Case Authorities	521
C. Include Selected Reproductions of Recorded Testimony	523
D. Organize Evidence to Enhance Understanding and Persuasiveness	525
E. If a Brief Is Lengthy, Prepare a Table of Contents	527
F. Stress Equity and Fairness, Not Just Facts and Contract Language	528
G. Stress the Burden of Proof where Possible	529
H. Address Remedy	529

V. Procedures for Filing Briefs	531
A. Length and Format	531
B. Types and Methods of Submission	532
C. Time of Submission	533
1. Meaning of Filing Date	533
2. Extensions of Time	534
D. Send a Copy to the Client or Party Representative	534
 Chapter 18. Other Post-Hearing Matters	 537
I. Overview	538
II. Reviewing the Opposing Party's Brief	538
A. An Untimely Filed Brief	538
B. Improper Inclusions in a Brief	539
1. Challenging Evidence that Was Not Admitted	540
2. Challenging a Blatant Misrepresentation	540
III. Sending the Opposing Side's Brief to the Principals	541
IV. Debriefing Witnesses and Observers	541
A. Debriefing Witnesses	541
B. Educational Value to Witnesses and Observers	542
C. Correcting Practices or Contract Interpretations	543
V. Dealing with Newly Discovered Evidence	543
A. Evaluating Importance and Value of Evidence	544
B. Reason for Late Discovery	544
C. Relevance and Importance of New Evidence	545
D. Means of Incorporating New Testimony	545
E. Unlikelihood of Reopening the Case	546
VI. The Deliberative Process—Boards of Arbitration	546
VII. Delays in Issuance of an Award	548
A. Impact of Delay	548
B. Protesting Delays in Issuing Awards	549
VIII. Receiving and Reviewing the Decision and Award	550
A. Analysis of Decision and Award	550
B. Compliance with the Award	551
1. Back Pay Awards	552
2. Other Types of Make-Whole Remedies	553
3. Cease-and-Desist Orders	554

4. Punitive Damages, Attorney’s Fees and Interest	555
5. Awards with General Directives and Retained Jurisdiction	555
Chapter 19. Challenging the Award	557
I. Overview	558
II. Legal Authority to Vacate an Arbitrator’s Decision	559
III. Deciding to Challenge	560
A. Assessing the Impact of the Decision and Award	560
B. Strategic Issues to Consider	562
1. Impact on Union–Management Relationship	562
2. Influence on the Moving Party–Arbitrator Relationship	563
C. Assessing the Chances of Success	564
D. Alternatives to Court Action	564
1. Buy-Out of Award	564
2. Modification/Correction of Award by the Arbitrator	565
IV. Grounds for Vacating an Arbitration Award	566
A. Fraud and Undue Influence	567
1. Bases for Fraud and Undue Influence	568
2. Defending against an Attempt to Vacate for Fraud or Undue Influence	569
B. Decision and Award Exceeds the Arbitrator’s Authority	569
1. Examples of Rulings of Arbitrators Exceeding Their Authority	570
2. Defending against Attack Based on Exceeding Authority	571
C. Procedural Errors	572
1. Means of Selecting and Appointing the Arbitrator	572
2. Lateness of Award	572
3. Improper Procedures in the Hearing	573
4. Defending against Attempted Vacatur Based on Procedural Errors	574
D. Decision Did Not Draw Its Essence from the Labor Agreement	575

E. Decision Is against Public Policy or Contrary to Law	579
1. Against Public Policy	579
2. Contrary to Laws and/or Decisions of Courts or Administrative Agencies	581
V. Summary of Challenges to Awards	582

Part IV. Advanced Advocacy Skills

Chapter 20. Advocates' Best and Worst Practices: Arbitrators' Perspectives	587
I. Overview	588
II. Best Practices	589
A. Before the Hearing	589
1. Gathering Evidence and Structuring the Case	589
2. Possible Settlement	590
3. Preparing Documentary Evidence, Exhibits, Issue Statement, and Coordinating with Opposing Counsel Regarding These Matters	591
4. Practical Preparations for the Hearing	593
5. Preparing Witnesses	594
B. During the Hearing	595
1. Advocate's Behavior	595
2. Opening Statement	596
3. Examination and Cross Examination	597
4. Closing Argument	598
C. After the Hearing	599
1. Post-Hearing Briefs	599
2. Filing Deadlines	599
III. Worst Practices	600
A. Before the Hearing	600
B. During the Hearing	600
1. Opening Statement	600
2. Examination	601
3. Cross-Examination	602
C. After the Hearing	602
1. Post-Hearing Briefs	602

