

# WRITING THE GRIEVANCE ARBITRATION BRIEF

by

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## I. INTRODUCTION

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One authority has defined the brief as "a survey of the potential proof for one side" of a dispute.<sup>1</sup> A second authority defines the brief as "a systematic presentation of arguments, authorities, and relevant background material" designed to aid in the decision-making process.<sup>2</sup> In labor arbitration the written brief is rarely used for an expedited hearing, but is frequently used in a regular grievance proceeding. At times the parties use the written brief to supplement final closing oral arguments; while at other times it is used in lieu of oral arguments. Whether used to supplement or in substitute, a well-written brief does such to advance the position of the advocate and, in fact, may be the deciding factor in a case. As such, the craftsmanship and persuasiveness of the brief are vitally important to the advocate's interest.

This section of the monograph will summarize many of the basic and technical rules covering style, form and substance

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<sup>1</sup> Glen E. Mills, Reason in Controversy, Allyn and Bacon, Inc., Boston, 1964, p. 184.

<sup>2</sup> Board of Student Advisers, Harvard Law School, Introduction to Advocacy, 2nd ed., The Foundation Press, Inc., Mineola, NY, 1976, p. 34.

that are important for effective brief writing. In reading the following materials, the advocate should not lose track of the fact that the primary purpose of the brief is one of influencing the arbitrator's decision. A brief which is technically well-written but unpersuasive is of little value. This is not to infer that rules of style and form necessarily subtract from the persuasiveness of the brief. To the contrary, the essential message of this chapter is that rules of style and form, if applied with persuasiveness in mind, will enhance the overall effectiveness of the brief.

The brief is comprised of a number of different sections, each of which will be analyzed separately. It is important, however, also to view the brief as a whole. The advocate should bear in mind that the various sections ought to work together to present the arbitrator with a systematic and logical case designed to favorably influence the final decision. Most important, since the arbitrator's knowledge of the case is normally quite limited, the brief should be critically examined to insure that it is complete, comprehensive and easily understood.

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## II. FORMAT

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### A. Title Page

The title page provides the relevant identifying information about the case and should be placed on the front of the brief. Illustration 1, which follows, is a sample of a title page and represents one of many formats that can be used. Regardless of the format, however, the following information should be included:

1. The names of the parties to the action;
2. The name of the grievant;
3. A statement identifying the document as a brief for an arbitration proceeding;
4. A statement identifying the party for whom the brief is being written (Union or Employer);
5. An identifying number if appropriate such as an AAA or FMCS case number;
6. The name of the arbitrator to whom the brief is being submitted;
7. The names of the spokespersons for each party.

### B. Table of Contents

The table of contents serves a double purpose. First, it allows the arbitrator to locate the various parts of the brief quickly. Second, a properly executed table of contents provides a summary of the major arguments and sub-arguments advanced by the advocate. Thus the arbitrator is quickly able both to overview the major lines of analysis advanced by the advocate and to locate the text on each argument.

Illustration II is a sample table of contents. A review of that sample provides an overview of how to construct a proper table of contents and also offers a suggested format for structuring the brief as a whole.<sup>3</sup> Several aspects of the style and format found in the sample brief deserve special comment. First, the argument section is set out separately from the materials found in the introduction and conclusion sections. Thus the format clarifies for the reader that the introductory and concluding materials are there for purposes of clarifying, supporting and reinforcing the body of the brief -- the arguments. Second, the arguments themselves are highlighted in three separate ways: 1) the main arguments are set to the furthest left margin, 2) the arguments are set in all capital letters, and 3) the arguments are underlined. Clearly this format should leave no doubt in the arbitrator's mind as to the essential lines of argument and analysis being advanced by the advocate. Third, where a main argument is complex, the recommended format encourages the advocate to provide in the table of contents an outline of the sub-arguments both for the purpose of helping the arbitrator to understand the complexities of an argument and to allow for an easy reference to the supporting text.

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<sup>3</sup> The sample brief is modeled after a recommended format for submitting a legal brief to an appellate court (*supra*, pp. 36-37). The author of this article believes that the format for writing a legal brief can be effectively adapted to brief writing in grievance arbitration disputes.

