The beginning is the most important part of the work.

Plato

I. OVERVIEW

After disposing of preliminary matters, the arbitrator traditionally asks whether advocates wish to make an opening statement. Opening statements mark the formal beginning of the arbitration hearing.

I cannot stress the importance of an effective opening statement. At no other time during the hearing are arbitrators more interested in learning the nature of the dispute, the central facts, the contractual and legal provisions at issue, and advocates’ theories of the case. This is your opportunity to tell your story directly to the arbitrator, not second-hand through witness testimony and exhibits. The opening statement is the roadmap that will guide the arbitrator to the destination of your choosing. An effective, persuasive opening statement will assure the arbitrator that he or she can rely on your representations. A poorly executed opening statement will place your professionalism and client’s case at risk.

This chapter describes techniques for developing powerful, persuasive opening statements. I discuss the advantages and disadvantages of making a statement and procedures and elements of effective opening statements. You will also find discussions on how to organize, prepare and present a powerful opening statement. Best practices and pitfalls to avoid are also included.

II. OPENING STATEMENT PROCEDURES

A. THE ARBITRATOR’S GENERAL RULE

Arbitrators enjoy wide discretion in whether and when to allow parties to make an opening statement. Opening statements are not guaranteed in the collective bargaining agreement or protected by statute. Arbitrators often set limits on their scope and length. Because they are so critical to your success, I recommend that you research the preferences of your selected arbitrator on this subject prior to the hearing. Arrangements for opening arguments would be a good topic to discuss at a prehearing conference with the arbitrator. See Chapter 3 for guidance on selecting an arbitrator.

Opening statements are customarily given before evidence is introduced into the record. The party with the burden of proof will present its opening statement first. The opposing party may either make its opening statement immediately after or wait (reserve) until the party with the burden of proof has presented its case. If an arbitrator wants to understand both sides of a dispute early in the hearing, he or she may ask both parties to make their opening statements before any evidence is offered into the record.

An arbitrator may entertain a request to change the order in which opening statements are presented. For example, an arbitrator might require the agency’s advocate to give his or her opening statement first in a contract case in which the grievant has been allowed to represent himself and is inexperienced with the arbitration process. Of course, the agency’s advocate could object to the unusual direction.

Some arbitrations, often jurisdictional disputes, involve more than two parties. Advocates determine the order in which opening statements will be made before the hearing, with the assistance of the arbitrator, if needed. The party with the most to gain as a direct result of the grievance may open first, followed by the party who bears primary liability. Intervening, or third parties, will give their opening statements last. Let us assume a third party, Union B, has intervened between Union A and the agency. At the hearing, Union A will open first, followed by Union B, and then followed by the agency. The agency may be afforded the opportunity to reserve opening until after Unions A and B have presented their cases.

B. NEVER WAIVE YOUR OPENING STATEMENT

Parties are not required to make an opening statement, unless directed by the arbitrator. Never waive your right to make an opening statement. Remember that the arbitrator is probably the least informed person on the intricacies of the issue at hand at the beginning of the hearing. Without the structured argument of an opening statement, the arbitrator will not know why you are offering your witnesses and exhibits into the record or making evidentiary objections. A decision to waive opening remarks is a decision to keep the arbitrator from learning your position at the outset of the hearing and allows your opponent to define the dispute and resolution for the arbitrator.

C. ADVANTAGES OF THE RESPONDING PARTY TO RESERVE ON OPENING STATEMENT

If you are the responding party, there are three reasons why you may wait to make your opening statement until your opponent has presented his or her case. First, you may not want to inadvertently reveal anything the opposition can use to support its theory of the case. Second, you may feel the opposing advocate has not presented sufficient evidence to establish his or her claim and move that the arbitrator dismiss the opponent’s case because the facts described in the opening statement and the law or contract do not establish a basis for relief. If the motion is denied, you will be prepared to make your opening statement and proceed with your case. Third, in rare situations in which you expect the opposition’s case to take weeks to complete, reservation of your opening statement will refresh the arbitrator’s memory of your theory of the case.

1. Revealing Information Useful to the Opposition

Advocates may erroneously believe that their opening statement may reveal some “bombshell” evidence that their opponent is unaware of,
especially if they have the burden of proof and are opening first. In almost all cases, the “bombshell” is already known to the opponent, and the advocate has missed a valuable opportunity to present a convincing, persuasive outline of his or her argument.

