LAWYERING SKILLS PRINCIPLES AND METHODS OFFER INSIGHT AS TO BEST PRACTICES FOR ARBITRATION

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I. INTRODUCTION

The expansion in the use of arbitration means that many people, including lawyers, are somehow involved in the process of settling a dispute through arbitration.[1] Persons who establish the procedures governing an arbitration, handle an arbitration, or teach a course about it often have questions about what the best practices for an arbitration hearing are.[2] In other words, rule-makers seek guidance as to what the procedural rules governing an arbitration hearing ideally should be, and advocates seek guidance as to how to best present the client's case. The relevant literature on arbitration provides advice on ethical considerations and suggests rules designed to save time.[3] Yet, the literature too often ignores another

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[1] *See* Suzanne J. Schmitz, *Giving Meaning to the Second Generation of ADR Education: Attorneys' Duty to Learn About ADR and What They Must Learn*, 1999 J. Disp. Resol. 29, 29, 47-50 (1999) (discussing how ADR "has become a permanent part of the legal landscape" and lawyers must educate themselves about ADR, including arbitration)

[2] At the conferences that I have attended, labor lawyers always have many questions about the best practices on certain issues. For example, they are interested in whether to reserve opening statement until immediately before presenting the case in chief or whether to use oral closing instead of written briefs. Sometimes experts in trial advocacy are available to answer such questions, but typically their lack of familiarity with arbitration procedures and the differences between arbitration and trial renders their advice less useful than it might be were these differences explicitly considered.

[3] *See e.g.*, Carrie Menkel-Meadow, *Arbitration Symposium Article: Ethics Issues in*

important source of best practices: litigation and trial lawyering skills principles and methods ("litigation principles").[4]

Arbitration is one type of Alternative Dispute Resolution ("ADR").[5] Unlike negotiation[6] or mediation,[7] it is an adjudicatory type of ADR.[8] A neutral, termed the arbitrator, hears the claims of each party and reaches a decision as to the appropriate resolution of the dispute.[9]

Traditionally, arbitration was a contractually agreed upon procedure in which the parties selected an arbitrator to reach a binding resolution of their dispute.[10] Merchants used commercial arbitration domestically as early as

Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not, 56 U. Miami L. Rev. 949, 949 (2002); Reginald Alleyne, *Delawyerizing Labor Arbitration*, 50 Ohio St. L.J. 93 (1989).

[4] For the sake of readability, this article will refer throughout to these litigation and trial lawyering skills principles and methods as "litigation principles." The shorthand is not intended to suggest that the lawyering skills used by litigators and trial lawyers are identical; the author recognizes that many litigation lawyers never go to trial. The shorthand is also not intended to conflate principles and methods, and when referring to a specific principle or method, the appropriate term is used.

[5] Katherine V.W. Stone, Arbitration – National, Encyclopedia of Law and Society (David S. Clark, ed.) *available at* http://ssrn.com/abstract=7810204 at 2 ("Arbitration is part of a larger movement toward alternative dispute resolution ("ADR"), a movement that attempts to develop substitutes for an increasingly dysfunctional civil justice system.")

[6] Negotiation involves two parties trying to settle a dispute through discussion. *See* ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN xvii (2d ed. 1991) ("It is back-and-forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed.")

[7] Mediation involves two parties trying to settle a dispute with the aid of a neutral third party. Menkel-Meadow, *supra* note 3, at 949 (distinguishing arbitration from mediation "in which a neutral third party facilitates party negotiations to resolve a dispute")

[8] Menkel-Meadow, *supra* note 3, at 949 ("Arbitration is simply a usually (but not always) private process of adjudication in which parties in a dispute with each other choose decision-makers (sometimes one, often a panel of three) and the rules of procedure, evidence and decision by which their dispute will be decided)

[9] Sometimes the dispute is decided by a panel of arbitrators. Stone, *supra* note 5, at 1 ("Arbitration is a form of dispute resolution in which parties agree to submit their dispute to one or more neutrals to conduct a hearing and render a decision on the merits.") This paper uses the singular term "arbitrator" to refer to the decision-maker throughout, but any idea referring to the "arbitrator" is equally applicable to a panel of arbitrators.

[10] JACQUELINE M. NOLAN-HALEY, ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL 143 (2d ed. 2001) (explaining that the traditional model of arbitration is a voluntary process where the parties submit the dispute to a neutral); Stone, *supra* note 5, at 1 ("When an arbitral award is issued, courts treat the award as final and binding."); Celeste Hammond & Jeffrey J. Mayer,

the 18th century.[11] In 1925, Congress passed the Federal Arbitration Act ("FAA"),[12] which governed commercial disputes brought to federal court. Arbitration has also been used for many years in the fields of securities regulation and labor relations, for resolving disputes between unions and employers.[13]

Today, the use of contractually-agreed-upon arbitration has extended well beyond the fields of securities, labor relations, and commercial disputes between merchants.[14] As one scholar wrote, "In recent years, the use of arbitration has taken on staggering proportions in the United States."[15] All fifty states have also enacted statutes governing arbitration.[16] Passage of these laws and the expansion of the FAA's scope in the 1980s to encompass a broader range of disputes encouraged an explosion in the use of arbitration.[17] Today, arbitration is commonly used in: international commercial disputes,[18] consumer disputes,[19] construction industry disputes,[20] employer-employee disputes,[21] and professional sports contract

Arbitration Advocacy: From Clause to Hearing, 28 Am. J. Trial Advoc. 101, 104 (2004) ("[Arbitration] is almost always binding in nature, and designed pursuant to a contract.").

[11] Stone, *supra* note 5, at 3 ("There are records of arbitration being used in the colonial period to settle disputes between firms within a common industry in a particular locality.")

[12] Stone, *supra* note 5 at 2; Secunda, supra note 15, at 692 & n.28 ("The FAA was initially referred to as the United States Arbitration Act, but its name was changed to its present form in 1947.").

[13] *Id.* ("[T]he institution of arbitration evolved, primarily in the areas of securities regulation and collective bargaining.").

[14] Stephen J. Ware, *Teaching Arbitration Law*, 14 Am. Rev. of Int'l. Arb. 35, 38, 37 (2003) ("Over the last generation, arbitration has expanded beyond its traditional domains of disputes among businesses and labor disputes in a unionized workplace.").

[15] Paul M. Secunda, *"Arasoi O Mizu Ni Nagusu" or "Let the Dispute Flow to Water": Pedagogical Methods for Teaching Arbitration Law in American and Japanese Law Schools*, 21 Ohio St. J. on Disp. Resol. 687, 697 (2006).

[16] Secunda, *supra* note 15, at 692.

[17] Stone, *supra* note 5, at 2 ("[I]n the 1980s, the Supreme Court reinterpreted the Act and has expanded its reach, adopting a national policy of promoting the use of arbitration in all relationships that have a contractual element.") The Supreme Court also "held that parties to arbitration agreements were required to arbitrate claims of violation, not merely of contractual right, but also of statutory rights." *Id.* at 5.

[18] John S. Murray, Alan Scott Rau, & Edward F. Sherman, ARBITRATION 292 (2d ed. 1996) (explaining that arbitration clauses in international commercial contracts are "almost universal").

[19] Ware, *supra* note 14, at 37.

[20] Richard Fullerton, *Searching for Balance in Conflict Management: the Contractor's Perspective*, 48 Disp. Resol. J Feb./Apr. 2005, at 48, 52. ("Over the last 20 years, arbitration has become used so widely in construction that many consider it the primary, rather than an

disputes.[22]

For the many people involved in these arbitrations, the existing literature on ethical considerations in arbitration is useful. The literature provides guidance on establishing ethical rules that will govern the advocates[23] and selected arbitrator.[24] But ethical guidance does not purport to advise a rule-maker or advocate who is choosing between two equally ethical approaches.

Likewise, one goal of arbitration often is to provide a more expeditious form of dispute resolution than litigation.[25] And the literature suggesting rules based on simplifying the procedure and shortening hearing time is, indeed, helpful in designing such an expeditious procedure.[26] Yet, this literature does not delve deeply into the multiple other considerations, beyond simplification and efficiency, that bear on rendering arbitration an effective form of dispute resolution.

This article suggests that another source of best practices for arbitration is litigation principles. Litigation and trial lawyering skills ("litigation skills"), taught in law schools throughout the country[27] and written about by

alternative, method of dispute resolution.")

[21] Paul F. Kirgis, *The Contractarian Model of Arbitration and Its Implications for Judicial Review of Arbitral Awards*, 85 Or. L. Rev. 1, 4 (2006).

[22] Secunda, *supra* note 15, at 698.

[23] Catherine A. Rogers, Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration, 23 Mich. J. Int'l L. 341, 418 (2002). I use the term "advocate" rather than "lawyer" to describe the client's representative at the arbitration hearing because, while the advocates are often attorneys, non-attorneys also serve as advocates in arbitration in certain industries. For instance, union representatives sometimes advocate in labor arbitrations.

[24] Menkel-Meadow, *supra* note 3, at 950-51, 957, 961.

[25] Menkel-Meadow, *supra* note 3, at 962 (mentioning in passing the "oft cited claims of speed and lower cost")

[26] Paul A. Zirkel & Andriy Krahmal, *Creeping Legalism in Grievance Arbitration: Fact or Fiction?*, 16 Ohio St. J. on Disp. Resol. 242, 262, 263 (2001) (suggesting that grievance hearings should more often be limited to one day and closing argument should be the "rule" and briefs "the exception"); Alleyne, *supra* note 3, at 93.

[27] *See* Sarah Schrup, *The Clinical Divide: Overcoming Barriers to Collaboration Between Clinics and Legal Writing Programs*, Clinical L. Rev. (forthcoming Fall 2007), *available at* http://ssrn.com/abstract=943452 at 15 ("In the last twenty-five years, however, the LRW [Legal Research and Writing] field has expanded so that today every accredited law school offers some form of LRW instruction."); Thomas F. Geraghty, *Foreword: Teaching Trial Advocacy in the 90s and Beyond*, 66 Notre Dame L. Rev. 689 n.4 (1991) (Stating that in 1991, "NITA [National Institute of Trial Advocacy] materials are used in 150 of the 157 AALS [Association of American Law Schools] accredited law schools"). As discussed more extensively below, many legal writing

legal writing and trial advocacy scholars,[28] are based on many principles and methods generally agreed to be the best practices in litigation and at trial.

Litigation principles are valuable and are generally agreed upon for a variety of reasons, which are not mutually exclusive. 1) They can be used to successfully solve problems.[29] 2) Their use aids the decision-maker[30] in reaching a decision.[31] 3) Their use aids the advocate to present the client's position in an organized way.[32] 4) Their use by the advocate is likely to

courses teach basic skills geared toward litigation and can be considered a sub-set of first-year lawyering skills classes that teach these types of litigation and trial skills. See infra notes 36-52 and accompanying text.

[28] *See* Schrup, *supra* note 27, at 15 ("Along with this growing discipline is an impressive body of scholarship about LRW [Legal Research and Writing] . . .); Terrill Pollman & Linda H. Edwards, *Scholarship by Legal Writing Professors: New Voices in the Legal Academy*, 11 Legal Writing 3, 55 (2005); Geraghty, *supra* note 27, at 8.

[29] *See* Keith A. Findley, *Rediscovering the Lawyer School: Curriculum Reform in Wisconsin*, 24 Wis. Int'l L.J. 295, 315 (2006) (discussing how legal writing courses train students to solve legal problems); Roy T. Stuckey, *Education for the Practice of Law: The Times They Are A-Changin'*, 75 Neb. L. Rev. 648, 650 (1996) ("[T]eaching students to be competent problem-solvers should be the primary goal of legal education because problem-solving is the core function of lawyers."); Kurt M. Saunders & Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F. L. Rev. 121, 144 (1994) ("[T]hinking like a lawyer, and lawyering more generally, is about solving problems.")

[30] The term "decision-maker" is intended to encompass a judge or juror.

[31] *See* Lucia Ann Silecchia, *Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?*, 100 Dick. L. Rev. 245, 285-86 (1996) ("Students will learn that legal writing is best when the writer understands how to use the style of communication appropriate for the particular situation and audience."); Kurt M. Saunders, *Law as Rhetoric, Rhetoric as Argument*, 44 J. Legal Educ. 566, 567 (Dec. 1994) (discussing how resolving a legal argument depends on "the audience, whether judge or jury" deciding that one claim is more reasonable than another); *cf.* James F. Stratman, *Teaching Lawyers to Revise for the Real World: A Role for Reader Protocols*, 1 J. Legal Writing 35, 37 (Fall 1991) ("Important recent research on revision skill suggests that a major difference between expert and novice writers lies in their ability to simulate and predict audience goals, needs and responses to a text.").

[32] *See* Pollman, *supra* note 28, at 22 (discussing how a legal writing course's substantive content includes "major structural paradigms of legal analysis"); Jacline R. Evered, *"Arming the Graduate for Professional Battle: No Place for the Weak Skilled" Teaching and Assessing a Course to Develop Multi-Functioning Lawyers*, 43 Brandeis L.J. 325, 326 (2005) (mentioning some of the skills of a "well-rounded, top-qualified law graduate" as including "an ability to absorb complex facts, organize evidence, and propose solutions to client problems."); Maureen E. Laflin, *Toward the Making of Good Lawyers: How an Appellate Clinic Satisfies the Professional Objectives of the MacCrate Report*, 33 Gonz. L. Rev. 1, 8 (1998) (classifying professional objectives into three general categories, one of which includes "communication and organizational

persuade the decision-maker of the strength of the client's case.[33]

Litigation skills are worthy of attention in and adaptation to the arbitration context because they can help to devise an arbitration process that furthers these goals. Of course, handling an arbitration raises unique questions of procedure and requires the use of some skills that differ from those used in litigation or at trial.[34] But many skills and procedures overlap with those used in litigation and at trial.[35] Explicitly considering the appropriateness of particular litigation principles, in light of those similarities and differences, provides insight as to the best practices, not only for litigation or trial, but for arbitration as well.

This article suggests best practices in arbitration, based on litigation skills, for two related contexts. One set of best practices is those that might be considered by persons, such as parties, advocates, and service-providers, drafting the rules governing an arbitration hearing. These suggestions cover issues such as whether to require opening statements and whether to submit live or paper testimony. The second set of best practices is intended for advocates preparing for and presenting at the arbitration hearing. These suggestions cover issues such as whether to stipulate to the issue and whether to argue in opening statement.

In Section I, this article will discuss the subject of litigation skills and illustrate how specific principles and methods foster the values of problem-solving, aiding the decision-maker, and presenting an organized and persuasive case. Section II will provide general background on what arbitration is. Section III will focus on describing how a prototypical arbitration process might look. In Section IV, the article will raise procedural, and related, issues upon which either rule-makers or advocates likely seek guidance. The section discusses specific litigation principles and applies them to recommend best practices as to these arbitration issues.

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skills").

[33] *See* Pollman, *supra* note 28, at 22 (discussing how legal writing course's substantive content includes "rhetorical principles of persuasion."); Latour "Lt" Lafferty, *Leadership in Trial Advocacy: Credibility is a Cornerstone of Effective Trial Advocacy*, 28 Am. J. Trial Advoc. 517, 522 (2005) ("[A] lawyer's goal at trial is to persuade (or lead) the fact finder" to accept your view of the facts.") (quoting Steven Lubet, Modern Trial Advocacy 15 (2000)); Saunders, *supra* note 29, at 126 ("Thinking like a lawyer means, to a large extent, thinking rhetorically within a problem-solving context.")

[34] *See* Stone, *supra* note 5, at 1 (stating that most arbitrations are less "formalized" than "a court of law").

[35] *See* Menkel-Meadow, *supra* note 3, at 949 (describing how arbitration is "a private process of adjudication").

Finally, in Section V, the article will conclude by discussing the utility of this approach to developing best practices for scholars, teachers, and practitioners.

II. LAWYERING SKILLS

Lawyering skills, which encompasses subjects such as legal writing and trial advocacy, is a relatively new area of teaching and scholarship.[36] Over the past twenty-five years, every accredited law school has included some type of lawyering skills course in the curriculum.[37] Typically, lawyering skills is a subject taught in the first year of law school.[38] It addresses topics such as types of legal reasoning, case reading, statutory construction, synthesis of authorities, application of legal authority to factual disputes, legal research, writing a predictive memorandum, writing a persuasive brief, and oral argument before a court.[39]

The aim of the subject of lawyering skills is to make explicit the principles and methods that underlie good lawyering.[40] The subject is a systematic study of these principles and methods.[41] The principles and

[36] *See* Pollman , *supra* note 28, at 55 ("Unlike many doctrinal areas, which have been mined for writing topics for many years, the young field of legal writing is bursting with important unexplored ideas.").

[37] *See* Schrup, *supra* note 27, at 15 ("In the last twenty-five years, however, the LRW field has expanded so that today every accredited law school offers some form of LRW [Legal Research and Writing] instruction.").

[38] I have taught the course in differing forms, discussed more extensively below, at three schools. I taught Lawyering Skills at UCLA and Legal Writing and Advocacy at USC, and currently teach Basic Legal Skills at the Brandeis School of Law, University of Louisville. Which type of lawyering skills class is preferable is a topic beyond the scope of this article, which simply aims to use the substantive content of such courses, in other words the principles and methods taught in such classes, to suggest best practices for arbitration. It is, however, my position, as of the time of the writing of this article, that a first-year lawyering skills class should focus on a very limited number of basic skills, such as those necessary to perform legal research and writing a predictive memorandum. Other skills should be taught as part of required second year courses.

[39] *See* Pollman, *supra* note 28, at 13 ([L]egal writing courses cover the role and function of the judicial system, common law analysis, statutory interpretation, forms of legal reasoning, case synthesis, structural paradigms, and other rich and complex subjects.").

[40] *See* Judith B. Tracy, *"I See and I Remember; I Do and Understand": Teaching Fundamental Structure in Legal Writing Through the Use of Samples*, 21 Touro L. Rev. 297, 298 (2005) (discussing how "[t]hose who teach legal reasoning and writing . . . explicitly introduce students to the fundamentals" of lawyering skills).

[41] *See* Findley, *supra* note 29, at 313 (discussing how law school instruction in skills should

methods taught are based on empirical research,[42] logic,[43] rhetoric,[44] linguistics,[45] psychology,[46] and common yet often unstated practices[47] the use of which mark one as an insider to the legal profession,[48] and particularly to the culture of litigation. Disagreement sometimes exists over the best manner of lawyering, but most scholars and experienced practitioners agree on the basic principles and methods underlying lawyering skills.

Many lawyering skills classes are termed legal writing classes.[49] Often

be more systematic than "the vagaries of any set of clients' interests and concerns are likely to present to an apprentice")

[42] *See e.g.*, ALBERT J. MOORE, PAUL BERGMAN, & DAVID A. BINDER, TRIAL ADVOCACY: INFERENCES, ARGUMENTS AND TECHNIQUES 214 (1996) (discussing how "empirical evidence [suggests] that jurors do not change their tentative verdict preferences at the close of the evidence as a result of closing arguments.") (citing V. Hans & K. Swigert, Jurors' Views of Civil Lawyers: Implications for Courtroom Communication, 68 Ind. L.J. 1297, 1314-15 (1993)). Of course, there are many lawyering skills principles which might still be empirically tested for validity. In addition, it would be interesting to empirically test the best practices suggested by this article.