ILLUSTRATION I

TITLE PAGE

IN THE MATTER OF THE ARBITRATION	)	THOMAS WHITE
	)	
BETWEEN	)	ARBITRATOR
	)	
INTERNATIONAL FEDERATION OF	)	
PROFESSIONAL AND TECHNICAL	)	
ENGINEERS, LOCAL 85, AFL-CIO	)	
	)	
"THE UNION"	)	
	)	
AND	)	
	)	
THE CITY OF PORTLAND	)	Reclassification Grievance
	)	Susan Jones, Grievant
"THE EMPLOYER"	)	AAA File No. 75-390-0127-84

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UNION'S POST HEARING BRIEF  
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Representing the Union:  
RICHARD KINGMAN  
business Representative

Representing the City:  
LEON WILLIAMS  
Assistant City Attorney

ILLUSTRATION II

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### III. INTRODUCTION

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While convention dictates that certain items be included in the introduction to the brief, it is important to remember that the basic purpose behind the introduction is to add background and clarity to the arguments themselves. Thus the rule of thumb for the advocate is to provide whatever is necessary to facilitate the arbitrator's understanding of the arguments. Consequently, there is no hard and fast substantive requirement as to what must be contained in the introduction. Generally, however, as a minimum the introduction will contain a subsection on background materials, a statement of the case, a statement of the proposition in dispute and an overview of the applicable contract language. Each of these four items is examined separately.

#### A. Background

Material presented in the background subsection of the brief normally focuses on procedural matters associated with the grievance dispute. Included in this material can be notations about the various steps of the grievance procedure, the process by which the parties arrived at a decision to arbitrate the dispute, the process by which the parties chose the arbitrator, any preliminary matters submitted to the arbitrator, and any other matters not directly related to the substance of the dispute itself. Usually this section is relatively brief but may be extended if there are a number of

procedural problems associated with the dispute and/or the arbitration hearing.

#### B. Statement of the Issue

In many grievance disputes the parties are able to stipulate to the statement of the issue. In such a case the advocate needs simply to present that stipulated statement in this subsection of the brief. However, if the parties are unable to agree on the issue statement, then the advocate needs to present a statement of the issue as viewed by the party he/she represents. In general, arbitrators draw their authority from the labor contract thus the advocate should frame the issue to specify what portion(s) of the labor contract is deemed to have been violated. Additionally, while parties at times choose not to present the question of remedy as a separate issue, to do so clarifies the arbitrator's authority.<sup>4</sup> An example of an issue statement that identifies the contract language in dispute and grants specific remedial authority to the arbitrator is as follows:

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<sup>4</sup> There is some dispute in arbitration circles as to whether the arbitrators have the right to remedy a finding of a contract violation where the parties do not specify that the question of remedy is properly before them. Most arbitrators take the position that the question of remedy is inherent to a question of possible contract violation. For clarity's sake, however, this entire issue can be side-stepped simply by providing the arbitrator with a remedy question as part of the statement of the issue. For a more complete overview of this issue, see Owen Fairweather, Practice and Procedure in Arbitration, 2nd ed., The Bureau of National Affairs, Washington, DC, 1973, pp. 494-497.



- 1) Did the City violate Article X, Section 5 paragraph (a) by not reclassifying the grievant to the Administrative Specialist I classification?
- 2) If so, what is the appropriate remedy?

### C. Statement of the Case

The statement of the case is often referred to as a statement of facts. This subsection provides the arbitrator with a clear overview of the incidents and events that led up to the grievance. Good advocacy recognizes the difference between information provided as fact or evidence and the arguments that are constructed from those facts. Consequently, the arbitrator must be able to recognize facts as facts. It is perhaps helpful to think of the statement of the case as being a story presented to a person (the arbitrator) for the purpose of providing a comprehensive understanding of the events in question.

In writing the statement of the case, the advocate should focus on two essential goals. The first is clarity. The advocate may have spent many hours, if not days, reviewing all of the essential history and facts behind the dispute. The arbitrator, on the other hand, is completely new to the dispute and thus relies exclusively on the information provided during the hearing and in the brief to clarify all relevant matters in the dispute. Consequently, what may appear very obvious to the disputants can be obscure to the arbitrator and thus needs to be carefully explained.

Second, the statement of the case provides an opportunity for the advocate to emphasize those facts which are essential to the line of analysis will be advanced in the argument section. Care should be taken not to distort the factual record. To do so is not only disorienting to the arbitrator, but in the end may also weaken the advocate's credibility which is essential to persuasive argument.

In writing the statement of the case there are a number of approaches which may be taken. One, which is perhaps most effective, is for the advocate to simply put forward the chronological history of the case as it unfolded. This may include background on the grievant, i.e., date of employment, work record, etc. Where the case involves contract interpretation, a note on the history of bargaining may well be appropriate. Again, however, the statement of the case should be written in a straightforward, non-argumentative fashion.

#### D. Applicable Contract Provisions

Little needs to be said about this part of the introduction. The arbitrator's analysis is facilitated when the disputed contract language can be quickly referenced. Moreover, the advocate will find more easily construct arguments if the citation for contract language is already contained in the brief as opposed to referring to language found in an exhibit. Thus this subsection functions primarily

for the purpose of expediency and efficiency. Consequently the advocate should include in this subsection any portion of contract language to which argument will refer.