Even if information contained in an opening statement has a “bombshell” effect, the opposition has options. The opposition may object to the new evidence based on prejudicial surprise and ask the arbitrator to exclude it. Or, the arbitrator may postpone the hearing so that the opposition has a reasonable opportunity to respond to the new information. In either situation, the advocate who waives the opportunity to make an opening statement for fear of revealing new, explosive information to the opposition has basically planted a bomb in his or her case. The “bombshell” theory presupposes that your opponent has not adequately prepared his or her case.

Respondents who reserve their opening for fear of revealing valuable information to the opposition may overestimate the value of “surprise” evidence. In most cases, the parties have vetted the issues during the grievance process prior to the hearing. Moreover, reasonable prehearing preparation will likely expose most “new” arguments and evidence. Indeed, assuming that your opponent has not adequately prepared his or her case for everything you intend on throwing at him or her violates one of the cardinal rules of case preparation: assume your opposition knows everything you know about the facts, the contract, and the law. If you are not absolutely positive that the other side is completely unaware of the “surprise” facts and argument you intend to hide by reserving your opening, you have forfeited the advantages of opening for nothing. Even if your opponent has not discovered your secret “new” argument or evidence, the arbitrator may grant the opposition’s objection to your proffer of new evidence or argument at hearing because of the prejudicial surprise. Many arbitrators believe that good faith bargaining requires disclosure of the core arguments and evidence you intend to rely on in support of your position during the multi-step grievance process prior to hearing. Such disclosure is in keeping with the requirement that grievances should be resolved at the earliest opportunity. Alternatively, the arbitrator may postpone the hearing in order to grant the party objecting to the new evidence a reasonable period of time to prepare.

2. Opposition Cannot Prove Its Case

A respondent who reserves opening remarks based on the belief that his or her opponent will be unable to prove his or her case-in-chief is generally wrong. The belief is often based on an assumption that the opposition is unaware of critical facts, arbitration awards, or the law governing the dispute. Just because the respondent is unaware of such critical information does not mean your opponent is equally unaware. Do not assume that your opponent has failed to adequately investigate and prepare his or her case. Before electing to reserve your opening based on the belief that your opponent will not be able to prove his or her case, you should be highly confident, based on your own through investigation and preparation, that the facts critical to your opponent’s case do not, in fact, exist.

It is unlikely that the arbitrator will grant a motion for, essentially, a bench decision in your favor because your opponent failed to establish one or more critical elements of his or her claim. Arbitrators generally are not receptive to making bench decisions without some time to mull over the facts and arguments. Again, absent prehearing briefs, arbitrators are often playing catch-up on the facts, contract, and legal provisions governing a particular case. Moreover, in most cases the opposition has usually proffered sufficient evidence to persuade the arbitrator to hear more before issuing a decision in your favor. Given these realities, reserving opening in the hope that your opposition will fail to proffer critical evidence during his or her case-in-chief, and that the arbitrator will grant your motion to issue a bench decision in your favor, is a long shot at best.

New advocates should open at the beginning of every case. Reserving opening is a tool for use by highly experienced advocates, and then only sparingly.

If you are determined to reserve your opening, ask the arbitrator to read the underlying grievance papers prior to receiving your opponent’s opening remarks. Many arbitrators, the author included, will do this as a matter of practice. If your position is adequately set forth in the moving papers, you may retain some of the benefits of opening at the beginning even though you have reserved the formal opening until the end of your opponent’s case-in-chief.

The central disadvantage of delaying your opening statement is that the arbitrator may not understand your position until late in the hearing. Evidence will be judged by the facts and arguments presented by your opponent. Your evidentiary objections may be a poor substitute for a concise, coherent articulation of your position made at the beginning of the hearing. If you introduce your argument after your opponent has presented his or her case, do not expect the arbitrator to rule in your favor on evidentiary objections.

3. First Impressions Matter

The more the arbitrator relies on your opponent’s framework (i.e., the opening statement) to view the presented evidence, the more difficult it will be to reorient him or her to your way of thinking. While you are making your record, your opposition will repeatedly refer the arbitrator back to the framework to which he or she was first introduced.

III. OBJECTIVES OF AN OPENING STATEMENT

An effective opening statement has three objectives: to provide the arbitrator with a framework or roadmap of the critical facts, contract provisions, and law of the case; to establish your credibility and build rapport with the arbitrator; and to persuade the arbitrator that your client is right and should win the case.

You must persuade the arbitrator that your theory of the case should win. An opening statement is advocacy without argument. It is not merely a recitation of “what the evidence will show.” It is storytelling at its best. You must weave together the core issue(s), facts, contract provisions, law to be decided, and the framework in which evidence is to be judged. Lead the arbitrator to the end of your story and describe why your version of the final chapter is justified.