[43] *See* Pollman, *supra*, note 28, at 26 ("Legal writing topics, too, have theoretical foundations. Those foundations include constitutional theory, legal methods concepts, jurisprudence, composition theory, philosophy, ethics, logic, political theory, rhetoric, literary theory, linguistics, cognitive psychology, narrative theory, comparative law, and legal history.").

[44] Schrup, *supra* note 27, at 16 (describing how the scholarship and approach to teaching of the subject of legal research and writing "builds on New Rhetoric theory, cognitive psychology and learning theory").

[45] *See* Pollman, *supra* note 28, at 26.

[46] *See* Schrup, *supra* note 27, at 5 (mentioning the discipline of legal research and writing's focus on cognitive psychology).

[47] *See* Geraghty, *supra* note 27, at 689 (discussing how most trial advocacy teachers teach based on "generally perceived notions of what is, and what is not, effective advocacy" and "[t]hese perceived notions are typically intuitive judgments, which are generally accepted by the practicing trial bar.").

[48] While the concept of being an "insider" or "outsider" to the legal profession has been used widely in scholarship, I am indebted to Professor Ed Finegan of USC for first introducing me to the idea. *See e.g.*, Schrup, *supra* note 27, at 19 (discussing how those adhering to "the outer-directed school" of New Rhetoric labeled "students as 'insiders or outsiders' based on whether they had acquired the requisite skill set.") (citing Linda L. Berger, Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Content, 49 J. Legal Educ. 155, 159 (1999)) (quoting Marilyn M. Cooper, Why Are We Talking About Discourse Communities? Or, Foundationalism Rears Its Ugly Head Once More, in Writing as Social Action, 202, 204-05 (Marilyn M. Cooper & Michael Holzman eds., 1989)).

[49] *See* Kate O'Neill, *Adding an Alternative Dispute Resolution (ADR) Perspective to A Traditional Legal Writing Course*, 50 Fla. L. Rev. 709, 709 (discussing integrating ADR into "the traditional core of legal writing courses" when lacking the resources "to adopt a full-scale

the classes focus on legal writing in the litigation context.[50] The class proceeds from the teaching of writing a predictive memorandum to the writing of a trial level motion brief or appellate brief.[51] While these classes encompass a great amount of material, the skills covered are limited enough to provide substantial detailed instruction on each of these topics.[52]

Other classes are termed "lawyering skills" or something similar.[53] These courses may focus on the same types of skills as the traditional legal writing class.[54] Alternatively, some include an even broader range of lawyering skills topics beyond what is needed to write memos and briefs, such as client interviewing, case preparation, and trial advocacy.[55] Those classes that address a broad range of topics permit less detailed instruction

'lawyering' program that might be able to add significant lecture time and role-plays devoted to ADR").

[50] *Id.* ("The traditional model of legal writing courses can be faulted for implying that the only business of lawyers is litigation;").

[51] *Id.* at 710 (stating that "traditional legal writing course . . . teaches students to research and write one or more memoranda of law in the Fall semester and an appellate (or possibly trial motion) brief in the Spring.") (citing Ralph L. Brill, et al., ABA, Sourcebook on Legal Writing Programs (1997)); *see also* Eric B. Easton, et al., ABA, Sourcebook on Legal Writing Programs (2d ed. 2006) (stating relatively few schools follow an approach which integrates client interviewing, counseling, negotiation, and ADR).

[52] At USC, I taught a legal writing and advocacy course. The course, part of a directed program, focused on topics such as types of legal reasoning, case reading, synthesis of authorities, application of legal authority to factual dispute, legal research, writing a predictive memorandum, writing a persuasive brief, and oral argument before an appellate court. My students were provided numerous opportunities to practice the skills covered by the class, and excelled at legal research and writing by the end of the academic year.

[53] *See* O'Neill, *supra* note 49, at 710 (discussing '''lawyering' or 'law office' course, which may add any or all of the following to the traditional legal writing agenda: increased attention to fact investigation and analysis, interviewing, counseling, negotiation, transactional planning and drafting, trial advocacy skills, and ethical issues."). At UCLA, the class I taught was termed "Lawyering Skills" and the class I teach at the Brandeis School of Law, University of Louisville is termed "Basic Legal Skills."

[54] At the University of Louisville, the non-directed Basic Legal Skills course focuses on the core components of a legal writing class, but each professor can add in any additional skills she feels appropriate. I chose to add only the skill of legal drafting in the context of drafting a release, so as to permit the students significant opportunity to practice the traditional skill set. I did, however, discuss client interests that may not be reflected in case authority and assigned an advice memo, rather than the more traditional litigation-related memo.

[55] *See* O'Neill, *supra* note 49, at 710. At UCLA, the lawyering skills course covers client interviewing, case preparation, and trial advocacy in addition to all those topics typically covered by a legal writing class.

on each topic, but provide more introduction to a variety of important skills. Like the more traditional legal writing class, these courses often focus on the skills used in litigation.[56]

At some law schools, additional lawyering skills classes are taught as upper level classes.[57] For instance, the majority of accredited law schools have a trial advocacy class that is taught as a simulated skills course.[58] The National Institute of Trial Advocacy ("NITA") first introduced trial advocacy as a lawyering skills subject at a conference in 1972.[59] The NITA model of learning trial advocacy through simulation and critique[60] was then incorporated into law school classes across the country and is the basis of

[56] In the program at UCLA, while placing significant emphasis on a client-centered approach to lawyering, all of my paper assignments were litigation-related. New York University also has a "lawyering program that focuses" on litigation. O'Neill, *supra* note 49, at 710 n.5 (1998) (citing The Real World comes to the Classroom, New York University, THE LAW SCHOOL MAGAZINE, p. 51053 (1993)). Even in classes that focus more broadly on skills beyond litigation, such as negotiation and transactional writing, arbitration is not typically covered. *Id.* at 710 & n.5 ("While I am not aware of any law school that has adopted such an expanded skills program for the express purpose of furthering ADR, plainly such programs would afford significant opportunity to incorporate ADR theory and skills") (citing James E. Molierno, the Legal Skills Program at the College of William and Mary: An Early Report, 40 J. Legal Ed. 535 (1990)). There has, however, been an effort to incorporate ADR into the first-year curriculum, including lawyering skills classes, at some law schools. Washington and Lee and William and Mary had lawyering process courses that included dispute resolution as of 1998. Leonard L. Riskin, *Disseminating the Missouri Plan to Integrate Dispute Resolution into Standard Law School Courses: A Report on A Collaboration with Six Law Schools*, 1998 Fla. L. Rev. 589, 595 n.27 (1998). Additionally, as of 1998, the University of Missouri-Columbia School of Law included an overview of ADR in the legal research and writing class; Inter-American University's Research, Analysis, and Writing Skills I course integrated writing exercises dealing with advising clients about methods of dispute resolution; and Ohio State University taught segments on dispute resolution in Legal Analysis and Writing. *Id.* at 592, 603.

[57] Schrup, *supra* note 27, at 9 (discussing how "in the wake of the MacCrate Report's call for more professional skill training in American law schools, clinics increasingly focused on pedagogical goals, including skills training, in addition to their legal-aid and public-service concerns."); David A. Binder & Paul Bergman, *Symposium: The 25th Anniversary of Gary Bellow's & Bea Moulton's The Lawyering Process: Taking Lawyering Skills Training Seriously*, 10 Clinical L. Rev. 191, 191 (2003) (discussing how the book THE LAWYERING PROCESS, written in 1978, "helped to establish lawyering tasks such as interviewing, counseling and negotiations as complex and worthy of study in their own right.").

[58] Geraghty, *supra* note 27, at 689 n.4 (Stating that in 1991, "NITA materials are used in 150 of the 157 AALS accredited law schools").

[59] *Id.* at 687 (discussing how NITA held its first session in 1972 and established a "nationally recognized, coherent methodology for teaching trial advocacy").

[60] *Id.* at 689 (describing NITA form of instruction).

the majority of trial advocacy classes today.[61] The teaching of trial advocacy in such a class allows more detailed instruction on the topic than that permitted in a first-year lawyering skills class.[62]

Arbitration, on the other hand, is not typically taught as a skills class[63] because so much other information needs be covered in an arbitration class, such as the context of arbitration as a form of dispute resolution,[64] the substantive background regarding what arbitration is,[65] and the complex law governing arbitration.[66] Lawyering skills methods and principles ("lawyering principles") are typically incorporated only as a topical sub-set of a course with a broader focus and range of topics.[67] Additionally, in some infrequent instances, aspects of arbitration are taught as one of many skills covered in first-year lawyering skills classes. [68] There, thus, has not

[61] *Id.* at 689 n.4.

[62] Other upper level lawyering skills classes include, for example, those on depositions, drafting, and client interviewing. Binder, *supra* note 57, at 215 n.89 (stating that UCLA has adopted a skills-centered approach to clinics on trial advocacy and interviewing and counseling). While I was teaching at UCLA in 2006, live clinical courses in trial advocacy, deposition, and interviewing and counseling were offered, and, in addition, simulated trial advocacy and depositions classes were offered.

[63] Jean R. Sternlight , *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 Notre Dame L. Rev. 681 (2005) ("The typical arbitration course focuses on Supreme Court cases dealing with commercial and/or labor arbitration. Rather than teaching students to be arbitrators, or to be attorney-advocates within the arbitration process, the course more frequently examines case law on such issues as when and whether arbitration clauses are valid, the nature of arbitrators' powers and authority, and the circumstances under which arbitral decisions are to be enforced or instead vacated."); *see also* Ware, *supra* note 14, at 40 (discussing how "the primary teaching tool in law school continues to be the casebook and there are several fine ADR casebooks available.").

[64] For scholarship on teaching arbitration practice see Secunda, *supra* note 15, at 708 ("[A]ny introduction to arbitration should include a comparison of arbitration to other methods of dispute resolution such as litigation and conciliation, emphasizing that the appropriate method to be utilized in any one case must be determined on an *ad hoc*, case-by-case basis.").

[65] Secunda, *supra* note 15, at 708 (discussing the types of "basic details" that a "course in arbitration should enable" students to explain and the types of "common questions" it should enable them to answer.).

[66] Ware, *supra* note 14, at 35 (explaining why arbitration law is a difficult subject).

[67] Sternlight, *supra* note 63, at 687 ("Some arbitration courses also include role plays of arbitration hearings."); *see* Secunda, *supra* note 15, at 714 (recommending the use of "skill-centered techniques" in addition to "theory-centered methods" to teach arbitration).

[68] O'Neill, *supra* note 49, at 714 (stating that "about half of the first-year class [at Washington University] writes at least one memorandum of law about an issue relevant to ADR, such as the enforceability of an arbitration clause in an employment contract").

been nearly as much focus on systematically studying and explicitly detailing arbitration lawyering principles as there has been developing litigation principles.[69]

The litigation skills subjects like trial advocacy and legal writing have generated a wealth of scholarship on lawyering principles which are worthy of attention in the arbitration context. Lawyering skills scholarship includes topics such as modifying or augmenting the traditional NITA methodology,[70] teaching skills in conjunction with clinics,[71] and developing partnerships between legal writing scholars and clinical scholars and teacher.[72]

Moreover, scholarship in the area of legal writing has expanded as the subject has been integrated into more law schools' curricula.[73] Legal writing scholarship includes articles on all of the various skills taught.[74] Articles written have included diverse subjects and cover not only the basics, but advanced litigation principles that further the goals for which lawyering skills are valued. For instance, one author has written on "fiction-writing strategies lawyers can use to construct a persuasive fact statement."[75] Another has applied "methods of statutory interpretation, literary criticism, and musicology to propose a resolution to methodological

[69] The many skills involved in arbitration suggest that it might make an ideal upper-level skills class. *cf.* Ware, *supra* note 14, at 38, 39 (discussing how "arbitration law is a very good vehicle" for teaching the skills set out in the McCrate report and describing how "[a]rbitration law implicates lawyers' roles as fact-gatherers, researchers, counselors, contract-drafters, negotiators, litigators and advocates in arbitration."). Developing a systematic and explicit lawyering skills approach to teaching arbitration would likely aid in devising such a class. This article, thus, should aid teachers interested in devising such a class. Of course, the great amount of substantive material on arbitration suggests that to most effectively teach arbitration as a freestanding lawyering skills class might require that students have had a more doctrinally focused course as a pre-requisite. Secunda, *supra* note 15, at 714 ("While a basic theoretical understanding of arbitration law is necessary, once such foundational knowledge is established it is also imperative to develop the student's practical skills as well.").

[70] Geraghty, *supra* note 27.

[71] Binder, *supra* note 57.

[72] Schrup, *supra* note 27.

[73] Pollman , *supra* note 28, at 55; Schrup, *supra* note 27, at 15 ("Along with this growing discipline is an impressive body of scholarship about LRW [Legal Research and Writing] . . .)

[74] *See* Pollman, *supra* note 28, at 119-26 (discussing legal writing scholarship topics based on "the substance or doctrine legal writing professors teach")

[75] Pollman , *supra* note 28, at 23 (citing Brian Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 Rutgers L.J. 459 (2001).

disputes over statutory interpretation."[76] A third has "use[d] current research in rhetoric, cognition, and computer usability to suggest guidelines for using electronic communication with courts."[77]

This article will focus on litigation skills and on how the principles and methods underlying these skills suggest best practices for arbitration.

The principles and methods discussed in this article are limited to three types: 1) principles that are generally agreed upon as furthering some or all of the skill goals discussed, infra, in the Introduction; 2) methods that are one of a range of generally agreed upon methods, which would be considered appropriate even by those who might advise differently; and 3) those methods that while perhaps not generally known, would not likely be disputed as a helpful method. The article does not discuss litigation principles that are truly controversial or would be generally contested. Instead, it seeks to use time-tested methods to suggest best practices for arbitration.

Within the first category, for example, is the principle that important information should be presented first because people remember well the information presented first. People, regardless of which values they believe are of paramount importance in defining good lawyering, tend to agree with this principle. Presenting important information first helps solve disputes because it focuses those involved in the dispute and the decision-maker on what is at issue. It tends to aid the decision-maker because the decision-maker finds out what the lawyers consider important at a time when the decision-maker is able to focus well. It tends to help the lawyer present an organized case on behalf of the client because it provides a method to organize the information by importance. It also tends to aid the lawyer to persuade the decision-maker because the decision-maker will remember exactly what the lawyer thought was important and, therefore, placed first.

Within the second category, for example, is the method of asking only two types of questions on cross-examination: those where the lawyer knows the answer and those, used only in limited instances, enumerated infra in Section IV, L, when the lawyer does not care how the witness responds. While some may disagree as to whether any questions where the witness

[76] Pollman, *supra* note 28, at 24 (citing Scott Fruehwald, *Pragmatic Textualism and the Limits of Statutory Interpretation: Dale v. Boy Scouts of America*, 35 Wake Forest L. Rev. 973 (2000)).

[77] Pollman, *supra* note 28, at 24 (2005) (citing Maria Perez Crist, *The E-Brief: Legal Writing for an Online World*, 33 N.M. L. Rev. 49 (2003).

does not know the answer should be asked,[78] such a method would likely not be regarded as unreasonable. It helps solve problems because it provides for a relatively smooth cross-examination focused on relevant testimony, with some flexibility to ask a variety of questions. It aids the decision-maker because it focuses the testimony on that known by the examining lawyer to be relevant or, at a minimum, that likely to cast light on the issues in dispute. It helps the lawyer present the client's position in an organized way because it establishes guidelines on the types of questions to ask. And the use of the method by the lawyer is likely to persuade the decision-maker because it does not lead to testimony that will be irrelevant or potentially harmful to the client's case.

Finally, within the third category, for example, is the method of thinking explicitly about inference chains. Many lawyers may not consciously sit down with the intent to map out the inferences leading from the key facts of the case to the conclusions they hope the decision-maker will reach. Yet, when reading about the method many will recognize it is a process in which they engage, and few are likely to dispute the helpfulness of the method. The method helps solve problems because it forces attorneys to think early on about the strength of their claims, and may even lead to settlement negotiations. The lawyer's use of the method will aid the decision-maker because the lawyer will file a motion, come to trial, or take other action with the ability to more clearly convey the relevant arguments. It aids the lawyer to present the client's position in an organized way because the lawyer will have thought explicitly about the arguments necessary to convey. It also aids the lawyer to persuade the decision-maker because the lawyer is more likely to clearly explain the strength of the arguments.

III. ARBITRATION OVERVIEW

Arbitration, as discussed in the Introduction, is typically a contractually agreed upon procedure in which the parties select an arbitrator to reach a binding resolution of their dispute.[79]

Parties may adopt arbitration for a variety of different reasons. Some common reasons include: 1) It is less time-consuming than litigation.[80] 2)

[78] *See e.g.*, Douglas E. Ray & Patricia Thomas Bittel, *Fatal Errors & Sparks of Genius in Labor Arbitration Advocacy*, Disp. Resol. J. Feb./Apr. 2003 at 24 ("As in litigation, an advocate should not ask a question on cross-examination without knowing what the answer will be.")

[79] *See supra* note 6 and accompanying text.

[80] Secunda, *supra* note 15, at 698 (discussing "speed" of arbitration as compared to litigation).

It costs less than litigation.[81] 3) Parties can establish the rules and procedures governing the arbitration to ensure that they are tailored to the parties' needs.[82] 4) Parties can pick a decision-maker of their own choosing,[83] perhaps one with experience in the field or industry.[84] 5) Information used in arbitration can be maintained as confidential.[85] 6) Parties can entrust an arbitrator to come up with an equitable solution rather than one based only on the governing law.[86] 7) Parties may have an ongoing relationship which might be endangered by full-blown litigation.[87] 8) The parties may desire the arbitrator to view or hear evidence not typically admissible in court.[88] 9) Remedies that differ from those in court may be available.[89]

The rules governing the conduct of a contractually-agreed-upon arbitration hearing can be established in several different ways. Some industries have their own associations with rules governing how the arbitrations will be conducted.[90] Many disputes in the securities industry,

[81] *Id.* at 700 " ("[A]rbitration is often far less expensive than adjudication in a judicial forum.").

[82] *Id.* at 699 ("[A]nother reason that parties favor arbitration revolves around the fact that they may mutually choose the procedures and rules by which the arbitration will be governed.").

[83] Nolan-Haley, *supra* note 10, at 144; Fullerton, *supra* note 20, at 52 (One advantage to arbitration is "the ability to select the neutral who will decide the dispute.").

[84] Claude R. Thomson & Annie M.K. Finn, *Managing an International Arbitration, A Practical Perspective*, Disp. Resol. J May/July 2005 at 74, 76 (stating a benefit of international arbitration is that the parties can select "individuals with expertise in the subject matter of the dispute").

[85] Menkel-Meadow, *supra* note 3, at 962 ("For many who choose to use arbitration, the advantages are not necessarily the oft cited claims of speed and lower cost ("efficiency"), but confidentiality.").

[86] *See* Murray, *supra* note 18, at 15 (discussing how arbitrator can apply "own sense of law and equity" ruling with the "spirit rather than the letter of the agreement").

[87] *Cf.* Ray, *supra* note 78, at 18, 19 (discussing how acrimonious arbitration proceedings can impede ongoing relationship making settlement often the better choice).

[88] *See* Hammond, *supra* note 10, at 103 (2004) (discussing how advocates in arbitration can rehabilitate witnesses with "hearsay or other 'garbage' testimony"); Steven Goode & Olin Guy Wellborn III, Courtroom Evidence Handbook: 2007-2008 Student Edition 75 (2007) (discussing how judges usually exercise their discretion to avoid viewing property or the scene).