Chapter 21. Blueprint of a Grievance Arbitration Case	605
I. Overview: A Case of Misunderstanding or Misconduct?	606
II. Hearing Participants and Other Involved Persons	607
III. Excerpts from the Transcript of the Hearing	607
IV. Excerpts From the Employer's Brief	641
A. Acme Gases Terminated Grievant for Just Cause Because the Grievant Engaged in Multiple Dishonest Acts	641
1. The Evidence Establishes That Grievant Engaged in Serious Misconduct	641
2. The Arbitrator Should Credit Rizzardi over Grievant's Self-Serving Denials	642
3. Grievant's Illicit Offers to Sell Company Property on the Side for Cash Constitute Attempted Theft	643
B. In Light of Grievant's Proven Dishonesty, Termination Was the Appropriate Disciplinary Measure	645
1. Under the CBA, Dishonesty Is a Terminable Offense in the First Instance	645
2. Because Grievant Held a Position of Trust Regarding Company Property, His Proven Dishonesty Constitutes Just Cause for Discharge	646
3. In the Alternative, the Arbitrator Should Not Disturb the Company's Decision to Discharge Grievant Since It Was Not Discriminatory, Arbitrary, or Capricious	647
V. Excerpts from the Union's Brief	647
A. The Testimony Relating to Arnold's Alleged Offer to Sell CO2 Gas	647
1. The Alleged Solicitation of Bill Rizzardi	648
2. The Evidence Relating to the Alleged Solicitation of Britt	649
VI. Argument	650
A. Introduction: The "Scam"	650
B. The Alleged Solicitation of Rizzardi	651
C. The Alleged Solicitation of Britt	652

D. Apart from the Inherently Implausible Nature of Rizzardi's Story, His Testimony Is Not Credible	653
VII. Excerpts from the Arbitrator's Decision and Award	655
VIII. Conclusion	662
 Chapter 22. Interest Arbitration and Other Labor Arbitration Variations	 663
I. Overview	665
II. Interest Arbitration	666
A. Function of Interest Arbitration Compared with Grievance Arbitration	666
B. Authority for Interest Arbitration	667
C. Interplay of Interest Arbitration and Contract Negotiations	667
1. Should the Chief Contract Negotiator Also Be the Interest Arbitration Advocate?	668
2. Deciding Which Issues to Resolve in Negotiations and Which to Carry into Interest Arbitration	669
3. "Playing Chicken" versus "Bird in the Hand"	670
4. Using Interest Arbitration as "Cover" for the Negotiators	671
D. General Considerations in Preparing for Interest Arbitration	672
1. Begin Preparation Well in Advance of the Time when It Is Known That an Interest Arbitration Will Be Required	672
2. Advocates Are Advised to Rely on Others to Gather Data and Other Information, But to Actively Participate in the Analysis and Preparation of the Data for Presentation	672
3. Review Prior Interest Arbitration Decisions	673
4. Review Statutes, Regulations, and Decisional Law for Guidance	673
5. Selecting the Interest Arbitrator	673

E. Criteria on Which Interest Arbitration Decisions Are Based	674
1. Comparability of Prevailing Wages, Benefits, and Practices	675
2. Historical Relationships and Historical Patterns	676
3. Ability/Inability to Pay	676
4. Cost of Living Changes	677
5. Pre-Arbitration Positions	678
6. Productivity Changes	678
7. Other Criteria	679
F. Selecting Comparable Jurisdictions/Employers/Work Units	679
1. Size of Political Jurisdiction/Employer	680
2. Size of the Work Force/Bargaining Unit	681
3. Physical Proximity to the Subject Jurisdiction or Workplace	682
4. Physical Proximity to a Major Metropolitan Area	682
5. Sharing of a Common Labor Market	683
6. Similarity of Products, Services, and Work Requirements/Employment Qualifications	684
7. Revenue-Generating Capability of Governmental Units	685
8. Union/Non-Union Status of Work Force	685
9. Internal Comparisons	686
G. Selecting the Most Appropriate Comparative Jurisdictions or Work Groups	686
H. Analyzing and Presenting Wage and Benefit Data of Selected Comparative Jurisdictions or Work Groups	689
1. Wage and Salary Analysis and Comparisons	689
2. Benefit Comparisons	691
I. Presenting the Case and Making the Arguments	691
1. Form of Presentation	691
2. Use of Witnesses	691
3. Presentation of Data and Other Information	692
4. Refuting the Other Side's Case	693
5. Arguments in Post-Hearing Briefs	694
III. Fact Finding or Advisory Arbitration	694

IV. Med-Arb	695
V. Final Offer Selection or “Last Best Offer” Interest Arbitration	696
A. Issue-by-Issue versus Total Package Final Offer Selection	697
Appendix A Federal Mediation and Conciliation Service (FMCS) Office of Arbitration Services— Policies & Procedures	699
Appendix B National Academy of Arbitrators (NAA), AAA and FMCS- Code of Professional Responsibility for Arbitrators of Labor-Management Disputes	713
Appendix C American Arbitration Association (AAA)— Labor Arbitration Rules	737
Appendix D Federal Rules of Evidence	765
Index	791