If you do not take time to prepare an effective opening statement, the arbitrator may assume that you did not take time to properly analyze the legitimacy of your case. This assumption may be unfair. Arbitrators know that cases are frequently “dumped” on advocates at the last minute. In the film, Unforgiven, just before Clint Eastwood shot Gene Hackman, Hackman pled, “I don’t deserve this, to die like this. I was building a house.” Eastwood answered, “Deserve has got nothing to do with it.” Unfortunately, lack of preparation, as exemplified in a poorly articulated opening statement, will garner as much sympathy from an arbitrator as Hackman received from Eastwood’s character.
IV. CONTENT OF AN OPENING STATEMENT

Several general parameters govern what you may say during your opening statement. The parameters are not included in collective bargaining agreements or codified into law. They have been adopted from trial advocacy practiced in the courts, and arbitrators exercise wide discretion in how they are followed. The traditionally permissible and impermissible content of opening statements follow.

A. PROHIBITION OF ARGUMENT

The rule most commonly applied to opening statements prohibits you from “arguing” your case because arguments may not precede the introduction of evidence. In practice, a proper opening statement is often difficult to distinguish from one that is inappropriately argumentative. The difficulty is due to a lack of uniform agreement as to the definition of argument. Generally, argument involves the activities of urging, comparing, using opinions, characterizing, or telling the arbitrator how to decide. John W. Cooley with Steven Lubet, Arbitration Advocacy, Second Edition, p. 114 (NITA 2003). Appropriate opening statements are intended to help the arbitrator understand the evidence.

Arbitrators have developed two tests to distinguish between permissible and impermissible opening arguments.

- **Witness test.** If a witness can take the stand and testify to the information made in the opening statement, it is not argument. However, if a witness does not exist who could testify, or if such testimony would be excluded, the information is impermissible content for the opening statement.

- **Verification test.** If the remarks in the opening statement can be verified, they are permissible. If not, the remarks constitute impermissible argument. The reason is that facts can be verified through testimony or other evidence. Statements that cannot be proven must be argument.


Some arbitrators will allow opening statements in which advocates draw reasonable inferences from the anticipated evidence. Other arbitrators find such inferences are not susceptible to proof and will consider them argumentative.

Common examples of impermissible argument in opening statements include:

- Statements claiming that evidence satisfies a contractual or legal standard. This determination is made by the arbitrator, not you. You may identify the standard and describe the facts that will meet or fail to meet that standard. You may not conclude that the evidence has satisfied that standard.

- Expressions addressing the credibility of witnesses or evidence.

- Direct emotional appeals for sympathy for your client or antipathy toward the adverse party. You can describe the facts in a way that positions your client favorably and your opposition negatively.

- Explanations of the applicability of specific arbitration or case law and legal conclusions.

Arbitrators may find your delivery style argumentative. Tone of voice, emphasis of a word or phrase, extreme repetition of facts, use of rhetorical questions, or body language may render otherwise acceptable language into impermissible argument.

Although argument is prohibited, arbitrators routinely allow parties to state their legal claim or defense. For example, a union advocate in a discipline case might claim in the opening statement that the agency did not have just cause to remove the grievant for the reasons charged. While this is technically an argument, most arbitrators allow this type of argument if it is briefly stated as the position of the party. The opposing party should refrain from objecting to this minor form of argument.

B. INAPPROPRIATE COMMENTS

In addition to argument, the courts suggest the following types of comments should be omitted from opening statements because they do not help the arbitrator understand the evidence:

- Personal attacks on the opposing advocate, e.g., that agency counsel would try to confuse the arbitrator.

- Referring to similar cases that had been recently won, lost, or settled; references to other similar cases, such as informing the arbitrator that the agency recently lost or settled a similar case.

- Offering personal opinions on the merits of the dispute or as to a non-witness, the advocate offering his or her personal opinion on the merits of the dispute, or stating facts the advocate is personally aware of.

- Discussing evidence that the arbitrator has previously excluded from consideration.

- Misstating the contractual or legal standard.

Expect your opponent to object if you include remarks similar to the above examples in your opening statements. The arbitrator will likely sustain the objection. Object if your opponent includes similar comments. Do not resort to personal attacks, discuss evidence the arbitrator has excluded, or offer your opinion on issues that should be addressed by the arbitrator.

C. DISCUSSION OF THE CONTRACTUAL OR LEGAL STANDARD

Your opening statement should identify the contractual and legal principals at issue. Feel free to read relevant portions of the contract provision, statute, regulation, bargaining history, side agreements, or established past practices. Incorporate these standards into your opening discussion. However, you may not argue how the standard should be interpreted.
D. DISCUSSION OF THE FACTS

Summarize the core facts involved in the case. Core facts are those that prove or disprove the contractual and legal issues in dispute. Describe the primary evidence you will offer in support of your position without going into detail. Emphasize evidence not in dispute.