[89] Hammond, *supra* note 10, at 116 (discussing case where parties could agree to punitive damages and agreement would be enforced under FAA even though state law would prohibit such damages) (*citing Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 52, 115 S. Ct. 1212, 1214, 131 L. Ed. 2d 76 (1995)); *cf.* Schmitz, *supra* note 1, at 48 (explaining that an advantage of arbitration is that it permits the parties to control the remedies available).

[90] Murray, *supra* note 18, at 61 (discussing how trade associations may use arbitration among

for example, are submitted to arbitration through either the New York Stock Exchange ("NYSE") or the National Association of Securities Dealers ("NASD").[91] The NYSE arbitrations are governed by the New York Stock Exchange Arbitration Rules[92] and the NASD arbitrations are governed by that entities' Code of Arbitration Procedure.[93]

Parties in other industries typically agree to use some type of arbitration service that has promulgated rules to govern the arbitrations administered by it.[94] Various services include the American Arbitration Association ("AAA"),[95] the Federal Mediation and Conciliation Service,[96] Judicial Arbitration and Mediation Services ("JAMS"),[97] The National Arbitration Forum,[98] and the International Chamber of Commerce.[99] In the construction industry, for instance, many parties sign a standard form requiring arbitration to be conducted according to the rules of the AAA.[100]

In some industries, parties still simply agree to their own rules in addition to or instead of using a service.[101] For some types of disputes, such as international commercial disputes, model rules, like the United Nations Commission on International Trade Law's Arbitration Rules, are available

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[91] Constantine N. Katsoris, *The Resolution of Securities Disputes*, 6 Fordham J. Corp. & Fin. L. 307, 309 (2001).

[92] Robert S. Clemente & Karen Kupersmith, *Pillars of Civilization: Attorneys and Arbitration*, 4 Fordham Fin. Sec. & Tax L. F. 77, 90 (1999).

[93] Cheryl Nichols, *Arbitrator Selection at the NASD: Investor Perception of a Pro-Securities Industry Bias*, 15 Ohio St. J. on Disp. Resol. 63, 70 (1999).

[94] Hammond, *supra* note 10, at 121 ("The parties often consider selecting an arbitration provider and providing for the use of it and its rules in their arbitration clause.")

[95] *Id.* at 121

[96] Zirkel, *supra* note 26, at 248 (mentioning Federal Mediation and Conciliation Service)

[97] William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 Emory L.J. 609, 616 (2006).

[98] *Id.* at 121.

[99] Joseph L. Daly, *Arbitration: The Basics*, 5 J. Am. Arb. 1, 20 (2006).

[100] W. Alexander Moseley, *What Do You Mean I Can't Get That? Discovery in Arbitration Proceedings*, 26 Construction L. 18, 21 (Fall 2006) (discussing how "AIA forms of agreement" and "a number of other standard industry forms of agreement" specify the procedural rules governing arbitration as the Construction Industry Arbitration Rules of the American Arbitration Association)

[101] Hammond, *supra* note 10, at 119-129 (discussing drafting arbitration clauses and providing examples of rules to consider and clauses that incorporate different rules). Some of the unions that I represented established arbitration procedures through contracts and agreements with the employers and through the past practices of the union and employer.

to those who wish to proceed without the aid of a service.[102]

Because the parties agree to the rules governing the arbitration and the procedure is designed to meet the parties' particular needs, variety exists in the manner in which arbitration is carried out.[103] The particular rules that govern the conduct of the arbitration are agreed upon by the parties so the conduct of an arbitration can, therefore, range from extremely informal to very formal.[104] Arbitration is, however, fundamentally an adjudicatory process although it is typically more informal than an actual court trial.[105]

Because, unlike many other ADR processes, contractual arbitration is typically binding, parties need to think seriously about which rules will best suit their needs.[106] The parties must also present their cases well so that the arbitrator has a sound basis upon which to decide the dispute.[107] Typically, only limited review of an arbitrator's binding decision will be available.[108]

However, some arbitration decisions are not binding and some arbitrations are not mutually agreed upon because the use of arbitration today has expanded beyond contractually-agreed-upon arbitration. Arbitration is now used in settings for which the law imposes a mandatory requirement to arbitrate.[109] For example, one type of mandatory arbitration,

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[102] Thomson, *supra* note 84, at 77 (discussing *ad hoc* international arbitration proceedings).

[103] Stone, *supra* note 5, at 1 ("But it is axiomatic that arbitrations take whatever forms the parties desire – arbitration is a creature of the parties and the parties are free to shape the scope of arbitration and the procedures to be used in whatever way they please.").

[104] *Id.* (discussing how "some arbitration procedures are extremely informal" and "[o]ther procedures are almost as formalized as a court of law.").

[105] *Id.* (stating that most arbitrations are less "formalized" than "a court of law").

[106] *Cf.* Schmitz, *supra* note 1, at 48 ("Because of the binding nature of arbitration and the limited review it entails, attorneys must approach arbitration carefully.").

[107] Thomas E. Crowley, *The Art of Arbitration Advocacy*, Haw. B.J. Sep. 1994 at 8, 8 ([W]e need to employ all our persuasive skills, because this is the only shot we'll get to persuade the arbitrator that our client richly deserves the remedies we seek.").

[108] Most disputes are governed by the FAA which provides very limited review. Others, such as labor disputes, have a similarly circumscribed review. Gould, *supra* note 9, at 647 ("Judicial pronouncements about the standard of judicial review for both section 301 and the FAA have a similar sound.") Whether parties can contract for more expansive review is unsettled and may depend upon the jurisdiction the parties are in. Hammond, *supra* note 510, at 105 (discussing how some parties have contracted for expanded judicial review but Circuits are split on whether such action is permissible).

[109] Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 Tex. Int'l L.J. 449, 478 (2005) ("Occasionally, however, we will find arbitration proceedings that by contrast are entirely 'nonconsensual' – that is, arbitration is resorted to not through 'the volition of contracting parties,' but because the selection of this dispute resolution mechanism has been

court-annexed arbitration, is now used by many courts.[110] These courts require parties in certain cases to arbitrate before going to trial.[111] The decision of the arbitrator is not, however, binding and can be appealed to the court de novo.[112] Thus, like contractual arbitration, the process is adjudicatory, but unlike it, the decision is not binding. The rules that govern these proceedings may be established by legislation or formulated by the court.[113]

IV. A PROTOTYPICAL ARBITRATION PROCESS

Unlike jury trials which are relatively similar in form regardless of the jurisdiction, there is no single method used in all arbitrations.[114] As discussed in section II, the process for an arbitration is usually agreed upon contractually between the parties and is adapted to the parties' desires and needs.[115] Moreover, arbitration is usually designed to be somewhat informal,[116] and as such, even within a defined set of rules, the process can vary from arbitrator to arbitrator.

Nevertheless, arbitration is normally more formal than mediation and

'driven primarily by government power.") (citing John Allison, *The Context Properties, and Constitutionality of Nonconsensual Arbitration*, J. of Disp. Resol. 1, 6 (1990)) .

[110] It is also sometimes compulsory in the public sector to use arbitration to negotiate the terms of a collective bargaining agreement. This type of arbitration is typically known as "interest arbitration." *Id.* at 479. While many of the litigation principles discussed in this article are equally applicable to "interest arbitration" as to "rights arbitration," an explicit discussion of "interest arbitration" is beyond the scope of this article.

[111] Menkel-Meadow, *supra* note 3, at 950 ("In addition, what began as a consensual and private process to avoid courts and litigation has migrated to the courts, where both state and some federal courts now require parties to go to court-annexed arbitration (where the arbitrators are usually lawyers, paid or volunteer) before they will be allowed a trial by either a judge or jury.").

[112] *Id.* at 954 ('If parties do not like what happened in the arbitration they usually have the right to a trial de novo . . .").

[113] *See* James C. Thornton, Note, *Court-Annexed Arbitration: Kentucky's Viable Alternative to Litigation*, 77 Ky. L.J. 881, 887 & n.26 (1989) (discussing how court-annexed arbitration programs may be created by state legislation or by court rule and operate under special rule and the supervision of the court).

[114] Murray, *supra* note 18, at 192 (discussing relative informality of arbitration and infinite variety of procedures from extremely formal "practically courtroom procedure" to "barely distinguishable from a mediation proceeding.")

[115] *See supra* text accompanying notes 79 to 89.

[116] *See supra* text accompanying note 105.

less formal than litigation.[117] It usually involves some preparation, including limited discovery,[118] and a hearing that resembles a trial in its stages, with some variations from a typical trial.[119] One common process looks as follows.[120]

First, well in advance of the arbitration hearing, the advocates review records of, and documents from, any relevant prior proceedings. The parties may have taken notes of informal negotiations that attempted to resolve the issue. There may have been some type of more formal negotiation or mediation which was a prior step before the parties turned to arbitration.[121] In labor and employment disputes, some type of prior

[117] Stone, *supra* note 5, at 1 (stating most arbitrations fall between the "extremes" of "extremely informal, permitting the parties to present their cases without any constraints from rules of evidence or procedure" to "almost as formalized as a court of law, and involv[ing] rules of evidence, discovery, pre-hearing motions, stenographic records, and post-hearing briefs."). If the case is a statutory claim or complex litigation where the full range of discovery and motion practice is available, then the litigation principles will be even more applicable with less need for modification. This is particularly so for statutory claims which rely on traditional legal argument rather than contract interpretation.

[118] Theodore St. Antoine, Ed., THE COMMON LAW OF THE WORKPLACE: THE VIEWS OF ARBITRATORS 10 (1998) (discussing how depositions in labor arbitration are available "only to preserve testimony that would otherwise be unavailable at the haring"); Moseley, *supra* note 100 (discussing limitations on discovery in construction arbitration); Fullerton, *supra* note 20, at 52 ("[A]rbitration does not eliminate all document discovery. However, an experienced construction arbitrator . . . can expedite discovery . . . limit (or eliminate) depositions, restrict the number of expert witnesses, and keep pre-hearing motions to a minimum."); Hammond, *supra* note10, at 103 ("In arbitration, the parties may have limited or even no discovery."); Morley R. Gorsky, *Presentational Skills: A Quick Reference Guide for Advocates*, Disp. Resol. J. Aug. 1999 at 51 (stating "Many arbitration hearings are conducted without the availability of broad discovery mechanisms, and when they are available in some form, they are often not fully resorted to.").

[119] Nolan-Haley, *supra* note 10, at 178 (stating that the arbitration hearing is similar in many respects to a trial in that both parties make opening statements, present their cases, and engage in closing arguments, but also differs from trial in a number of ways in that the record is not as complete, written transcripts are not always used, the evidentiary rules are not applicable, and rights such as discovery, compulsory process, cross-examination, and testimony under oath are often limited); *see* Crowley, *supra* note 107, at 8 ("The critical stages for arbitration advocacy are: the pre-arbitration conference; the preparation for the hearing; the prearbitration memorandum; the opening statement; the examination of witnesses; the submission of exhibits; and the final argument.")

[120] This outline of the arbitration process and the descriptions in Section IV of the questions raised are based not only on the scholarship cited but also on my experience as a lawyer handling labor arbitrations and as an arbitrator hearing mandatory court-annexed arbitrations.

[121] Bennett G. Picker, *New Roles: Problem Solving ADR: New Challenges, New Roles, and New Opportunities*, 72 Temp. L. Rev. 833, 835 (1999) (discussing how as ADR counselors, they

grievance procedure likely occurred.[122] And, in some areas, including labor, there may have been related administrative proceedings.[123]

Then, the advocates prepare for the arbitration.[124] This involves familiarizing themselves with the relevant contract provisions, researching the arbitrator[125] and any relevant cases, procuring relevant documents, preparing the witnesses,[126] and visiting relevant sites, such as a

frequently draft agreements that provide for "neutral fact-finding, executive negotiations, and mediation as a predicate to either arbitration or litigation."); Thomson, *supra* note 84, at 79 (suggesting that "mediation is often fruitful" if it occurs before a international commercial arbitration begins). In some cases, the negotiation or mediation process may be completely confidential and the information about it unavailable for use in preparing the arbitration. In other circumstances, the party may be able to refer to its own notes and ideas from the negotiation or mediation. William L. Kandel, Em. Rel. L.J. (Winter 2002) at 135, 149 (Discussing how an agreement or ADR provider may provide for "confidential mediation as a first step towards voluntary resolution of a dispute."); Fullerton, *supra* note 20, at 54 , (discussing how "mediation was incorporated into the dispute resolution provisions of the American Institute of Architects standard contract documents as a condition precedent to arbitration" in 1997) (citing New AIA Contract Stresses Mediation, 52(3) Disp. Res. J. 5 (Fall 1997)).

[122] Charles A. Borell, *How Unions Can Improve Their Success Rate in Labor Arbitration*, Disp. Resol. J. Feb./Apr. 2006 at 28, 31 (discussing availability of settling grievance at any step in grievance procedure before arbitration).

[123] A union is entitled to request information about a grievance under the National Labor Relations Act. When an employer refuses to provide information necessary for contract administration, the union may file charges with the National Labor Relations Board. Laura J. Cooper, *Discovery in Labor Arbitration*, 72 Minn. L. Rev. 1281, 1290-93 (1988).

[124] Gorsky, *supra* note 118, at 49 ("The best guide to good advocacy will be of little value if counsel is unwilling or unable to devote the necessary care and attention to the preparation of a case, including the proper preparation of witnesses.")

[125] This is often one of the first steps taken because the arbitrator is often chosen only after it becomes clear the dispute will be submitted to arbitration, and the research aids in selecting the arbitrator. For a discussion of researching arbitrators in order to select an arbitrator for international commercial disputes see Thomson, *supra* note 84, at 77.

[126] *See* Borell, *supra* note 122, at 37 (discussing steps advocates should perform in preparing for labor arbitration). This article does not purport to be a guide to the complete steps necessary to prepare for an arbitration. Rather, it simply provides guidance as to best practices for arbitration based on litigation principles, particularly for areas where the arbitration process significantly differs from the litigation and trial process. It does not undertake a complete systemic application of litigation principles to arbitration, as in particular it does not generally address topics where the arbitration process is significantly similar to the litigation and trial process. A systemic application of litigation principles to arbitration is a long-term undertaking that will benefit from further scholarship and teaching in the area. For instance, several of the topics discussed herein, such as the appropriate demeanor and presentation in arbitration, warrant a much more in-depth discussion. And several topics for which litigation principles might provide guidance, such as research, closing arguments, or approaches to adverse witnesses are not discussed at all herein

construction site.[127] It may also involve some type of discovery of or exchange of documents between the parties.[128]

Next, either at a pre-arbitration meeting or at the start of the arbitration, the advocates confer on exhibits and agree as to those they will admit.[129]

Also, the advocates submit the issue or issues to be arbitrated. This may be prior to the hearing[130] or at the arbitration.[131]

At the hearing, the advocates give opening statements. These statements resemble those at a trial. [132] The opening statement summarizes the party's case and sets out the evidence that the advocate intends to present, including the testimony of the witnesses.[133] Sometimes, the

because of the relative similarity to litigation and trial.

[127] Michael J. Altschuler, *Seeing is Believing: The Importance of Site Visits in Arbitrating Construction Disputes*, Disp. Resol. J. Aug./Oct. 2003 at 36 (advocating use of site visits in construction arbitration)

[128] Thomson, *supra* note 84, at 79 (suggesting that in international commercial arbitration "it is now generally accepted that parties should produce all non-privileged documents that are directly related to the issues in dispute. . ."); Michael J. Bayard, *Thirty Steps to a Better Arbitration*, Disp. Resol. J. Aug./Oct. 2004 at 41, 42 (2004) (Recommending that arbitrators "make a list of the documents you think will be central to the case and then check to see if they have been provided."); Kandel, *supra* note 121, at 143 (discussing NASD discovery guidelines which include "lists of information requests presumptively appropriate for specific underlying disputes")

[129] Kent B. Scott, *Arbitration Advocacy: Preparing the Case*, Utah Bar J. June/July 2002 at 8, 9 (describing arbitration where handling and exchange of exhibits is discussed at a (usually telephonic) preliminary scheduling conference.); Gorsky, *supra* note 118, at 51 (suggesting that "[i]n addition to obtaining agreement on as many facts as possible, it is also a good idea to obtain prior agreement with respect to documents so that the smooth presentation of a case is not impeded unnecessarily."); Crowley, *supra* note 107, at 8 ("Before the hearing, we'll want to arrive at a joint set of exhibits with the opposition, and also submit any independent exhibits on our own behalf that our opponents couldn't agree upon.").

[130] Thomson, *supra* note 84, at 79 (advising that arbitrators in international commercial disputes should hold a preliminary conference where the parties reach agreement about the issues in dispute).

[131] Crowley, *supra* note 107, at 8 ("the arbitrator may, at the beginning of the hearing, ask for statements clarifying the issues involved.") (quoting Rule 29 of the AAA Commercial Arbitration Rules)

[132] Nolan-Haley, *supra* note 10, at 178 (stating that the arbitration hearing is similar in many respects to a trial and that both parties make opening statements).

[133] Borell, *supra* note 122, at 31 & n.19 (discussing article that states an opening statement in a labor arbitration should explain the theory of the case, "identify the witnesses who will testify . . . and give a brief summary of what they will testify to.") (citing James R. McDonnell, *From Ignorance to Enlightenment: How to Educate the Arbitrator*, Common Ground (Spring 2000)).

defendant elects to reserve opening statement until immediately before presenting the defense witnesses.[134]

After opening statements, the advocate for the claimant[135] takes the first witness on direct examination.[136] As at a trial, direct examination is generally expected to be a series of open and closed questions that provide the witness the opportunity to tell the story. Because of the relative informality of the proceeding, however, more leading questions may be permitted on direct examination than would be allowed at trial.[137] Moreover, an advocate will sometimes call an adverse witness on direct examination and use leading questions with the witness.[138]

After direct examination, the defendant's advocate then cross-examines the witness, and the claimant's advocate engages in re-direct examination until questioning is exhausted.[139] Often there are no questions on cross-examination, or the cross-examination is very brief, due to the relative lack of discovery.[140] The claimant's advocate continues to directly examine witnesses and the defendant's advocate to cross-examine until the claimant's case concludes. Then the advocate for the defense presents witnesses on direct, and the claimant's advocate cross-examines.[141]

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[134] Ray, *supra* note 78, at 22 (stating that in labor arbitration "it is common for some advocates to reserve their opening statement until the side with the burden of proof has presented its entire case . . .")

[135] This paper will use the terms "claimant" and "defendant" to designate the parties. In some instances, however, the "defendant," and not the "claimant," presents the case first. In this instance, the ideas applying to "defendants" would apply equally to "claimants," and vice versa. For instance, in a union discharge case, the employer "defendant" bears the burden of proof and presents the case first. St. Antoine, *supra* note 118, at 20 (discussing how in certain labor cases, it may be more efficient for the employer to proceed first).

[136] Thomson, *supra* note 84, at 80 (stating that in international commercial arbitration "the claimant's case usually proceeds first followed by the defense and counterclaim if any"); Kent B. Scott, *Arbitration Advocacy Part Two: The Arbitration Hearing*, Utah B.J. Nov. 2002, at 20, 21 ("The party bringing the claim will lead off and continue its presentation of the evidence until all of its witnesses have been examined.")