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#### IV. BODY OF THE BRIEF

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The body of the brief is composed exclusively of the major arguments of the advocate and this section is the heart of the advocate's brief. The significance of this section is emphasized by stylistically elevating its importance over the introduction and the conclusion. Roman numerals are reserved for the purpose of identifying main arguments and these arguments are further emphasized through the capitalization of all letters and by underlining (see Illustration II).

The arguments should be developed to reflect a clear and consistent theory of the case. The theory of the case is the interpretation placed on the facts by the advocate and put forward through the main arguments. In other words, the arguments taken together (theory of the case) reflect what the advocate believes to be the strongest case that can be built to support or prove the primary contention. (The term "primary contention" refers to the basic position taken by the advocate toward the issue in dispute. For example: "The discharge of the grievant was for just cause and not in violation of the agreement.") The advocate should keep several factors in mind when developing the theory of the case.

First, the main arguments will each head a subsection in the body of the brief. The advocate should begin each subsection by stating the argument in exactly the same fashion as found in the Table of Contents, i.e., using Roman numerals, capitalization of all letters, and underlining. The substance of each subsection is devoted to the development of the main argument. If the main argument is extremely complex then the material should be further broken down into a series of sub-arguments.

Second, in developing the main arguments, the advocate must focus on the specific nature of the dispute between the parties. Typically, there are four different generic types of disputes. They are disputes over: 1) fact, 2) definition, 3) value, and 4) policy or action.<sup>5</sup> In a dispute over fact, the parties disagree as to what actually occurred, for example, in a discharge case involving the issue of theft, the dispute might focus on whether or not something was taken by the grievant. A dispute over definition focuses on the meaning to be given a word or event, e.g., in a modified seniority provision does the word "training" mean formal training, in-service training or on-the-job training. A value dispute is concerned with the weight, value, utility, or quality of something, e.g., how much weight or credit ought be given for a good employment record or bad employment record in a

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<sup>5</sup> Douglas Ehninger and Wayne Brockriede, Decision by Debate, Dodd, Mead & Company, New York, 1963, pp. 240-241.

discipline or discharge case. In a policy or action dispute, the parties generally agree as to what occurred but can't agree on what the proper policy or action ought be in response to the situation. For example, in a layoff dispute the employer might argue that a reduction in business in one division justified a layoff without regard for plant-wide seniority, while the union might contend that a reduction in one division did not justify such a layoff. Typically, a dispute over policy or action also involves either a factual, definitional or value dispute.

Regardless of whether the central dispute between the parties is a matter of fact, definition, value, policy, or any combination of these four, the advocate's theory of the case must clarify the type of dispute. To put it another way, while it may be obvious that the parties disagree, the focal point of that disagreement may be vague. Thus, in writing the main arguments, the advocate must lead the arbitrator to the specific point of dispute.

Third, the relationship between the main arguments can either be parallel or in a series.<sup>6</sup> In the parallel relationship each argument stands independent of the other argument and in a direct, supporting relationship to the primary contention. Consequently, each of the main arguments, in and of themselves, may be sufficient to justify the adoption of the advocate's position. Illustration III depicts

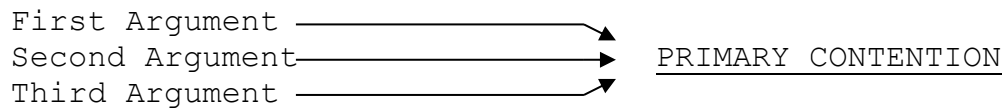
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<sup>6</sup> Ehninger and Brockriede, pp. 234-236.

the relationship between main arguments and primary contention in the parallel form of argument development.

ILLUSTRATION III

PARALLEL STRUCTURE



The following is an example of the parallel form in a discharge dispute from the employer's perspective:

1. The proven charges against the grievant are of such a serious nature that discharge is justified on a first offense.
2. The grievant's very poor work record and numerous written warnings support the employer's decision to terminate him.
3. The contract requires that the employer's decision to terminate be upheld if the arbitrator finds that the charges against him are true.

A major problem area with the parallel form of argument is the tendency of advocates to use the "shotgun" approach. In the shotgun approach, the advocate places in the brief all possible arguments that can support his/her position. This approach is often motivated by the advocate's concern that an argument might be overlooked which the arbitrator would find persuasive. While there is that risk, on balance the shotgun is probably more likely to weaken the advocate's case than to strengthen it. In reading numerous arguments that lack substantial strength, the arbitrator's attention may stray from those arguments critical to the advocate's position. In

such a case, the arbitrator may not see the important arguments with the clarity that is essential for effective persuasion. Thus, the advocate is better advised, when using the parallel form, to select and develop only those arguments which are well supported and which are vital to the advocate's theory of the case.