[137] Gorsky, *supra* note 118, at 54 (discussing arbitrators relaxing the rules against leading a witness).

[138] Alleyne, *supra* note 3, at 104 (discussing limited practice of calling an adverse witness in labor arbitration).

[139] *Id.* at 100 (stating that labor arbitration ordinarily includes "cross-examination and rebuttal of evidentiary contentions by both parties).

[140] *See* Ray, *supra* note 78, at 23 ("[S]ometimes the best cross-examination is no cross-examination at all.").

[141] *See* Thomson, *supra* note 84, at 80.

Sometimes the arbitrator will intervene with questions for the witnesses.[142]

The advocates then either present an oral closing argument, similar to that made at trial, or request the opportunity to submit post-hearing briefs instead.[143] If post-hearing briefs are submitted, they are often submitted simultaneously so that a decision is as expeditious as possible.[144] The post-hearing briefs cite to relevant authority and present the parties' affirmative arguments and rebuttal to the other side's arguments.[145]

IV. BEST PRACTICES SUGGESTED BY LITIGATION PRINCIPLES

The prototypical arbitration raises many questions as to what best practices in arbitration should be.[146] Scholarship on, teaching of, and experience with litigation and trials do not always provide an explicit answer to these questions because of the differences between the prototypical format of an arbitration and the more extensive procedure of litigation and trial. But, by exploring litigation principles and explicitly considering the differences and similarities between arbitration and litigation, best practices for arbitration are suggested.

This section explores questions about best practices in arbitration that arise in two different but related contexts.

One set of questions is those that might be considered by rule-makers, those persons such as advocates, parties, and service-providers, who must

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[142] Hammond, *supra* note 10, at 131 (discussing how active arbitrator may develop testimony without advocate's participation).

[143] Nolan-Haley, *supra* note 10, at 178 (stating that the arbitration hearing is similar in many respects to a trial and that both parties make closing arguments and may be required to submit briefs in support of their positions).

[144] Scott, *supra* note 136, at 21 (stating that "arbitrators prefer post hearing briefs be submitted and exchanged simultaneously . . .").

[145] Ray, *supra* note 78, at 24 (stating that brief should apply contract language and applicable rules to the facts, should cite relevant decisions, and should distinguish the theories relied on by the opposition)

[146] This paper does not purport to raise every question bearing on best practices raised by arbitration. Rather it focuses on several common questions that litigation principles are helpful in resolving. There may, of course, be other questions that litigation principles will also be helpful in resolving. *See supra* note 127. If preferred, best practices can generally be thought of as default practices. Advocates retain the freedom to represent the client in a manner different than that suggested. Moreover, because parties contract to the practices to be used, they can always agree to a different practice than that adopted by an arbitration service or industry association. (In the mandatory arbitration context, the governing entity might consider following the suggestions as the default practice.)

draft the rules governing an arbitration hearing. These questions are covered in sections A through F, which address whether to require opening statements, whether advocates should be permitted to read from documents, whether advocates should be permitted to call adverse witnesses on direct examination, whether advocates should be permitted to ask leading questions on direct examination, whether closing argument should be written or oral, and whether to submit live or paper testimony.

The second set of questions is those that might be considered by advocates who are preparing for and presenting at the arbitration hearing. These questions are covered in sections G through M, which address how extensively and in what manner to prepare, what demeanor is most appropriate, whether advocates should stipulate to the issue statement, how to account for possible no-show witnesses in opening statement, whether to argue in opening statement, whether to cross-examine witnesses and, if so, which questions are appropriate, and how to effectively respond to the opposing party's contentions in the post-hearing brief.

Each section includes: (1) a description of why the question arises in the arbitration context, (2) the relevant litigation principles, and (3) the recommended best practices. Sections A through G are arranged in the order in which the questions might arise for the rule-maker. Likewise, sections H through N are arranged in the order in which the questions might arise for the advocate.

A. Opening Statements

1. The Question: Should the parties be required to give opening statements or be permitted to reserve them?

Some defending advocates reserve presentation of opening statement until just before the presentation of their case.[147] They do this to avoid alerting the opposing party (who has only had limited discovery) to their case. They also hope to benefit from hearing the opposing case before making the ultimate decision as to how to frame their case.

[147] Ray, *supra* note 78, at 22. It was standard practice among the labor attorneys with whom I discussed this issue as a new attorney to recommend that I waive oral argument until the presentation of my case in chief. For several years, I did exactly that until I had the opportunity to hear from three arbitrators at a conference that they strongly preferred and recommended that all parties give opening statement at the start of the hearing.

Interestingly, however, some arbitrators strongly prefer that defending advocates present an opening statement at the start of the hearing.[148] They say that without the defense opening statement, they have little basis upon which to question the claimant's theory of the case.[149]

2. The Relevant Litigation Principles

Three basic litigation principles strongly suggest that rules should require advocates to give opening statements in order to ensure an effective arbitration.

First, advocacy, whether oral or written, is most helpful to a decision-maker when it presents key information up-front. Litigation principles emphasize that whether listening or reading, people remember well the information presented first.[150] This principle is based on empirical research[151] and established rhetorical advice.[152]

A subsidiary of this principle is that the opening statement at trial is critically important because it is the first information about the case that the

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[148] St. Antoine, *supra* note 118, at 21 (recommending that both parties present opening statements prior to the evidence because the arbitrator can better understand the evidence and rule on any objections); Borell, *supra* note 122, 31 & n.19 (discussing article written by labor arbitrator that "recommended that this statement never be waived") (citing James R. McDonnell, *From Ignorance to Enlightenment: How to Educate the Arbitrator*, Common Ground (Spring 2000)); Ray, *supra* note 78, at 22 ("It is better to make an opening statement that forewarns the arbitrator that the other party's witnesses and evidence will not decide the case, and put in the arbitrator's mind an alternative way to look at the facts.")

[149] *Id.*

[150] Linda H. Edwards, LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION 151 (4th ed. 2006) ("A [law-trained] reader's attention is not evenly distributed. It is greatest in the first several pages, and it decreases rapidly from then on.") ("While readers spend more attention on the document's first few pages and on a compelling Conclusion, attention levels revive a bit at internal beginnings and endings, like the start of a new issue or the last few paragraphs of a statement of facts.")

[151] This psychological effect is known as the primacy effect and goes hand-in-hand with the recency effect, such that listeners remember what they hear first and last. Jansen Voss, Student Article, *The Science of Persuasion: An Exploration of Advocacy and the Science Behind the Art of Persuasion in the Courtroom*, 29 Law & Psychol. Rev. 301, 311 ("The law of primacy in persuasion . . . holds that people are influenced most by the information received first.")

[152] Michael H. Frost, *With Amici Like These: Cicero, Quintilian and the Importance of Stylistic Demeanor*, JALWD Fall 2006 at 5, 6 (Cicero "knew the value of strong opening arguments and wrote copiously on the subject.") (stating that "most rhetorically powerful location in the brief [is] its opening pages.")

jury receives.[153] In most civil trials, defense attorneys almost always give opening statements immediately after the plaintiff's opening statement, rather than just before the defense case-in-chief.[154] "Doing so enables defense counsel to offer a factfinder a competing view of the case, before the factfinder can become mentally locked into the plaintiff's version of events."[155]

Second, an effective procedure ensures that the decision-maker does not learn of important information relevant to the argument at a point later than when the argument was first made. For example, when a reader learns of new information related to an argument previously made, the reader is surprised and the reader's schema for processing prior information is disrupted.[156] Moreover, important new information relied upon by the opposing party not only disrupts the reader's schema but causes the reader to doubt the original writer's credibility and arguments.[157] For instance, to write an effective statement of facts for a brief, the writer should include all the facts that will later be discussed in the discussion section.[158] This avoids surprise to the reader. Another example is that to write a thorough persuasive opening brief, the writer should anticipate the likely opposing counterarguments and address them in the affirmative argument or rebuttal after the presentation of the affirmative argument.[159] This avoids later surprise to the reader and provides an opportunity to integrate potentially

[153] *See* Moore, *supra* note 42, at 95 & n.2 (explaining that "[i]ntroduction can help mold a factfinder's final assessment about what evidence is most important" and discussing how facfinders begin to develop hypotheses about what really happened early in the trial) (citing Moore, *Trial By Schema: Cognitive Filters in the Courtroom*, 37 UCLA Law Rev. 273 (1989)).

[154] *Id.* at 108.

[155] *Id.*

[156] *Cf.* Moore, *supra* note 42, at 109 (discussing how, given the broad scope of discovery for trials, leaving out significant evidence from an opening statement "may serve only to sandbag a factfinder").

[157] *Id.* (discussing how generally an opening statement should not "volunteer weaknesses" but if the advocate "conceal[s] unfavorable information that seriously calls into question your client's version of events and your adversary elicits that information at trial, a factfinder may conclude that your opening statement was misleading and thus that you and your client lack credibility.").

[158] Richard K. Neumann, Jr., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE 369 (5th ed. 2005) ("You must recite in the Statement all facts that you mention elsewhere in your motion memorandum or appellate brief. . . . The judge is entitled to a place in the document where all the legally significant facts can be seen together.").

[159] Edwards, *supra* note 150, at 303 (discussing addressing counterargument in an opening brief when the writer is relatively sure that the argument will be raised and it can be weakened by preemptive discussion, which is more often than not).

adverse information into a supportable theory of the case.

Third, and closely related, is the principle that effective advocacy focuses on the affirmative arguments of the party, rather than on rebuttal to the opponent's argument.[160] For instance, when writing a persuasive brief, the affirmative argument of the party should be presented in full before turning to any rebuttal.[161] This provides the reader the key information up-front[162] and aids the decision-maker in recognizing the strength of the party's argument. On the other hand, if strong support for the affirmative argument is saved for the end of the section and rebuttal, the reader will not have received all of the most pertinent facts and arguments up-front.[163] There will always be arguments on the other side,[164] and sometimes there may not even be a strong response to an argument. Nevertheless, if a lawyer is pursuing a case, the lawyer should have some theory upon which it is grounded, and the case should have some foundation in fact. That theory and those facts, and not rebuttal, must be the focus of the argument. Otherwise the lawyer appears defensive, and the decision-maker may be misled into thinking the lawyer has no strong arguments.[165]

3. The Best Practice:The parties should be required to give opening statements and should not be permitted to reserve them.

On the whole, these principles strongly suggest that an effective arbitration which efficiently presents the positions of each party to the

[160] *Id.* (discussing how "an affirmative stance" is "a primary advantage of the opening brief" and placing affirmative argument before counterargument and discussing affirmative argument in more detail and at greater length avoids a defensive looking document).

[161] *Id.* ("Avoid placing an identified counterargument ahead of your own affirmative argument. Rather, place it after you have made all of your *own* points; otherwise, your brief will take on a defensive tone and will lose much of its rhetorical power.").

[162] *See supra* text accompanying note 150.

[163] *See* John C. Dernbach et al., A PRACTICAL GUIDE TO LEGAL WRITING & LEGAL METHOD, 247 (3d ed. 2007) (discussing the importance of placing arguments in "descending order of strength").

[164] Saunders, *supra* note 31, at 567. ("[I]t is always possible to argue for or against a particular claim. Arguments that support one claim never entirely exclude those supporting the opposing claim.").

[165] Edwards, *supra* note 150, at 303.

arbitrator should begin with opening statements. The opening statement is generally the first, or one of the first, statements of information about the case the arbitrator hears. When an advocate waives opening statements, the advocate misses a chance to provide key information at a time the arbitrator is very likely to hear and remember it. On the other hand, providing an opening statement is helpful to the arbitrator precisely because it provides the key information up-front.

Forgoing opening statements also ensures that the arbitrator will learn important information about the advocate's case from the opposing party. This likely causes a less fair proceeding because the arbitrator has been informed of the strength of one side's case but not the strength of the others'. Further, providing an opening statement well serves the goal of focusing on a party's affirmative arguments and aiding the arbitrator to understand the strength of those arguments.

On the other hand, litigation principles do suggest an advocate obtains some advantage by waiting to present an opening statement. The advocate could present new information and thereby surprise the arbitrator, disrupt the arbitrator's schema for understanding the case in the light presented by the other side, and potentially even undermine the other side's credibility.

However, the significant detractions of waiving opening argument outweigh any such type of advantage by surprise. The arbitrator will have failed to learn important information at the start of the proceeding. Additionally, the arbitrator will have already heard, and possibly become invested in the strength of, the opposing arguments.

Additionally, the principle that effective advocacy focuses on affirmative arguments indicates that waiting to provide an opening statement until after the presentation of the other's side case is not likely to be as helpful to the arbitrator. Hearing the affirmative position of the party at the start of the proceeding will mean the arbitrator is best able to remember and rely on the information. It will also mean that the arbitrator is more likely to understand the strength of the position than if the arbitrator first learns of the position in response to the other side's case.[166]

[166] Even if the arbitration will be multi-day with gap days between hearing days, waiving the opening statement in order to prevent the other advocate from having more time to prepare a response is not likely to be the fairest process or the process most helpful to the arbitrator. Perhaps the parties could agree to present the two most important witnesses for each side on the first day, letting each have additional time to address the less important witnesses on the successive arbitration days. Additionally, even when required to give an opening statement, the advocate can still choose to leave out one of the several arguments the advocate intends to make in

B. Publishing[167] Documents

1. The Question: Should parties be permitted to have witnesses read from, or otherwise publish, admitted documents?

Many advocates wish to have witnesses read from the documents, or to publish important segments of documents in some manner. The advocates wish to call relevant items to the arbitrator's attention or to set the context for testimony a witness will present.[168] Arbitrators are sometimes somewhat impatient with the advocates who attempt to publish documents. They will not permit reading from the documents on the grounds that the arbitrator can easily read the document later for himself or herself.[169]

2. The Relevant Litigation Principles

A fair proceeding should include a decision based on relevant documents, as well as other relevant evidence. Solid preparation by a lawyer includes discovering relevant documents.[170] Presenting documentary evidence, in addition to oral testimony, can aid the decision-maker in reaching a decision.[171] Moreover, overlooking documents can mean overlooking important support for the client's case or an important argument that the adversary will make.[172]

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order to prevent the other party from learning of that argument. This will, at least, reduce the level of surprise to the arbitrator in learning of only one argument, rather than an entire different theory of the case, supporting facts, and other arguments after the close of the first party's case in chief.

[167] "Publishing" is the "formal, little-used name" for communicating the "contents of an exhibit to the jurors as soon as it's been admitted in evidence." Moore, *supra* note 42, at 278.

[168] *Cf.* Scott, *supra* note 136, at 21 ("There is nothing like a good witness to bring the contents of a document to life in the mind of an arbitrator."); Daly, *supra* note 99, at 53 (advocating use of visuals to demonstrate critical exhibits for the arbitrator).

[169] I have been admonished not to waste time having a witness read from a document when my intent was otherwise. (I was instead referring the document to the witness for some other purpose, such as testifying to discussions about the effective dates of the document.)

[170] *Cf.* Ryan Reetz, *Documentary Evidence*, Florida Civil Trial Practice, Chapter 13, §13.2 (2006) ("Effective and wise use of the documentary evidence can be an important part of the trial lawyer's tactics and may often mean the difference between success and failure in the courtroom.")

[171] Moore, *supra* note 42, at 272 (discussing how documents can make oral testimony "more memorable and easier to understand" and how exhibits may trigger a factfinders "recollection of oral evidence that may otherwise have been forgotten.").

[172] Jeffrey C. Melick, *Preparing and Trying a Civil Case*, Massachusetts Basic Practice

A document helps the jury decide the case only if the jury is aware of the contents of the document.[173] Thus, one of the basic precepts of good trial advocacy is that important segments of documents should be published to the jury.[174] Without publication (or presentation during closing argument), there is no assurance the jury will read the document or recognize relevant portions of the document.[175] Moreover, the rest of the evidence may not make sense to the listener who is unfamiliar with key portions of the relevant documents.[176]

3. The Best Practice: Witnesses should be permitted to read from documents.

These principles suggest that in order to ensure a fair proceeding, advocates or their witnesses should be able to read to the arbitrator from documents, or otherwise publish the documents. First, reading from the document ensures that the arbitrator hears the content of the document and does not later overlook it in the shuffle of paperwork when reaching a decision. Second, reading from the document provides an advocate the opportunity to point out and focus on relevant portions of the document, thereby highlighting the strength of the client's case. Finally, the rest of the evidence relating to the point the document supports will likely make more sense for the arbitrator if the arbitrator has heard the relevant portions of the document.[177]

Manual Vol. III, Chapter 15, § 15.3.8(c)(discussing how trial lawyer must prepare by identifying important documentary evidence including not only helpful evidence but also documents that are not helpful and will need to be dealt with at trial).

[173] *Cf.* John J. Egan, Charles F. Barrett, and E. Macey Russell, Massachusetts Superior Court Civil Practice Manual, Chapter 12, §12.8.1 (2002) ("The jury will not review 100 pages of documents to reach its conclusion. Counsel must direct the jury to the key documents introduced into evidence and marked as exhibits.").

[174] Moore, *supra* note 42, at 278 (discussing how sometimes the contents of an exhibit are obvious from a witness' testimony, but often "an exhibit has a power to convey information that oral testimony cannot match." For instance, a picture cannot be described, and an advocate may want the juror to hear the contents of an important document before the closing argument).

[175] *Cf.* Reetz *supra* note 170 (discussing how documentary evidence should be used to "reinforce and highlight facts that are significant and helpful").

[176] *Cf.* Stephen A. Saltzburg, *Trial Tactics, Offers of Proof: The Basic Requirement*, Crim. Just. Fall 2002 at 50, 53 (discussing how judges rely "on the lawyers to tell them why the documents matter" when a document is challenged).

[177] One litigation principle that supports this idea is that the more facts that support a conclusion, the more likely the decision-maker will be to adopt that conclusion. *See infra* text

Of course, some might argue that an arbitrator, who is trained and experienced at decision making, unlike a jury, is not likely to overlook a key document, rendering publication less critical. But, even if an arbitrator is well-organized and unlikely to decide the case without reading all of the admitted documents, the appearance of fairness is created by ensuring that the parties know the arbitrator has heard the document.

Moreover, publication allows the arbitrator to learn from the advocate which portions of the document are believed critical and aids the arbitrator to understand the other evidence presented in light of the document. These advantages outweigh any time-saving the arbitrator gains by reading the documents later. If time constraints are a serious issue, then, at a minimum, the advocates should be permitted to request the arbitrator to take a moment to read to himself or herself the document, with relevant provisions highlighted.[178]

C. The Adverse Witness on Direct Examination

1. The Question: Should the parties be permitted to call an adverse witness on direct examination?

Some advocates call an adverse witness because they genuinely need the witness's testimony to prove the affirmative case, while others call an adverse witness as a strategy to surprise the other side.[179] This has led some to argue that arbitrators should forbid the calling of adverse witnesses.[180] Others believe that rules providing for fairness and efficiency should permit calling adverse witnesses.[181]

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accompanying note 257.

[178] Matthew M. Franckiewicz, *An Arbitrator's View of Writing Briefs*, Disp. Resol. J. Feb. 1999 at 59, 61 (suggesting that advocates highlight exhibits used at the hearing).

[179] Alleyne, *supra* note 3, at 104 (suggesting that when employer calls grievant in discipline case, the employer advocate has "possible advantages of surprise and opportunity to cross-examine without waiting for the union to conduct a direct examination").

[180] *Id.* at 104-05 (discussing arguments that it is unfair to permit calling the adverse grievant witness and that it involves self-incrimination).

[181] *Id.* at 104-05 (taking position that governing rules should permit calling adverse witnesses because such a rule eliminates time needlessly spent on objections to calling adverse witnesses and is perfectly fair)

2. The Relevant Litigation Principles

As discussed extensively in Section A,[182] focusing on a party's affirmative argument helps the decision-maker understand the strength of the argument. Additionally, a decision-maker who learns the information that bears on the argument up-front will not be surprised by later learning new facts. Moreover, presenting the relevant facts up-front avoids the other side representing a fact as more problematic than it is for the advocate's case. For example, when writing a persuasive brief, attorneys typically include facts that they anticipate opposing counsel will rely on and cast those facts in the light most favorable to their client. This familiarizes the judge with the facts, and the judge is not surprised to learn of the facts when they are, indeed, later relied upon by opposing counsel.[183]

3. The Best Practice: The parties should be permitted to call an adverse witness on direct examination when the witness will testify to information not available from other sources.

The litigation principles suggest that, at times, it will be helpful to the arbitrator to hear from an adverse witness as part of the party's case in chief. When an adverse witness has information that supports an advocate's case and that is not available from another source, it will be helpful for the arbitrator to hear the adverse witness's testimony. This permits the advocate to make a complete affirmative case and avoids surprise to the arbitrator when later learning of the information during the other party's case in chief.

Rules that permit calling an adverse witness only when the information is not available from other sources should decrease instances where advocates call an adverse witness solely to surprise the opposing party. The rules of the arbitration might require that any adverse witness be called after the rest of the case has been presented[184] and subsequent to a brief proffer

[182] *See supra* text accompanying notes 150-165.

[183] See Helene S. Shapo et al., WRITING & ANALYSIS IN THE LAW 373 (4th ed. 1999) (discussing how lawyer should include unfavorable, as well as favorable, facts in the statement of the case "so that the court need not rely on the opposing brief to understand the dispute").

[184] While this might mean the advocate cannot present the witnesses in the most helpful order, it will at least insure that the advocate does present all the relevant information supporting the affirmative case to the arbitrator without opening the door to abuse of calling a hostile witness for non-evidentiary purposes.

by the advocate of the subject of the testimony.[185] This would ensure the information was not otherwise available. Of course, calling an adverse witness for purposes of unnerving the opposing advocate will not be completely eliminated through this safeguard. It will, however, be substantially eliminated, and the goal of presenting the arbitrator with all the information supporting the affirmative case up-front and at the same time will be met.

D. Leading Questions on Direct Examination

1. The Question: Should parties be permitted to use leading questions with friendly witnesses on direct examination?

Some take the position that because arbitration is informal, leading questions should be permitted on direct examination of friendly witnesses. They believe that objections to such leading questions unduly delay arbitration and that if an advocate uses poor technique, it simply reflects poorly on the advocate's case.[186] Others take the position that advocates should not ask leading questions on direct examination.[187]

2. The Relevant Litigation Principles

The purpose of a trial is to aid the decision-maker to understand and make conclusions about the relevant facts.[188] Indeed, without knowledge of

[185] While this might cause a slight delay, in most non-complex cases, it should not take very long to make such a proffer.

[186] Alleyne, *supra* note 3, at 99 (arguing arbitration rules should eliminate objections to leading questions on cross-examination in the interest of time-savings because adverse impact of leading questions is apparent to arbitrator and can be dealt with on cross-examination or in closing argument); *cf.* Gorsky, *supra* note 118, at 54 (discussing arbitrators relaxing the rules against leading a witness.).

[187] Ray, *supra* note 78, at 23 ("At the least, it is a mistake, and at worst a fatal error to attempt to establish important facts through leading questions. In order to make the most of the opportunity to persuade the arbitrator, the advocate should let the witness testify to the key facts in the case."); Gorsky, *supra* note 118, at 54 (stating that rule against leading "is a common sense one" and "[i]n applying common sense, an arbitrator is not making the hearing unnecessarily technical.").

[188] Moore, *supra* note 42, at 113-14 (discussing how "factfinders have relatively short attention spans" and "responses to open questions maintain their interest . . .") (citing S. Hamlin, WHAT MAKES JURIES LISTEN 212-13 (1985); Robert F. Hanley, *Brush Up Your Aristotle*, Litig. Winter 1986 at 39, 40 ("A successful advocate must also be able to tell and act out a story, to

the relevant facts, the decision-maker can make only an ill-informed decision. To aid the decision-maker in learning the facts, the opening statement and direct examination should focus on the facts that support the case rather than the arguments that flow from those facts.[189] Like the opening statement, direct examination should focus on narrative and telling the story in the witness's own words.[190] To this end, open questions that permit the witness to respond in the witness's own manner and words should generally be used.[191] Sign-posts[192] and closed questions can be used to set the scene, to elicit important information unintentionally omitted by the witness, to emphasize important evidence, and to insure that the story unfolds like a movie with a cohesive set of scenes.[193]

When instead of using open and closed questions, a lawyer uses leading questions, the lawyer does not permit the witness to tell a story or focus on the facts. Moreover, the lawyer raises credibility issues because the lawyer appears to be substituting the lawyer's own story for that of the witness. The jury may think the lawyer is trying to hide the true story from them.[194]

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organize its pieces so his listeners can put it together for themselves. In life, people make decisions first and then find the arguments to rationalize them, though rarely is this sequence consciously appreciated.").

[189] *See* Moore, *supra* note 42, at 111 (discussing how using a chronology for testimony on direct examination "responds to the way that judges and jurors usually approach decision-making, which is to develop a story about what they believe really happened.") (citing W. Bennett & M. Feldman, Reconstructing Reality in the Courtroom (1981). This is not to suggest, of course, that the facts should not be chosen with the arguments in mind. Of course, the facts focused upon should be those that support the story and argument the advocate desires the judge or jury to decide upon. *Id.* at 112.

[190] Moore, *supra* note 42, at 95 & n.2 ("Judges and jurors typically approach decision-making . . . [by making] sense of the testimony by developing a story about what they believe really happened.") (citing Bennett & Feldman, Reconstructing Reality in the Courtroom (1981); Holstein, *Jurors' Interpretations and Jury Decision Making*, 9 Law & Hum. Behav. 83 (1985); Pennington & Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. Personality & Soc. Psychology 242 (1986); Pennington & Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 Cardozo Law Rev. 519 (1991)).

[191] Moore, *supra* note 42, at 113 (discussing how "the primary advantage of open questions is that they encourage witnesses to relate events in their own words").

[192] A sign-post is simply when the advocate indicates with a short phrase that the advocate is turning to a different line of questioning.

[193] *Id.* at 114 (discussing use of closed questions to elicit neglected evidence and provide additional emphasis); *Id.* at 125 (discussing importance of setting the scene and referring to example direct examination that uses closed questions); *Id.* at 144 (discussing using closed questions to "steer around" marginally relevant information)

[194] *Id.* at 113 ([U]sing open questions] tends to enhance a witness' credibility, because they

And, as discussed more extensively below in Section H, the classic rhetoricians emphasized how important credibility is to successful presentation of a case.

3. The Best Practice: The parties should not be permitted to use leading questions on direct examination.[195]

The litigation principles suggest that an effective arbitration procedure should not permit leading questions on direct examination. An effective procedure encourages the witnesses to use narrative to aid the arbitrator to understand the facts. Leading questions instead substitute the advocate's argument for the story of the witness and may sometimes even prevent the arbitrator from hearing relevant and helpful information.

Prohibiting leading questions need not unduly delay the procedure. Because the arbitration process is informal, the arbitrator can simply note to the advocate that leading is occurring and request the advocate to use more open questions.

Of course, if the advocate continues to lead, the arbitrator may need to take additional measures, whether in response to the opposition's objections or not. The arbitrator might simply point out that the testimony will be given less weight than had it been provided in narrative form. This will avoid the time-delay of repeatedly striking the evidence from the transcript, if there is one, or having the counsel rephrase each question.

E. Written or Oral Closing Argument

1. Should closing argument be made orally or should written briefs be permitted?

Arbitration rules often permit the parties to choose whether to make an oral closing argument or to submit briefs in lieu of argument.[196] Some

foster the idea that the testimony is coming from the witness and not the lawyer) (citing W. O'Barr, Linguistic Evidence: Language, Power, and Strategy in the Courtroom 76-83 (1982))

[195] This discussion is intended to address questions directed at the substance of the testimony. As at trial, leading questions are an acceptable short-cut for establishing background information not in dispute, such as dates of occurrences that are not in dispute, titles, or job descriptions.

[196] *Cf.* Hammond, *supra* note 10, at 120 (listing issue of whether parties should "end the case with closing arguments, closing briefs, or both" as one to be addressed when drafting an arbitration clause).

propose that in the interest of saving time, written briefs should not generally be permitted.[197] At least some arbitrators, however, prefer to receive post-hearing briefs and then hear closing arguments to enable them to ask questions raised by the briefs.[198]

Many advocates submit a post-hearing brief because they want the opportunity to cite to relevant law that would not have been presented during the case or to summarize their arguments in writing in a way more coherent than the hearing provided for.[199] Many others do not want the extra burden, time, and expense of briefing the issue(s) and so rely on an oral closing argument.[200]

One alternate method which is used by some advocates is to have an oral argument given only to the transcriptionist, without the arbitrator or opposing advocate present, at the conclusion of the arbitration. This permits immediate and simultaneous submission of the argument in written form without one party first hearing the others' argument.[201] A similar alternative would be to simply bring a written version of the intended closing argument to arbitration. The advocates would take a brief interlude to work at their computers and modify their arguments in accordance with the evidence presented and then would submit them in writing.

Another alternative would be to submit a written pre-hearing, rather

[197] Zirkel, *supra* note 26, at 262-63 (finding "statistically significant upward trend line for filing of post-hearing briefs" in grievance arbitrations and quoting former National Academy of Arbitrators president William Murphy stating "the process would be greatly improved if the filing of briefs were confined to a few cases of exceptional complexity") (citing William P. Murphy, *The Ten Commandments for Advocates How Advocates can improve the Labor Arbitration Process*, in Arbitration 1992: Improving Arbitration Advocacy Skills Proceedings of the Forty-Fifth Meeting of the National Academy of Arbitrators 253, 261 (Gladys W. Gruenberg ed., 1993)); Franckiewicz, *supra* note 178, at 61 (recommending that parties in labor arbitration adopt rules that provide "post-hearing briefs will not be permitted except in cases where the arbitrator determines that such briefs are necessary").

[198] Judith B. Ittig & Michael J. Baynard, *Thirty Steps to A Better Arbitration*, Disp. Resol. J. Aug./Oct. 2004 41, 83 (2004).

[199] *See* Kandel, *supra* note 121, at 149 ("The parties may also want to submit post-hearing briefs, particularly advisable after a multi-day hearing or where a party has chosen not to submit a pre-hearing brief.").

[200] Daly, *supra* note 99, at 56 ("The parties may prefer an oral closing argument because of the time and cost involved in preparing a post-hearing brief; plus the postponement of the decision as a result of the extra time required to prepare a brief.").

[201] This method was mentioned at one of the conferences I attended of labor lawyers discussing arbitration. Unfortunately, I am unable to attribute the mention of the method to a particular attorney.

than post-hearing brief, and then provide an oral closing argument.[202]

2. The Relevant Litigation Principles

Jurors have most often made up their minds as to the outcome of the case before closing arguments are delivered.[203] Thus, empirical research shows that opening statements, direct testimony, and cross-examination more highly influence the juror's decisions than does closing argument. Indeed, many judges take the position that closing argument is "relatively unimportant."[204]

Closing argument is, however, the only opportunity the advocate has to present the case in a cohesive and non-narrative form.[205] Cross-examination is not a full argument of the case, while opening statement and direct examination are more predominately narrative than argument.[206] Thus, closing argument represents the decision-maker's only opportunity to understand the theory of the case and the arguments a party is making as a whole.

Moreover, written communication and oral communication have different advantages and disadvantages. Oral communication provides mutual context that is lacking in a written communication unless explicitly included in the writing.[207] For instance, as explained by Ed Finegan, Professor of Linguistics and Law, if a group is sitting around a table eating and a person says, "Is there salt on the table?" the person expects someone to pass the salt. If on the other hand the same person asks someone helping

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[202] *See* Kandel, *supra* note 121, at 149 (suggesting parties may want to submit post-hearing briefs when they have not submitted pre-hearing briefs)

[203] Moore, *supra* note 42, at 214 ("empirical evidence [suggests] that jurors do not change their tentative verdict preferences at the close of the evidence as a result of closing arguments.") (citing V. Hans & K.Swigert, *Jurors' Views of Civil Lawyers: Implications for Courtroom Communication*, 68 Ind. L.J. 1297, 1314-15) (1993).

[204] Moore, *supra* note 42, at 214 (discussing frequent response from judge to objection to an adversary's closing argument that "it's only argument.").

[205] *Id.* at 217 (discussing how closing argument is typically the advocate's only opportunity to make explicit arguments)

[206] *See supra* text accompanying note 190.

[207] Edwards, *supra* note 150, at 149-50 (discussing how we pick up information about a conversational partner "without conscious thought"); *See* Adam Kramer, *Common Sense Principles of Contract Interpretation (And How We've Been Using Them All Along*), 23 Oxford J. Legal Stud. 173, 179 (discussing how written contracts provide "less mutual context concerning the location and immediate circumstances of the communication than there would be in the case of an oral communication").

to set up a table for a dinner party, "Is there salt on the table?" the person likely expects a yes or no answer.[208] Thus, it is more difficult to convey the writer's intended meaning in writing.[209]

Additionally, oral communication permits the lawyer to respond to the decision-maker's immediate questions or concerns.[210] And a lawyer can more easily communicate emotion verbally than through writing.[211]

On the other hand, a writing is memorialized for the reader to reference as many times as necessary.[212] This aids the reader in understanding the writer's intended meaning.[213] An oral statement is typically made only once, or at most a few times. The listener must rely on memory, with or without aid of the listener's own notes, to represent the speaker's intent.[214]

Additionally, the process of legal writing can further the lawyer's creative and critical thinking.[215] A lawyer can reconsider the arguments at a later time, adding in new thoughts, and editing from a more critical perspective.[216] Writing, thus, "can be more complex than natural speech."[217]

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[208] Professor Finegan teaches at the University of Southern California.

[209] Susan L. DeJarnatt, *Law Talk: Speaking, Writing, and Entering the Discourse of Law*, 40 Duq. L. Rev. 489, 496 (2002) ("Except for a small corps of highly trained writers, most persons could get into written form few if any of the complicated and nuanced meanings they regularly convey orally.")

[210] Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 Iowa L. Rev. 1159, 1190 (2004); *see* Andrea M. Braeutigam, *What I Hear You Writing Is . . . Issues in ODR: Building Trust and Rapport in the Text-Based Environment*, 38 U. Tol. L. Rev. 101, 104-05 (2006) (discussing how the flow of "face-to-face" communication is "synchronous").

[211] Ehrenberg, *supra* note 210, at 1190; Kramer, *supra* note 207, at 179 (discussing how a contract drafter cannot make use "of body language or voice modulation"); *see* Braeutigam, *supra* note, at 105 ("Without tone of voice, it can be difficult to capture or convey the emotional content of words.")

[212] *See* Kramer, *supra* note 207, at 179 (discussing how a written contract can be "re-read and considered at leisure").

[213] Ehrenberg, *supra* note 210, at 1188 (discussing how a decision-maker can study, analyze, and criticize a writing because it is permanent in form).

[214] Philip N. Meyer, *Making the Narrative Move: Observations Based Upon Reading Gerry Spence's Closing Argument in the Estate of Karen Silkwood v. Kerr-McGee, Inc.*, 9 Clinical L. Rev. 229, 240, n.28 (2002) (discussing how a reader can review previous portions of a text but for a listener "[t]here is nothing to backloop outside of the mind").

[215] Ehrenberg, *supra* note 210, at 1186.

[216] Ehrenberg, *supra* note 210, at 1187.

[217] DeJarnatt, *supra* note 209, at 496.

3. The Best Practice: Closing argument should be made orally, and the parties should not be permitted to opt for written briefs in lieu of oral closing argument.[218]

The arbitrator will likely have reached a decision, or at least a tentative decision, before the closing argument suggesting that an oral closing argument is preferable to a written one. The litigation principle which most clearly dictates that an oral closing argument is preferable is that a juror is likely to have made a decision before the closing argument. An arbitrator is trained to be neutral and is more experienced in decision making than the typical juror. Training and experience indicate that arbitrators may form only tentative decisions until hearing the entire case. Nevertheless, arbitrators, like juries, likely have made a decision before the closing argument. Indeed, their training as decision-makers and experience with similar issues may make arbitrators even more likely than jurors to feel adept at understanding the governing rules (generally contract terms and principles of interpretation), interpreting the facts, identifying the parties' interests, and making an early decision. Because the closing argument is unlikely in most cases to have a significant effect on the ability of the arbitrator to fairly decide the case, it unnecessarily delays the proceeding to wait for post-hearing submission of briefs.

Moreover, an oral closing argument aids the arbitrator to understand the context of the argument. It also enables the advocate to share the emotional impact of the arguments with the arbitrator and to respond to the arbitrator's questions and concerns.

Of course, the closing argument is the only opportunity to make a full argument. And, in some cases, arguments may have been overlooked or underestimated by the arbitrator, causing the arbitrator to reconsider and rely on the closing argument in reaching a decision. In this event, an oral closing argument still provides the opportunity to argue. While it may not as effectively convey complex ideas as a written brief, it enables the

[218] The agreed rules might permit the arbitrator to make an exception and permit written briefs when the issues are numerous and the arguments addressing them complex such that it would be difficult to process and take notes on a oral closing argument. Even then, the option of using an oral closing argument with transcription or a pre-prepared written closing argument would be almost, if not equally, as effective as a brief written and submitted post-hearing and would likely save some time and expense. While the written brief might allow the advocate to express complex ideas more fully than an oral closing argument, the advocate would lack the opportunity to respond directly to the arbitrator's questions or concerns as might be possible with an oral argument.

advocate to address questions and concerns raised by the arbitrator. And it provides an advantage over a written brief because the context of oral communication should more readily enable the arbitrator to understand the arguments the advocate makes. While the arbitrator may not have the written brief to refer to later when finalizing or writing a decision, he or she may have a transcript and should have notes of the oral argument.

If the parties routinely arbitrate issues of such complexity that they believe it is very important for the arbitrator to have a written closing argument to which to refer, they should consider having the oral closing argument reduced to transcript or providing a pre-prepared written version of the argument.[219]

F. Live Testimony or Affidavits

1. The Question: Should witnesses' testimony be submitted in the form of declarations or affidavits rather than in live form?

In some arbitrations, parties submit the entire case, or parts of the case, in written form.[220] Some have suggested that all direct testimony should be submitted on paper with only live cross-examination.[221] Others have suggested that only key witnesses should be presented live, with others being presented in paper form.[222]

[219] *See supra* text accompanying note 201.