One approach to ensuring that the arguments chosen are important to the case is called the "why-because" method. Under this technique, each argument must stand in a why-because relationship to the primary contention. For example, if there is a just cause discharge dispute before the arbitrator, then the advocate for the union will usually be contending that the employer's action failed the test of just cause. Applying the why-because writing aid would result in the following structure:

Primary Contention: The employer's actions in discharging the grievant fail the tests of just cause

WHY (do I support the above contention)?

(Because) 1. First argument

(Because) 2. Second argument

(Because) 3. Third argument

The words "why" and "because" are not written into the brief, rather they reflect the thought process of the advocate. The why-because method of structuring arguments places a heavy burden on the advocate to state the arguments in such a fashion that each very clearly and logically stands

in a supporting role to the primary contention. Arguments in a brief are presented as proof and this relationship should not be obscured. Arguments that stand only in a weak or tangential relationship to the primary contention fail the why-because test and should not be developed in the brief.

In the series structure, arguments are related in the fashion of a chain. In a chain each new argument is dependent upon the previous argument and, in turn, forms the basis for the next argument. Thus, if any one argument is proven incorrect, the entire chain collapses. Illustration IV sets out the serial structure.

#### ILLUSTRATION IV

##### SERIES STRUCTURE

First Argume → Second Argument → Third Argument → Fourth Argument → PRIMARY CONTENTION

The following is an example of a serial argument used to build the union's case for a layoff/seniority dispute:

1. Bob was notified that he was being laid off.
2. Bob is senior over Tom, Bill and Harry.
3. Bob's attempt to bump Bill, Tom and Harry was denied by the employer.
4. The labor contract grants bumping rights by seniority.
5. Therefore, (primary contention) the employer's denial of Bob's bumping rights is in violation of the labor contract.

Fourth, regardless of whether the advocate uses a parallel or series structure, the substance of each argument



must integrate the facts with contract provisions. The arguments, therefore, consist of a step-by-step reasoning process that emphasizes the facts and their relationship to relevant contract language and/or the practices of the parties.

Finally, a major substantive and stylistic problem often encountered when crafting the argument section of the brief, concerns the use of citations. While some arbitrators take the view that they were hired by parties to render their own unique, independent judgment on the dispute; most arbitrators are receptive to the authority provided by the work of other arbitrators where that work closely parallels the facts of the instant dispute. Consequently, citations can be useful to the advocate. However, in using citations, the advocate should be sensitive to two problem areas. First, the advocate must be clear about the purpose behind the use of the citation. Is it, for instance, being used to establish a general arbitrational principle; if so, then what is that principle? Or, perhaps it is being used as authority to help give weight to the position taken by the advocate. If so, it is important that the advocate conclusively establish that the instant case and that being cited are essentially similar in nature. Second, lengthy quotes generally do not serve a constructive purpose in the text of the brief. The specific point often gets lost in the extended verbiage. Rather, the advocate is generally best advised to summarize the point and add emphasis

with short citations. If the advocate believes that the arbitrator should review a long excerpt from the prior arbitration decision, then that decision should be attached as an appendix to the brief.

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## V. CONCLUSION

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The conclusion of a brief provides both a quick summary of the advocate's case and a statement as to the relief sought (deny the grievance or make the grievant whole). The summary portion of the conclusion should be short, and in most cases will be a simple one or two sentence statement of the basic theory of the case. It is not necessary to summarize all of the arguments presented in the body of the brief.

The conclusion of the brief should also inform the arbitrator what action the advocate is requesting, such as affirm, deny, cease and desist order, or a make whole remedy. Identifying the action that the advocate is requesting should not be considered just a formality. The relief one or both of the parties wants may not be clear, especially when the issues are relatively complex. It is discouraging, to say the least, for advocates to find that they won the case on its merits, just to find that the remedy provided by the arbitrator is inadequate. To help protect against such an eventuality, the advocate ought be clear and persuasive as to expected relief.

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## VI. CLOSING COMMENT

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Good brief writing integrates proper form and style with a good sense of persuasiveness. While a technically well-written brief can do much to advance the cause of the advocate, a failure to fully understand the psychology of persuasion will, in turn, do much to undermine the brief. Two concluding observations are presented with the above point in mind. First, arbitrators generally are not persuaded by heavy sarcasm or material which denigrates the other party. Phrases such as "the absurd position of my opponent" or "the ridiculous interpretation of contract language as offered by the union (employer)" detract from the persuasiveness of the advocate's case. Second, arbitrators do not like to be threatened. Veiled threats such as "only a person who lacks an understanding of the collective bargaining process could agree with my opponent" may not be intended as intimidation but read as such and work against the advocate's interest.

Style and form that help to establish clarity, combined with material that is both well-reasoned and persuasive, are the keys to effective brief writing. Advocates who write the brief with these goals in mind will do much to advance the cause of their clients.