[220] St. Antoine, *supra* note 118, at 11 (discussing labor cases where parties submit the case on stipulations of facts and exhibits and written briefs without a hearing); Thomson, *supra* note 84, 79-80 (discussing how in international commercial arbitration some arbitrators encourage the use of witness statements, for particular witnesses, in lieu of direct examination to expedite the process); Bayard, *supra* note 128 at 43 (recommending that arbitrators "[s]uggest to the parties that they consider methods of presenting testimony that could expedite the proceedings, such as written witness statements . . ."); Kandel, *supra* note 121, at 149 (mentioning cases where parties submit "dispute solely on documentary evidence").

[221] James J. Myers, *10 Techniques for Managing Arbitration Hearings*, Disp. Resol. J. Jan./Mar. 1996 at 28, 28 ("Using affidavits for direct testimony is a new technique that is working successfully to reduce time for witness testimony in large, complex case program proceedings. . . . When the witness testifies, the affidavit constitutes the direct testimony and the witness is then available for cross-examination by counsel for the other party.").

[222] Crowley, *supra* note 107, at 8 ("Although testimony through affidavits is acceptable and cost-effective for less important witnesses, use live testimony, together with any supporting documents, for the presentation of critical evidence.").

2. The Relevant Litigation Principles

As discussed in Section E, oral communication and written communication have different advantages and disadvantages.

Live testimony also offers an opportunity for cross-examination. Cross-examination can be important for several reasons. Cross-examination provides the adversary an opportunity to emphasize certain aspects of a witness's testimony that support the strength of the advocate's case[223] and to point out significant flaws in the direct testimony of the witness.[224]

Cross-examination functions as an opportunity to argue during an otherwise predominately narrative presentation.[225] When issues are complex or multiple inferences could be made from the testimony, then cross-examination can help the decision-maker make connections and see the case in the same light as the advocate.[226]

Additionally, live testimony offers some specific advantages in cases where witness' credibility is at issue. Live testimony insures that a witness's story is heard more fully than a simple summary through stipulations or a summary declaration.[227] Live testimony also requires the witness to maintain the witness's position in the face of the opposing party.[228]

Traditionally, live testimony has also been thought to provide a better opportunity than written testimony for the decision-maker to assess credibility.[229] Social science research establishes, however, that decision-

[223] Moore, *supra* note 42, at 160 (an advocate typically focuses "cross examination on specific items of evidence" supporting the advocate's argument "and undermining the adversary's")

[224] *Id.*

[225] *See supra* text accompanying note 190.

[226] Moore, *supra* note 42, at 167 (discussing how "the story form of testimony" and other "baggage" make "it difficult for a factfinder to recognize [from direct examination] how evidence links to argument while "[o]n cross examination, by contrast, [an advocate is] freed of the baggage.").

[227] *See* Olin Guy Wellborn, *Demeanor*, 76 Cornell L. Rev. 1075, 1100 (1991) (discussing how summarization is problematic when evaluating credibility because "close examination of verbal content is useful to the one evaluating credibility")

[228] Wellborn, *supra* note 227, at 1092 (discussing how "[t]he requirement of live testimony may deter dishonest witnesses" who may "balk at lying in public, in a courtroom, in the physical presence of the opponent, the judge, and the jury.")

[229] Wright et al., 8A FED. PRAC. & PROC. CIV. 2D § 2115 (2007) ("[T]he federal courts still adhere to the view that live testimony is best, in large measure on the assumption that it can improve credibility determinations.")

makers can equally or more effectively judge credibility from written testimony than from live testimony, provided the content of written testimony is not a summary.[230]

3. The Best Practice: Generally, using written statements, that are not summary in form, and providing an opportunity for live cross-examination when a witness's credibility is at issue is equally appropriate as using live testimony only.

In cases where credibility is not in dispute, the advantages and disadvantages of live and written testimony weigh relatively equally. In that situation, parties should use whichever form of testimony better suits their needs.

In cases where credibility is in dispute, the advantages and disadvantages again weigh relatively equally. Live testimony ensures that the direct testimony is not a summary, provides an opportunity for cross-examination, and requires the witness to face the opponent. Because the arbitration hearing is less formal than a trial, the effect of requiring the witness to face the opponent in a public forum may be minimized.

On the other hand, provided the statements are not in summary form, written testimony permits the decision-maker to evaluate credibility based on the content of the witness statements. It also purportedly saves time and expense in certain cases.

A procedure which uses written statements on direct examination with an opportunity for cross-examination is, thus, a satisfactory substitute for live testimony because it preserves some of the benefits of both types of testimony. It saves time and expense for direct examination and permits the decision-maker to assess credibility based on the content of the witness statement. It also provides an opportunity, through cross-examination, for the advocate to aid the arbitrator to make connections and to understand any flaws in the direct testimony. Moreover, it requires the witness to face the opposing party. For such a procedure to work successfully, the written statements must not be in summary form or the arbitrator will not be able to successfully judge credibility from the written statements.

The disadvantage of having a written statement and oral cross-

[230] Wellborn, *supra* note 227, at 1092 ("Transcripts are probably superior to live testimony as a basis for credibility judgments because they eliminate distracting, misleading, and unreliable nonverbal data and enhance the most reliable data, verbal content.")

examination is that the cross-examination will be delayed, and the arbitrator will thereby see the written statement first, lending it more persuasive strength.[231] Because of this, some parties may prefer live testimony only.

G.Preparation

1. The Question: How extensively and in what manner should an advocate prepare for an arbitration?

Some advocates prepare for an arbitration in almost exactly the same manner they would prepare for litigation, leaving no stone unturned and taking full advantage of any limited discovery available.[232] Others believe that because an arbitration is supposed to be cheaper and more efficient than litigation, the hearing does not warrant much preparation, if any at all.[233] Others emphasize that preparation is important but must correspond to the role of arbitration as a dispute resolution procedure.[234]

2. The Relevant Litigation Principles

A basic litigation principle is that preparation is the key to presenting a successful case, whether written or oral. By not preparing, the lawyer does the client and the decision-maker a disservice. All of the relevant information bearing on the issue will not be presented, and the most favorable case that could have been made for the client likely will not be made. For instance, before writing a brief, a lawyer should research relevant law, identify the theme of the case, identify available arguments

[231] *See supra* text accompanying notes 150, 223-26 (discussions about the importance of presenting key information first and about the importance of cross-examination.).

[232] Kandel, *supra* note 121, at 149 ("Witness preparation must be undertaken as rigorously as in litigation, emphasizing testimony based on the proponent's personal observation and presented from this perspective.") ; *see* Crowley, *supra* note 107, at 8 ("Whether for trial or arbitration, there's no dodging the hard work of painstaking preparation.")

[233] Gorsky, *supra* note 118, at 54 (Discussing cases where counsel and witness appear to be meeting for the first time at arbitration.); *cf.* Borell, *supra* note 122, at 35 (informal survey of small sample of labor arbitrators in New York, New Jersey, and Pennsylvania indicated that advocates could be in need of better preparation).

[234] Ray, *supra* note 78, at 19 (discussing how labor advocates should understand the differences between arbitration and litigation and should carefully prepare and plan for the arbitration long before the hearing).

and discover all facts relevant to those arguments.[235] A lawyer preparing for an appellate oral argument is well-advised to do all the above and then practice the argument.[236] As to trial advocacy, Irving Younger gave the example of a lawyer, as typically presented on television, who goes to trial without preparing and writes his closing argument the night before he presents it. He emphatically states that this is wrong: the lawyer should be so prepared that he is able to write the closing argument before the trial has even started.[237]

Litigation methods offer some interesting techniques to aid in discovering relevant evidence, formulating the theory of the case, and preparing supporting arguments. Normally, in any legal matter, it is crucial to prepare a time-line of events.[238] One method of preparing for litigation that relies on such a time-line is historical reconstruction.[239] In historical reconstruction, the lawyer identifies the determinative event. The lawyer then asks, if the lawyer's theory of the case is correct, what would likely have happened before the determinative event, during the determinative event, and after the determinative event.[240] This method can be used to identify documents that should be searched for and questions that should be discussed with witnesses.[241] It can also be used to check whether the arguments the advocate intends to make are consistent with the facts.[242]

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[235] *See* Neumann, *supra* note 158, 302 (discussing how before writing a brief the advocate must develop a theory and arguments that support the theory).

[236] Edwards, *supra* note 150, at 355-56 (discussing content of and preparation for appellate oral argument).

[237] Irving Younger, Credibility and Cross-Examination, CLE video

[238] *See* Moore, *supra* note 42, at 9 (assuming that the advocate has prepared a chronology before constructing arguments)

[239] DAVID A. BINDER, ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 163 (2004).

[240] *Id.* at 164.

[241] *Id.* at 165.

[242] For example, if there was a termination and the company claims it was due to poor performance, the advocate will consider what might have happened before the termination. The advocate might think there would be discussions between the employee and her supervisor about her performance, records of poor performance, complaints from clients about poor performance, and mistakes made by the employee that were noticed by staff or co-workers. Another example of this method used at UCLA is from the movie *A Few Good Men*. In the movie, Tom Cruise's character is representing two men accused of killing a third man who was to be relocated from the base the day after the killing. The men claim they acted on the order of their superior. Cruise wants to argue that the dead man was not actually scheduled to be relocated the next day and that, instead, the superiors ordered the killing. Cruise performs a site visit and sees all the dead man's

Another method for discovering evidence and testing a lawyer's arguments is to think explicitly about inference chains. Doing so enables the lawyer to think about the argument to be made in an explicit manner. First, the lawyer identifies a key conclusion that the lawyer hopes to convey to the decision-maker.[243] The lawyer next identifies a key piece of circumstantial evidence that would or does (depending on whether it has already been discovered) support the conclusion.[244] Next, the lawyer identifies the inferences that lead from the evidence to the conclusion.[245] In other words, the lawyer identifies the generalizations that make the conclusion a likely one based on the evidence.[246] Identifying the inferences early in preparation helps the lawyer to assess the strength of the argument based on how believable the inferences are. It also serves as the basis for preparing clear witness examinations and arguments that explicitly state the underlying inferences rather than leaving it to chance that the decision-maker will make the same inference the advocate does.[247]

Once a lawyer has thought explicitly about the inferences underlying an argument, the lawyer can identify more supporting evidence (that exists or

clothes still hanging in the closet. He then argues that the clothes would not be hanging in the closet the evening before if the man was planning to leave the next day.

[243] Moore, *supra* note 42, at 15-16 (discussing identifying "crucial factual propositions").

[244] *Id.* at 20 (discussing choosing a single piece of evidence that supports the "crucial proposition" the advocate must prove).

[245] There are several different ways of mapping out an inference chain. These are two examples I use, based on material from UCLA's program. Example 1: Mingle's mother, Hummel, told Mingle that Hummel planned to exit the elevator at the lobby **which suggests** that Hummel did what she stated and remained on the elevator as it descended towards the lobby. Thus, Hummel was on the elevator when it crashed.

Example 2:

Fact: Hummel told Mingle that Hummel planned to exit the elevator at the lobby.

Inference 1: Hummel did what she stated and remained on the elevator as it descended towards the lobby.

Generalization 1: People normally do what they state they will do.

Conclusion: Hummel was on the elevator when it crashed.

[246] Moore, *supra* note 42, at 24 ("To strengthen embryonic arguments [one linking a piece of evidence to a proposition without explaining the basis for the connecting inference], you begin by identifying the generalizations connecting the evidence to the factual proposition.") (bracketed description added to text).

[247] For purposes of legal writing, whether a memo or brief, writers are similarly advised to make their inferences explicit. If the writer fails to make the inferences explicit, the reader may draw exactly the opposite conclusion from the fact the writer relies on. *See* Edwards, *supra* note 150, at 112-13 (discussing importance of explaining reasoning that supports writer's conclusion).

might be discovered) by identifying when the inferences are especially likely or unlikely to apply.[248] This is sometimes referred to as identifying "especially whens" and "except whens."[249] Any fact that makes the inference more likely is one that could be used to buttress the argument and make it more persuasive to the decision-maker.[250] Any fact that decreases the likelihood of the inference holding is one that if it exists might be raised by the other side.[251] By identifying these facts, the lawyer can prepare to rebut them.[252]

Another method for thinking explicitly about an argument is to frame the argument as an improbability. This method is sometimes termed, "If ___, Would Not ___ Because ____" because it identifies a fact, then a second fact in conflict with the first fact, and then the reason the second fact conflicts with the first.[253] For example, "**If** she had forgotten until today that she placed her gun in the trunk of her car at the time of purchasing the car, then she **would not** have purchased the car over a year ago **because** people generally remember where an important item is within the time period of a year." This method helps the lawyer identify weaknesses in the lawyer's argument and in the opponent's argument.[254] It is, thus, particularly helpful in developing cross-examination of the other side's witnesses and the rebuttal portion of closing argument.

3. The Best Practice: Advocates should thoroughly prepare for arbitration and should use litigation methods to prepare most efficiently.

Just as for any other dispute resolution procedure, preparation is required for an arbitration to work effectively. Thus, advocates should not

[248] Moore, *supra* note 42, at 25 (arguing that to prepare effective arguments an advocate has to "identify additional evidence suggesting that the generalization is especially likely to be true given the unique circumstances of a particular case").

[249] *Id.* at 25, 40.

[250] *Id.* at 27 ("Hence, the 'especially whens' tend to persuade a factfinder that your factual proposition is correct.").

[251] Moore, *supra* note 42, at 39-41 (discussing use of "except whens" to identify adversary's "likely response")

[252] *Id.* at 41 (discussing using "except whens" to plan counter).

[253] *Id.* at 73. An advocate can also add an "unless" to the end of the improbability to identify reasons that undermine the argument.

[254] *Id.* at 74 (discussing how the technique helps explicitly identify evidence to rely on to argue an adverse witness' story is inconsistent).

wait until the hearing to meet witnesses and look at documents for the first time. Instead, advocates should prepare a time-line and theory of the case in advance of the arbitration. In addition, the advocates should identify the evidence supporting the case and flesh out the arguments the advocate intends to present to the arbitrator. Ideally, the advocate will prepare the witnesses after developing the arguments and before the hearing.

By using the litigation methods discussed above, advocates can gain a more detailed understanding of the case in a more efficient manner. Historical reconstruction is one easy additional step beyond creating the time-line.[255] It can be especially useful in cases in which the timing of events is in issue.

Inference chains and improbabilities can also be used to quickly gain a sophisticated understanding of the case. The inference chains can become the crux of the affirmative argument[256] and by adding "especially whens" and "except whens," the advocate can quickly identify whether there is further information to be discovered.[257] The improbabilities can serve as the foundation for rebuttal.[258]

For the typical arbitration, the advocate's time and expenses will be limited and, thus, developing every potentially helpful inference chain and improbability will not be justified.[259] And developing those the opposing

[255] Bayard, *supra* note 128, at 43 (Recommending that arbitrators "create a time-line identifying all the major events for the project or transaction, or ask the parties to prepare one as a joint exhibit, if possible.").

[256] If the advocate were representing a union on behalf of an employee discharged for bringing a gun on company property and was arguing the firing was without just cause, the inference chain she developed might look as follows: Evidence: Another employee routinely brought his firearm to work. Inference 1: The employee would interact with supervisors at work. Inference 2: The supervisors would notice he had a firearm. Conclusion: Supervisors permitted another employee to carry a firearm on company property.

[257] "Especially whens" as to Inference 2: He carried it in plain view. It was large and bulged under his clothes. He spoke about the firearm with other employees. He spoke about the firearm with supervisors. He brought it everyday. He interacted with the supervisors at least three times a day. He interacted with supervisors in face to face conversation. "Except whens" as to inference 2: He carried it concealed. He never mentioned it to anyone. He did not interact with the supervisors. The supervisors only saw him seated behind a glass window of a security booth. He locked it in his locker immediately upon coming in. He retrieved it from his locker immediately before leaving.

[258] If the advocate were representing an employer who discharged an employee for bringing a gun on company property, this would quickly identify a response to the employee's anticipated argument that she forgot the gun was in her trunk.

[259] Of course, if it is a complex case that approaches the level of importance of cases that are

party will likely use may not be warranted at all.[260] Rather, the advocate should focus on a few inferences and a few improbabilities that appear to support the strongest arguments for the advocate's case. By so doing, the advocate can efficiently identify needed information, affirmative arguments, and rebuttal.

H. Demeanor and Style

1. The Question: What demeanor and style is most appropriate for arbitration?

Sometimes litigation and trial lawyers adopt the same demeanor in arbitration that they adopt in those proceedings. They are very formally dressed and theatrical in presentation and miss no opportunity to argue a point on behalf of their client, no matter how small.[261]

Others believe that because arbitration is relatively informal, they can treat the process as a casual one.[262] They are unconcerned about their appearance and speak in colloquial terms which would be inappropriate in a more formal setting. Some even engage in *ex parte* communications with the arbitrator.[263]

In the middle, some advocates adopt a presentation that is less adversarial than litigation yet still civil.[264]

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typically litigated, then developing many of them and those the other side will likely use will be equally as appropriate as it is in preparing for trial.

[260] If time and resources permit, however, it will be useful to do so. It is always helpful to understand what the other party will argue as their strongest arguments, which inference chains easily identify, and the weaknesses the other party will identify in the advocates' case, which improbabilities easily identify.

[261] Gorsky, *supra* note 118, at 54 (Implying that some counsel are "so intent on winning that they overlook certain aspects of fairness that arbitrators are entitled to expect," and later discussing how some counsel "agree to very little in the hope that by compelling their opponent to prove everything . . . proof will not be forthcoming.").

[262] *Cf.* Hammond, *supra* note 10, at 102 (discussing how because "[t]heoretically, it is unclear what rules govern" "attorneys do at least sometimes play fast and loose in arbitration.")

[263] Kandel, *supra* note 121, at 141 ("Parties and witnesses are looser in arbitration because the courtroom is replaced by an office building or hotel, the courtroom by a conference room, and the robed judge by the business casual arbitrator. Advocates must . . . rein in themselves against the temptation to behave injudiciously. *Ex parte* contacts with an arbitrator, known to be improper by every competent advocate, nonetheless occur.")

[264] Crowley, *supra* note 107, at 8 ("While arbitration is 'adversarial' too, we get far more

2. The Relevant Litigation Principles

Litigation methods emphasize how presentation and appearance are generally as significant in persuading a decision-maker as is the substance of the argument.[265] Rhetorical techniques, linguistic principles, and common, but often unstated, practical knowledge all support the importance of presentation and appearance.[266] The classical rhetoricians emphasized the importance of credibility and appeals to emotion in persuasive argumentation.[267] Credibility in oral advocacy involves dressing appropriately, using formal language,[268] respecting the arbitrator and opposing counsel,[269] and not overstating the case.[270] These aspects of

mileage by employing a graceful diplomacy when dealing with the arbitrator, opposing counsel, and witnesses.")

[265] Lillian B. Hardwick, *Classical Persuasion through Grammar and Punctuation*, JALWD Fall 2006 at 75, at 76-77 ("In a live speech, the audience absorbs and is affected by the appearance of the orator before hearing even the slightest hint of the argument. In the next instant or two, the audience responds to the speaker's voice, intonation, word choice, and phrasing, before recognizing any specific or even general content.").

[266] Frost, *supra* note 152, at 6 (stating that Cicero "would observe that style reflects character and that judges are more favorably disposed in the presence of a 'good man speaking' well.") (citing Edward P.J. Corbett, *Classical Rhetoric for the Modern Student* 99 (2d ed., Oxford U. Press 1971); 4 Marcus Fabius Quintilianus, Institutio Oratoria 355 (Loeb Classical Library) (H.E Butler trans., Harv. U. Press 1921)); Hardwick, *supra* note 265, at 76-77 ("Aristotle listed ethos as the 'first kind' of persuasive means, explaining that '[i]t is not true, as some writers on the art maintain, that the probity of the speaker contributes nothing to his persuasiveness; on the contrary, we might almost affirm that his character [ethos] is the most potent of all the means to persuasion.'") (citing Aristotle, The Rhetoric of Aristotle 9 (Lane Copper trans., D. Appleton & Co. 1932).

[267] Frost, *supra* note 152, at 9 (discussing how Aristotle, Cicero, and Quintilian "focused a substantial part of their analysis" on "affective modes of argument," labeled "pathos (appeals to emotion)" and "ethos (credibility))." *Id.* at 12. ("In their view [classical rhetoricians], successful legal arguments depend as much on the advocate's character and credibility, or ethos, as they do on their logical integrity (logos) or emotional content (pathos)).

[268] *Id.* at 14 ("[Cicero] believed, for example, that 'much is done by good taste and style in speaking, [so] that the speech seems to depict the speaker's character.'") (citing 3 Marcus Tullius Cicero, De Oratore 329 (Loeb Classical Library) (E.W. Sutton & H. Rackham trans., Harv. U. Press 1942)); Hardwick, *supra* note 265, at 76-77 ("Quintilian instructed, 'Let no man . . . look down on the elements of grammar as small matters.'") (citing Quintilian's Institutes of Oratory vol. 1, 30 (Rev. John Selby Watson trans., George Bell & Sons 1910); Hanley, *supra* note 188, at 41 ("Inappropriate language injects absurdity and bad taste into an argument . . . [W]eighty matters should not be treated lightly, nor trivial matters solemnly.")

[269] Frost, *supra* note 152, at 14 ("According to [Quintilian], credibility also depends on avoiding 'the impression that we are abusive, malignant, proud or slanderous toward any

presentation might be termed "silent arguments."[271] Silent arguments are not made explicitly by the lawyer but rather are conveyed implicitly by demeanor.[272] For instance, conveying an attitude that the lawyer believes in the client is a silent argument on behalf of the client.[273]

Principles of good written advocacy also support the importance of presentation. If a writing contains grammar errors or sloppy citation, the reader likely will be unwilling to look beyond the presentation to the substance. The reader will instead infer that the substance of the analysis must also be lacking.[274] Indeed, as explained by new rhetoricians, presentation and appearance that mark one as an "outsider" cause a reader to disregard the content of the argument.[275] Linguists verify that the same holds true for oral advocacy.[276]

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individual or body of men, especially as cannot be hurt without exciting the disapproval of the judges.") (citing 2 Marcus Fabius Quintilianus, Institutio Oratoria 11 (Loeb Classical Library) (H.E. Butler trans., Harv. U Press 1921)).

[270] *Id.* at 12 ("Moreover, for Aristotle, and for Cicero and Quintilian after him, projecting the proper ethos is just as important as actually possessing it:") *Id.* at 13 ("It is very helpful to display the tokens of good-nature, kindness, calmness, loyalty and a disposition that is pleasing and not grasping or covetous . . .") (citing Cicero at 329. 3 Marcus Tullius Cicro, De Oratore (Loeb Classical Library) (E.W. Sutton & H. Rackham trans., Harv. U. Press 1942)).

[271] Moore, *supra* note 42, at 88 (discussing how a lawyer's "demeanor may . . . give rise to silent arguments").

[272] *Id.*

[273] *Cf.* Frost, *supra* note 152, at 14 ("Quintilian thought that credibility depended mainly on an advocate's perceived motives for taking a particular case: 'It is . . . preeminently desirable that he should be believed to have undertaken the case . . . [from a]moral consideration.") (citing 2 Marcus Fabius Quintilianus, Institutio Oratoria 9 (Loeb Classical Library) (H.E. Butler trans., Harv. U Press 1921)); Moore, *supra* note 42, at 88 (recommending that advocates, "use a sincere tone of voice and interact with your client during recesses in a way that suggests that you respect and believe the client."); John C. Sheperd & Jordan B. Cherrick, *Advocacy and Emotion*, 138 F.R.D. 619, 624 (1991) ("Persuasive advocates believe in and care deeply about their client's cause. Successful advocates know how to express their strong, positive feelings for their clients in a manner that touches the emotions of a judge or jury."); Hanley, *supra* note 188, at 40 ("If there is one characteristic common to successful advocates, it is the ability to project sincerity.").

[274] *See* Hardwick, *supra* note 265, at 76 ("[n]o matter how clear the thinking or how well crafted the argument, it will not communicate and persuade if it neglects the most fundamental of writing techniques.").

[275] *See* Schrup, *supra* note 27, at 19 ("The outer-directed school, on the other hand, emphasized the importance of discourse communities and focused on institutionalizing processes and labeling students as 'insiders or outsiders' based on whether they had acquired the requisite skill set.").

[276] The example used by Ed Finegan, Professor of Linguistics and Law, who regularly

3. The Best Practice: Generally, an advocate should treat the arbitrator, witnesses, and opposing advocate with respect and should approach an arbitration as though it is a formal dispute resolution proceeding which is less confrontational than a jury trial.

Litigation principles suggest that an advocate in arbitration should present himself or herself in a manner that impresses the arbitrator in order to permit the arbitrator to focus on the substance of the case. The litigation principles provide several key insights. First the overall principle: the advocate must conduct herself or himself in a manner generally expected by the arbitrator. To do otherwise will cause the advocate to be viewed as an "outsider," someone unfamiliar with the mores of arbitration and, thereby, less credible. The advocates should, thus, avoid theatrical presentation, nitpicking objections, and an adversarial tone with the opposing advocate. These actions give the advocate away as a litigator rather than a problem solver. Instead, the advocate should adopt a tone more appropriate to a small conference room,[277] an approach which points out weaknesses in the opposing case without challenging each technical failure, and a professional tone with the opposing advocate.

Second, the advocate should treat the process as an important one, worthy of respect. The advocate should not lapse into colloquial speech, act as though the arbitrator is a buddy (*ex parte* communication is an extreme instance of this behavior), or dress in jeans. Instead, the advocate should use proper grammar and style, treat the arbitrator with the respect of someone who will render a decision in an important matter, and dress slightly more formally than would normally be appropriate in the industry.[278]

Third, the advocate should express sincerity in the belief that the client's interests are important and the client's case is a good one. This is perhaps even more crucial than at trial because arbitrators have license to consider

lectures to the students in the USC legal writing and advocacy program is that from the Bible of "shibboleth." "Then said they unto him, Say now Shibboleth: and he said Sibboleth: for he could not frame to pronounce it right. Then they took him, and slew him at the passages of Jordan: and there fell at the time of the Ephraimites forty and two thousand." Judges 12:5-6 King James Version.

[277] *Cf.* Murray, *supra* note 18, at 212 (suggesting use of non-theatrical, conversational style when seated together around a conference room table).

[278] For example, if typically the advocate would wear a dress to work, she might wear a blazer and skirt instead to the hearing.

equities to a greater extent than a judge or jury.[279] The arbitrator may draw on experience in the field or industry, rather than simply deciding the case on a legal basis. Thus, even if the client may not have the stronger of the two cases on a legal basis, it is crucial for the advocate to convey an attitude that the client's interests are important and that the client's position is more reasonable than that of the other party.

I. The Issue Statements

1. The Question: Should the parties agree on the issue prior to the arbitration?

Arbitrators sometimes advise advocates to agree on a statement of the issues, and agreement has been suggested as a method for saving time.[280] The primary reason that arbitrators desire a stipulated statement of the issues is so that the arbitrator's jurisdiction is clear in advance of the testimony.[281] Some advocates will reach agreement on a statement of the issue in order to avoid an initial unfavorable impression with the arbitrator who desires such a stipulated statement.[282] Many advocates, however, are reluctant to be pressured into agreement. They wish to use the issue statement to frame the case in the way that will most aid the arbitrator to understand the strength of the client's position.[283]

2. The Relevant Litigation Principles

Litigation principles suggest that the issue is a critical component and aids the decision-maker by framing the entirety of the case. In a brief, the

[279] Hammond, *supra* note 10, at 106 (discussing case where arbitrator could base decision on equity) (citing *Moncharsch v. Heily & Blase*, 832 P.2d 899, 904, 10 Cal. Rptr. 2d 183, 188 (1994)).

[280] Thomson, *supra* note 84, at 79 (stating that the arbitrator should ask the parties to agree to the issues in dispute to expedite the arbitration).

[281] *Id. See* St. Antoine, *supra* note 118, at 14 (discussing how "if no agreement is reached, the arbitration proceeds at the risk of posthearing attack on the grounds that the resulting award exceeded the jurisdiction of the arbitrator.")

[282] *Cf.* Ray, *supra* note 78, at 22 (advising that stipulations to the issue can be a "minefield" for novice advocates who may stipulate "away a significant part of the case.").

[283] *Id.* (discussing how stipulations as to the issue are not required and "[a]n advocate can decline to agree to the adversary's statement of the issue and frame the issue any way he or she chooses.").

statement of the issue is often the first item the decision-maker reads. As discussed in Section A, readers particularly remember items read first, so the statement of the issue is a critical part of such a writing.[284]

In a brief, the statement of the issue should define the specific legal question at issue.[285] To be helpful to the reader, it should not be overly broad, too narrow, vague, or confusing.[286] Instead, it should focus the reader precisely on what is at stake.

Additionally, the statement of the issue should alert the reader to key facts at issue.[287] This lets the reader know immediately what the case will be about.

Finally, the statement of the issue should serve the further function of persuading the reader of the response to the issue that the advocate desires.[288] It should not do so in an argumentative way, but instead should do so through word choice, the manner in which the legal issue is framed, and the facts which are highlighted.[289]

The classical rhetoricians suggest that the statement of the issue is equally important in oral advocacy as in a brief. They included a part of the speech termed the *exordium*, which was similar to the written issue included in a persuasive brief.[290] They advised that "Its purpose is 'to prepare our audience in such a way that they will be disposed to lend a

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[284] *See supra* text accompanying note 150.

[285] Edwards, *supra* note 150, at 316 (explaining that the statement of the issue "should identify the particular legal issue").

[286] *Id.*

[287] *See* Edwards, *supra* note 150, at 317 (discussing how to frame the issue with a statement of the legal issue and a statement of the key facts); *cf.* Frost, *supra* note 152, at 10 ("Cicero takes a similar approach, except he adds that "[t]o secure an intelligent and an attentive hearing, we must start from the actual facts themselves.") (citing 4 Marcus Tullius Cicero, De Partitione Oratoria 335 (Loeb Classical Library)) .

[288] Edwards, *supra* note 150, at 316 (explaining that a second function of the statement of the issue is to "begin persuading the judge to decide that issue in your client's favor").

[289] *See* Edwards, supra note 150, at 319 (explaining that to avoid argumentation, and advocate can "limit adjectives and adverbs, using facts instead of such characterizations").

[290] Frost, *supra* note 152, at 9-10 ("Under classical theory, legal arguments begin with an *exordium* identifying the issue(s) before the court. *Exordium* , which means 'the warp of a web' or 'a beginning,' is an especially apt metaphor because it stresses the integration of the parts with the whole, an important point when analyzing the structure of arguments. . . . Quintilian identifies the *exordium* as that 'portion of a speech addressed to the judge before he has begun to consider the actual case.'")(citing 2 Marcus Faius Quintilianus, Institutio Oratoria 16 (Loeb Classical Library)) .

ready ear to the rest of our speech.'"[291] "This is accomplished by including 'the point which seems most likely to serve our purpose' and by rebutting or lessening the force of points that damage the case."[292] "[T]he purpose of the exordium is to 'enable us to have hearers who are attentive, receptive, and well-disposed.'"[293]

3. The Best Practice: An advocate should not feel pressured into agreeing to a statement of the issue, but rather should frame the statement of the issue in a manner that best aids the arbitrator to understand the client's position.

Litigation methods suggest that if only one issue statement is to govern the case, the arbitrator will miss an opportunity to learn at the start of the hearing what the strengths of each party's position are. Thus, an advocate should be wary of agreeing on one written statement of the issue to present to the arbitrator. In most instances, each party's advocate will desire to frame the legal issue in a light that emphasizes different facts and the strength of the client's position.Having each party provide its own statement of the issues enables the arbitrator to see any differences in the parties' positions. The arbitrator can discuss these differences and rule on them, if necessary, thereby avoiding surprise topics at the hearing. This will be almost as efficient as having the parties agree to the statement of the issue, but will allow the arbitrator to better understand the strengths of each party's case.

J. The Opening Statement and No-Show Witnesses

1. The Question: Should an advocate include in the opening statement evidence from a witness when the witness may not appear at the hearing?

The advocate in an arbitration is faced with a dilemma unlikely to occur at trial. Sometimes there is a witness who has highly advantageous testimony, but there is some probability that the witness will not actually appear to testify. Because there is no truly enforceable method of enforcing

[291] Frost, *supra* note 152 at 9.

[292] Frost, *supra* note 152 at 17

[293] Frost, *supra* note 152 at 17 (citing Rhetorica ad Herennium 13 (Loeb Classical Library) (Harry Caplan trans., Harv. U. Press 1954).

a subpoena against a non-party witness, the advocate cannot insure the witness will show up.[294] The advocate needs to determine whether to include the testimony in the opening statement.

2. The Relevant Litigation Principles

Litigation principles suggest that the opening statement should include the key evidence on which the lawyer intends to rely. The opening statement at trial serves as a roadmap to the case for the decision-maker,[295] much as the umbrella rule of a discussion section serves as a roadmap for the judge reading a brief.[296] As such, the opening statement should include a summary of the key evidence that the lawyer will present.[297] When the lawyer presents a well-organized opening statement which includes all of the key information to be relied upon, the lawyer gains credibility with the jury. Credibility is a key component of successful oral advocacy, as principles of rhetoric, discussed in Section H, describe. If however, the lawyer later fails to present evidence promised in the opening statement, credibility will likely be damaged.[298] The decision-maker will perceive a

[294] Hammond, *supra* note 10, at 103 ("[The parties] may have limited ability to obtain third-party documents and testimony. Courts may quash abitrator's subpoenas or conclude that the subpoena is outside the arbitrator's jurisdiction.") For example, I once arbitrated a case where a woman was discharged for bringing a firearm onto her employer's property. One of the affirmative arguments I presented was that of disparate treatment. While I had some other evidence of disparate treatment, the best evidence I had was another employee who would testify that he had brought his firearm to work on more than one occasion, and, that although his supervisor was aware of his doing so, he was not terminated. I had prepared the witness, and he had assured me that he would voluntarily show up. In an abundance of caution, I requested the arbitrator to subpoena the witness, which request the arbitrator granted. Needless to say, I included the witness testimony as a cornerstone of my opening statement, and then the witness did not show up. Research revealed there was likely no affordable method of enforcing the subpoena.

[295] Moore, *supra* note 42, at 95 (arguing that opening statement is often "downplayed" as simply a "roadmap" of the evidence to follow).

[296] *See* Edwards, *supra* note 150, at 287 (discussing how umbrella section serves "important function" for "a brief with several issues or for a single-issue brief where context would help the reader.") .

[297] Moore, *supra* note 42, at 95 ("Then in a brief Overview you summarize the evidence you will offer in support of the principal arguments justifying a verdict in your client's favor.").

[298] *Id.* at 108 ([D]uring closing argument your adversary may ask the factfinder to infer from your failure to produce what you promised that you intentionally misled the factfinder or tried to paper over a weak case by making assertions that you knew you could not fulfill. Thus, it is almost always unwise to refer to evidence if it is of doubtful admissibility, or if you are uncertain about what a witness will say.").

hole in the case and may also believe that the lawyer was untruthful about the evidence.

On the other hand, should the lawyer later present evidence that was not included in the opening statement, this may surprise or confuse the decision-maker.[299]

3. The Best Practice: The advocate should not include evidence in the opening statement that is based on the testimony of a witness who may not appear.

The litigation principles suggest that the best practice is not to include evidence in the opening statement that is based on the testimony of a witness who may not appear. Even if the witness's testimony is the only significant evidence supporting one major argument, the advocate should have at least one other major argument supported by other evidence. Not presenting the evidence from the witness who may not appear will certainly detract from the arbitrator's ability to understand the strengths of the client's case. The arbitrator may be surprised to learn of important information when the evidence is presented and may spend time trying to determine how the evidence fits with the advocate's theory of the case.

But presenting evidence as critical in the opening statement when the evidence will not actually be proved will more seriously undermine the strength of the case.[300] The advocate will almost certainly lose credibility when the expected evidence is not presented. Additionally, an advocate can take measures to somewhat reduce the surprise to the arbitrator of learning of evidence not presented in opening statement. When possible, the effect of surprise can be minimized by asking questions on direct examination that relate the witness's testimony to other items of evidence that were discussed in the opening. Questions can also be asked that aid the arbitrator to understand how the evidence fits in with the theory of the case. Closing argument can also be used as an opportunity to point out how the evidence supports the theory of the case.

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[299] *See supra* text accompanying note 156.

[300] To minimize the likelihood of this happening, the advocate might seek agreement early on that written statements can be substituted for oral presentation if a witness fails to appear. In addition, having the witness sign a written statement might increase the likelihood of the witness showing up because it may minimize the reason the witness has for not wanting to appear. For instance, if the witness will testify that he has brought a firearm onto the property, he may be reluctant to do so for fear his own job will thereby be jeopardized.

Of course, it is not always possible to predict whether a witness will appear. Should a witness not appear, contrary to the expectations of the advocate, the advocate should explain to the arbitrator who the witness was, why the advocate fully expected the witness to appear, and what the expected testimony was.[301] The advocate should be sure to emphasize that the witness's testimony would support the other testimony already provided. The advocate should also be explicit about which other testimony that was. While the hole in the supporting evidence will be apparent, the credibility of the advocate may be saved in this manner.

K. Argument in the Opening Statement

1. The Question: Should an advocate argue in the opening statement?

Because of the informality of an arbitration hearing, advocates likely can argue rather than summarizing evidence in the opening statement. Skilled advocates are always trying to characterize the facts and slip unobjectionable argument into opening statements. And an advocate may even be tempted to argue extensively during opening statement.[302]

2. The Relevant Litigation Principles

The primary rule governing opening statement at trial is that the lawyer should not argue.[303] The opening statement should focus on the facts that support the case rather than the arguments that flow from those facts.[304] A

[301] Here is a sample of what an advocate might state: "The witness was a co-employee who I had prepared and followed up with only three days ago when he assured me that he would be here today. Along the lines of the testimony from 'Mr. Supervisor,' the supervisor who said he did not know there was a rule prohibiting firearms and the testimony of 'Mr. Employee,' who stated that he had once brought a firearm to work in his car, this employee would have testified that he had brought his gun onto the property on several occasions and had shown it to his supervisor."

[302] Scott, *supra* note 136, at 21 ("I encourage you to refrain from the temptation of arguing your case in your opening statement.").

[303] Moore, *supra* note 42, at 106 ("The principle rule governing opening statement is the one forbidding argument. In general, what this means is that you can refer to the evidence that a witness or document will provide, but not to the inferences and conclusions you will ask the factfinder to draw from testimony.") (citing Tanford, *An Introduction to Trial Law*, 51 Missouri Law Rev. 623, 649 n.131).

[304] *Cf.* Moore, *supra* note 42, at 95 & n.2 (explaining that "Introduction can help mold a

primary function of the opening statement is to set out the outline of the case and persuade the decision-maker through narrative.[305]

Of course, in order to aid the decision-maker in understanding the strength of the client's case, it is helpful to include a brief summary of the arguments in the introductory portion of the statement, to characterize the facts in a manner favorable to the lawyers' position, and to slip in a few inferences from the facts that aid the decision-maker in reaching a favorable conclusion from the facts.[306] But facts and narrative, the chronology and plot of the story,[307] should predominate.[308] A good story has the power of persuasion, and the primary purpose of the opening statement is to tell one. The purpose of the proceeding is to let the decision-maker draw conclusions about the facts.[309] Without knowledge of the relevant facts, the decision-maker could make only an ill-informed decision. Arguments aid the decision-maker who has been presented with the relevant facts, but cannot replace a well-told story.

3. The Best Practice: The advocate should argue, but the opening statement should still focus on the facts at issue.

Litigation principles suggest that to best aid the arbitrator's decision-

factfinder's final assessment about what evidence is most important" and discussing how factfinders begin to develop hypotheses about what really happened early in the trial) (citing Moore, *Trial By Schema: Cognitive Filters in the Courtroom*, 37 UCLA Law Rev. 273 (1989)) .

[305] *Cf.* Sheperd, *supra* note 273, at 621 ("You cannot persuade another person unless you can communicate the facts in a simple, organized, and coherent fashion. Chronology and plot form the essential elements of a good story.").

[306] *See supra* text accompanying notes 243-247 (discussing the use of inference chains and discussing making inferences explicit).

[307] Moore, *supra* note 42, at 108 ("An effective opening statement provides the factfinder with a chronological picture of your version of events, communicates your most important arguments, and also paints your client in a sympathetic light."); Sheperd, *supra* note 273, at 621 ("Chronology and plot form the essential elements of a good story. Advocates should pay close attention to these elements in describing the facts of their case.").

[308] *Cf.* Hanley, *supra* note 188, at 40 (Discussing cross-examination and stating "Lead the jurors to the conclusion you want them to embrace, then let them believe they found it themselves.").

[309] *Cf.* Edwards, *supra* note 150, at 242 ("People tend to cling more tenaciously to conclusions they think they have reached themselves than to those asserted by others.") *Id.* ("An effective legal argument will not push an unwilling reader down a path. Rather, an effective legal argument will place the reader at a vantage point that allows the *reader* to see and take the best path.").

making process the opening statement should focus on the facts, rather than argument. The arbitrator, like a judge or jury, will make a decision on the facts of the case. Even more than at trial, the arbitrator has the ability to rule on the equities of the situation. The arbitrator may use experience in the field to determine the best result given the facts. Thus, the opening statement should focus on the facts. It should provide a persuasive narrative about the chronology of the events that will aid the arbitrator in understanding the key facts, the equities of the case, and the strength of the client's position.

However, the opening statement should include a prefatory argument in order to make the relevance of the facts to the legal arguments explicit for the arbitrator. But the argument should be brief, an aid to understanding the narrative rather than a substitute for it. Moreover, the opening statement should frame the facts favorably in order to emphasize the strength of the client's position, but the framing must be in line with the facts as included in the documents, testimony, or other evidence. Likewise, while making explicit the inferences that flow from the facts can be helpful when the inference is not obvious, this technique should not be overused.[310] The bulk of the opening statement should be about the story, leaving the arbitrator free to come to his or her own preliminary conclusions.

L. Appropriate Questions on Cross-Examination

1. The Questions: Should an advocate cross-examine witnesses? If so, what questions are appropriate?

Because of the limited discovery in arbitration, advocates do not have as firm an idea of the testimony a witness will give as is typically available through a deposition.[311] This makes it more difficult to prepare for cross-examination. Some advocates respond by not cross-examining at all.[312]

[310] *Cf.* Hanley, *supra* note 188, at 40 (discussing Aristotle's use of enthymeme, where "you begin with an easily accepted truth, and you proceed to an inevitable conclusion.").

[311] Kandel, *supra* note 121, at 145 ("These pressures to condense discovery may create hearings akin to 'trial by ambush' but do not thereby deny due process."); Gorsky, *supra* note 118, at 54 (stating "Many arbitration hearings are conducted without the availability of broad discovery mechanisms, and when they are available in some form, they are often not fully resorted to. As a result, the parties usually are less well-informed about the case they will have to meet . . .").

[312] Ray, *supra* note 78, at 23 ("[S]ometimes the best cross-examination is no cross-

Others will ask questions despite not knowing what the witness' response will be in hopes of eliciting favorable information.[313] Some only ask questions to which they know the answer.[314] Many seek guidance on what type of questions they should ask.[315]

2. The Relevant Litigation Principles

As discussed in Section F, cross-examination functions as an opportunity to argue during an otherwise predominately narrative presentation.[316] When issues are complex or multiple inferences could be made from the testimony, then cross-examination can help the decision-maker to make connections and see the case in the same light as the lawyer. This can be particularly important in light of the research that suggests juries have already decided the case before closing argument.[317]

Generally, two times exist when it is appropriate to ask a question on cross-examination. The first is when the lawyer knows the answer the witness will provide to the question. These are often termed "safe questions."[318] The other is when the lawyer does not care how the witness will respond.

There are several types of safe questions. The type predominately used at trial is when the lawyer knows what the response of the witness will be based on a prior deposition.[319] Safe questions can also be based on the

examination at all.").

[313] Hammond, *supra* note 10, at 131(advising that "In arbitration, however, you may have to ask questions that are dangerous, because the questioner may not know the answers to the questions. Such blind cross-examination, however, is often a necessary part of arbitration."); Ittig, *supra* note 198, at 44 (discussing how some evidentiary hearings are conducted "more like depositions than arbitration hearings" and how this can be avoided through stipulations of facts and documents).

[314] Ray, *supra* note 78, at 24 ("As in litigation, an advocate should not ask a question on cross-examination without knowing what the answer will be.")

[315] At conferences I have attended that discuss arbitration, there is typically at least one question regarding how to prepare for and what to ask on cross-examination when the party lacks a deposition of the witness.

[316] *See supra* text accompanying note 225.

[317] *See supra* text accompanying note 203.

[318] Moore, *supra* note 42, at 164 ("A safe question is one which requires the witness to either provide your desired response or allows you to impeach (contradict) a response other than your desired one.").

[319] These questions are safe because the advocate can impeach the witness if the witness answers differently than at deposition. Moore, *supra* note 42, at 164.

contents of documents other than prior depositions.[320] It is somewhat more cumbersome to impeach a witness using a prior statement other than a deposition[321] or to undermine the witness credibility by use of a document that is not a prior statement.[322] But this type of safe question is still routinely used.

Another type of safe question is when an arguably more credible witness has provided an answer to the question. If the witness being cross-examined answers differently than the other more credible witness, the lawyer can present the other witness for purposes of undermining the witness' testimony on cross-examination.[323] Of course, the lawyer cannot call the other witness in the middle of the cross-examination so may not be able to achieve a juxtaposition of the testimony that is visible enough to be noticeable to the decision-maker.[324] For this reason, this method is not as commonly used as relying on documents (particularly prior statements) as the basis for safe questions in trials.

A third type of safe question is a question based on logic or common sense. There are some questions which any person is likely to answer in a particular way.[325]

Additionally, when a witness has made a statement on direct examination, a question asking for confirmation of that statement is safe.[326] The lawyer must be sure to have recorded the statement verbatim.[327] Using this type of safe question emphasizes favorable testimony through repetition

[320] *Id.*

[321] *See id.* at 195 (discussing how with a prior witness statement, unlike with a deposition, the foundation to admit a document must be established, when it has not already been admitted, in order to use the document to impeach and how).

[322] *See id.* at 183 (discussing how lawyer cannot impeach a witness with another witness's statement but can argue the inconsistency in closing and may be able to ask questions pointing out witnesses' inconsistent testimony).

[323] *Id.* at 165 ("If the witness does not give your desired answer, you can later impeach the witness through the . . . more believable witness.").

[324] *See id.* at 198 (discussing how a lawyer must wait until the lawyer's turn to present evidence to call a witness for purposes of proving an inconsistency).

[325] *Id.* at 165-66 (discussing questions where answer is consistent with common experience and providing example where a company supervisor would be more concerned about larger customers than smaller ones).

[326] *Id.* at 164 (discussing using prior statement, such as during direct examination, as basis for safe question).

[327] If necessary, the transcript of the proceeding can then be used for impeachment.

which aids the decision-maker in recognizing its significance.[328]

Sometimes, however, a lawyer does not care what the answer to the question is. One instance is when the lawyer is using the question to preview for the decision-maker the point which will be made by a series of safe questions to follow.[329] This type of question is most appropriate when the inferences from the testimony, while strong, may not be clear to the decision-maker without some aid.

Another time an unsafe question is appropriate is when one answer will help the client's case and the other answer, which will not forward the client's case, would be assumed by the decision-maker anyhow.[330]

Additionally, in rare circumstances, unsafe questions may be asked because of unexpected events at trial.[331] For instance, maybe the primary argument the lawyer was relying on has been exceptionally weakened by unexpected adverse evidence. The lawyer may then seek to enhance a relatively weak, and formerly secondary argument, by asking unsafe questions. In this event, the lawyer may use a line of almost entirely unsafe questions to make an argument.[332] Another method the lawyer may try in such circumstances is "fishing," asking unsafe questions in the hope of obtaining favorable evidence.[333] "Fishing" is typically reserved for circumstances where the outcome without "fishing" is almost certainly not going to be in the client's favor.[334]

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[328] *See* Voss, *supra* note 151, at 314 ("The more something is said the more likely it will be believed and remembered."). Repetition is a commonly used persuasive writing technique. Edwards, *supra* note 150, at 336 (advising to repeat key facts unobtrusively to emphasize the facts or concepts).

[329] Moore, *supra* note 42, at 183 (discussing use of "ultimate conclusion questions" when factfinder may not understand the argument without it or when witness is unlikely to provide rebuttal).

[330] *Id.* at 201 (discussing example where the attorney asks the witness if he was wearing his glasses at the time of the incident; if not, this aids the case in that the witness couldn't see well and if so, the jury probably would have assumed the witness was wearing the glasses and could see anyhow).

[331] *Cf. id.* at 200 (emphasizing importance of asking safe questions and risks of not doing so).

[332] *Id.* at 202 ("[S]ometimes you may decide to try to strengthen an argument that you had initially regarded as secondary, but which takes on new importance when an argument you had regarded as stronger before trial has evaporated.").

[333] *Id.* at 203 ("'Fishing' refers to a type of cross examination in which you ask numerous unsafe questions in the hope of obtaining evidence to support arguments you have *not* constructed prior to trial.")

[334] *Id.* at 204 ("[Y]ou may reasonably decide to take this approach if the alternative is almost certain defeat.").

Distinguished trial lawyers know that if none of these types of questions is necessary to advance the case, then cross-examination is not necessary. Instead, the lawyer relies primarily on the opening statement and the evidence presented on direct-examination.[335]

3. The Best Practice: An advocate should cross-examine a witness in only two instances: 1) when the witness's testimony will strongly support some aspect of the advocate's affirmative argument or provide strong rebuttal to an adverse argument, or 2) when the witness' testimony on direct examination significantly undermined an argument being forwarded by the advocate. The questions should be safe questions, unsafe questions which will aid the decision-maker in understanding a difficult point, or unsafe questions which if not asked would only serve to undermine the strength of the advocate's case.

An advocate in arbitration should err on the side of not cross-examining witnesses. Because of the limited nature of discovery, arbitration, to an even greater extent than litigation or trial advocacy, focuses on the affirmative argument of the parties. Typically, an advocate will persuade the arbitrator based on direct examination rather than cross-examination.

In arbitration there have been no (or few) depositions and limited discovery. Thus, the advocate is unlikely to know the response of a witness to a question. If the advocate does not know the response, or has any doubts, the advocate should generally refrain from asking the question.[336] Asking the question will likely only elicit a response that confuses the testimony, and thereby the arbitrator and the advocate, more than it aids in highlighting the strengths of the client's case.

If however, the witness has just provided favorable testimony, cross-examination is a nice opportunity to have the witness repeat the testimony and to make the inference from that testimony explicit for the arbitrator.

Additionally, if there is a significant weakness in the testimony that the advocate can elicit by asking a safe question, based on a document, credible

[335] *See id.* at 202-03 (discussing "no questions" as "most useful of an attorney's cross examination strategies.").

[336] For the reasons discussed in this section, litigation principles do not suggest that asking unsafe questions is typically necessary in arbitration. *Cf.* Hammond, *supra* note 10 at 131 (arguing that an advocate "may fail to meet" the burden of proof if the advocate does not ask questions on cross-examination the answers to which are unknown).

witness, or common sense,[337] the advocate should ask the question and call the weakness to the arbitrator's attention. These types of safe questions can work particularly well in arbitration because of the informality of the proceeding. It may be perfectly appropriate if impeachment becomes necessary to seek permission to immediately read from a contradictory document or to immediately reference the testimony of another witness.

An advocate should not, however, adopt the stance that because there was no discovery, it is necessary to ask unsafe questions. Asking unsafe questions should be resorted to only in rare instances. First, in some circumstances, the advocate may determine that though the ultimate point is complex, the arbitrator will likely agree with the point. In such circumstances, the advocate may decide to ask a question, regardless of the answer the witness might provide, to make the point explicit.[338] Second, an advocate appropriately asks an unsafe question when the unfavorable answer would be assumed by the arbitrator even if the question were not asked. Finally, when despite the advocate's thorough preparation, the evidence at arbitration has rendered the advocate's case or primary argument no longer viable without further support, the advocate might appropriately ask unsafe questions.

[337] Here are two examples of effectively cross-examining a witness based on common sense. First, an advocate might want to show that a union was on notice of a change to the schedules. Because of the lack of discovery, the advocate knows only the date of the initial change to the schedules and the date three months later when the union filed a grievance. The advocate might question the union president as follows: "You would consider yourself a person of at least average intelligence, wouldn't you?" "So you would notice if there was a change in the schedules, right?" "Union members would complain to you?" "You would hear about it pretty fast?" "Certainly, it wouldn't take three months for you to notice your schedule changed?" "And it wouldn't take three months for everyone else to start complaining, would it?"

Second, another advocate wants to prove a certain class of employees is supervisors. To do so the advocate needs to show the employees "exercise independent judgment." The advocate might ask a series of questions such as, "You try to do your best at work, right?" "And, there's not a written rule that governs every aspect of your job, correct?" "But you are still able to perform the job right?" "You simply do the logical thing, don't you?" "And part of that is trying to solve a problem on your own before seeking out your supervisor's assistance, correct?"

[338] See note 337 for examples where the advocate will not care if the witness responds unexpectedly because to do so would be contrary to shared common sense understandings of how the workplace works.

M. The Post-Hearing Brief

1. The Question: How can an advocate effectively respond in the post-hearing brief to the contentions raised by the opposing advocate at the hearing?

Post-hearing arbitration briefs are different from a traditional briefs in support of motions or many appellate briefs, because the advocate is already aware of the arguments the opposing advocate has made at the hearing. Some writers, therefore, may tend to repeat the opposing advocate's arguments in order to then rebut those arguments.

2. The Relevant Litigation Principles

As discussed above in Section A, a brief should focus on affirmative arguments. Addressing a potential counterargument through affirmative argument rather than in rebuttal is ideal.[339]

Sometimes, however, the counterargument is unrelated to the affirmative argument, making rebuttal necessary. If rebuttal is necessary and if possible, a lawyer should address the counterargument without explicitly raising it. One common method of doing so is by distinguishing negative authority without ever mentioning the broad adverse proposition for which it might stand. When it is necessary to raise the counterargument explicitly, because not to do so would confuse the decision-maker as to what function the rebuttal serves, it should be raised only once, briefly, and generally.[340] The adversarial system posits that the opposing lawyer will raise the argument explicitly, and the more times a reader reads a statement, the more likely the reader will conclude that it is true.[341]

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[339] Edwards, *supra* note 150, at 303 ("As a general rule, the most effective forms of counterargument do not identify the opposing arguments as such . . . . Rather, the effective counterargument 'disproves' the opposing arguments primarily by affirmative 'proof' of the writer's own position.").

[340] Edwards, *supra* note 150, at 303 (discussing how opposing party's argument should be mentioned "briefly and in general terms").

[341] Kenneth F. Oettle, *Don't Give Your Adversaries Free Airtime* 170 N.J.L.J. 192, 192 ("Advocacy is like advertising – if you keep putting the thought out there, sooner or later the consumer may try it on for size.");*cf.* Voss, *supra* note 151, at 314 ("The more something is said the more likely it will be believed and remembered."). Irving Younger related a story where on cross-examination the lawyer, who wished to prove the light was green, asked the witness whether the light was red multiple times, solidifying in the decision-maker's mind that the light was indeed

3. The Best Practices: Avoid stating counterarguments except when necessary for clarity.

Once the advocate has drafted affirmative arguments, he or she can begin to address the counterarguments. The advocate should resist the temptation to ensure that the arbitrator knows there is a strong rebuttal to each of the other side's arguments by explicitly mentioning each and then moving on to rebut it. Instead, the advocate should rely on the affirmative argument to rebut any directly contrary arguments. The advocate can likely rely on the arbitrator being experienced enough to recognize that the argument also rebuts the opposing side's contentions. Also, if there are cases or other authority that the opposing advocate relies on, then distinguishing that authority effectively rebuts counterargument based on the authority without explicitly repeating the counterargument.

Finally, in some instances, an advocate does need to mention the other sides' argument explicitly, in order to alert the arbitrator that the advocate is rebutting it. The advocate should do so generally and briefly. The advocate should focus the arbitrator on the strength of the rebuttal, rather than rehashing the opposing advocate's position, of which the arbitrator is already aware.

Of course, when an advocate already knows an argument will be made based on the hearing testimony, the advocate does not risk alerting the opposing advocate or the arbitrator to an adverse argument. Therefore, an advocate might feel more comfortable explicitly mentioning the other sides' argument even when not clearly necessary to orient the arbitrator. However, the disadvantage of repeating the argument and focusing on rebuttal rather than affirmative presentation of the case outweighs the advantage of orienting the arbitrator, except where clearly necessary. An advocate's focus on the affirmative argument helps the arbitrator understand the strength of the client's case and position.

V. CONCLUSION

Litigation principles are generally agreed upon for sound reasons. These principles are worthy of attention in and adaptation to the arbitration context.

red. The lawyer, thus, undermined his own case by leading the decision-maker to reach the opposite conclusion than the one he desired. Irving Younger, Credibility and Cross-examination, CLE video.

Indeed, by considering the best practices suggested by these principles, rule-makers, advocates, teachers and scholars should not only improve their skills, but should foster more effective dispute resolution. Rule-makers can push beyond ethical requirements and efficiency. They can develop rules more specifically oriented to ensure the type of procedure they desire. Advocates can better present the client's case in an organized manner that aids the arbitrator. Teachers will be better prepared to integrate arbitration skills into lawyering skills classes, to add more arbitration skills to an existing arbitration course, or simply to answer students' questions about underlying principles and methods. Scholars might find an area ripe for new scholarship – the systematic development and explication of the principles and methods underlying arbitration skills.