When discussing facts, avoid inadmissible evidence, overstating evidence, and evidence and defenses you expect your opponent to offer.

- **Inadmissible evidence.** Do not refer to evidence the arbitrator has previously excluded or which you do not intend to offer into evidence. For example, your opening statement would not address information obtained from a witness unable to testify or evidence protected from disclosure by the attorney-client, physician-patient, husband-wife, or priest-penitent privileges. To be appropriately included in your opening remarks, you must have a reasonable, good faith belief that the evidence is relevant, admissible, and will be offered into evidence.

- **Overstatement of your evidence.** Do not exaggerate or overstate the evidence you expect to offer into the record. For example, if your witness will testify the grievant drove the company vehicle at 65 miles per hour, state that fact in your opening. Do not describe the grievant as “excessively speeding;” unless the witness used the characterization. Objections based on exaggerations in opening statements are rarely granted because arbitrators do not know whether the assertion can be proven or is hyperbole. Tactically, inflated promises of proof set you up for failure. If the arbitrator does not share your opinion regarding the weight of the evidence, he or she may find that you have failed to establish a critical element of your claim or defense.

- **Evidence and defenses your opponent will introduce.** Because this area is a bit gray, a brief background may be helpful, especially when you need to respond to objections posed by your opponent. Most arbitrators will allow you to address in your opening evidence and defenses you anticipate the other side will offer. Having some knowledge of how and why courts handle this situation will be helpful, particularly in responding to objections by your opponent.

In court, you are generally not permitted to address in your opening remarks evidence and defenses you anticipate your opponent will offer and how you will rebut them. Unless you plan to offer the evidence yourself, you lack a good-faith basis that your statements will be supported by testimony since you have no control over whether your opponent will call a particular witness or elicit testimony in support of a particular defense. Courts have recognized an exception to this prohibition where the opposing party represented they would offer certain evidence or made certain arguments in the pleadings, prehearing motions, or in their opening statement. In that case, you may refer to the referenced evidence and defenses in a nonargumentative way in your opening.

In arbitration, there are no formal pleadings. Most arbitrators recognize the documents exchanged during the grievance process as the equivalent of court pleadings. As such, you may address in your opening those facts, claims, or defenses you anticipate the other side will make because they were raised during the grievance process. To meet an objection by the opposing party, you should be fully prepared to show the arbitrator the origin of the anticipated facts, claims, and defenses in the grievance chain.

It is generally a good idea to include in your opening some reference to facts and arguments you anticipate will be made by your opponent. Including information on your opponent's position completes the picture for the arbitrator, which fulfills one of the purposes of opening statements. Arbitrators rarely allow replies and sur-replies to opening statements. This puts the party with the burden of proof at a disadvantage because he or she will not have an opportunity to reply to any affirmative defenses or counterclaims advanced by the responding party. To redress that problem, the party with the burden of proof can address in his or her opening the evidence or claims it anticipates the responding party will make based on the grievance record preceding the hearing. Only summarily address your opponent's anticipated evidence and claims. The majority of your opening statement should be spent addressing your case, not your opponent's. Avoid going into great detail on what you anticipate your opponent will do because there is no guarantee that he or she will call the witnesses you expect, that the witnesses will testify in accordance with your expectation, or that your opponent will make the arguments he or she made earlier in the grievance process. This may lead the arbitrator to believe that you do not know what you are doing.

E. ETHICAL CONSIDERATIONS FOR ATTORNEY ADVOCATES

Advocates who are attorneys have additional ethical considerations when formulating their opening statements. The Model Rules of Professional Conduct, adopted by most states with some modifications, do not specifically address opening statements. However, several general provisions apply:

- Rule 3.3: Prohibits a lawyer from knowingly making a false statement of material fact to a tribunal.
- Rule 3.4(e): Prohibits a lawyer from alluding to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue, or state an opinion as to the justness of a cause or the credibility of a witness, or the culpability of a civil litigant.

The Model Rules mirror limitations placed on opening statements in labor arbitration. Attorney-advocates who violate these rules risk having a complaint lodged against them with their local bar association.

F. REMEDY SOUGHT

Your opening statement should include the remedial relief sought. Remedial relief for a grievant may request the arbitrator to direct the agency to cease and desist from violating the collective bargaining agreement. It may address a claim for monetary relief. The responding party should address the grievant’s claim as well as its own request for relief. Arbitrators armed with this information at the outset are better able to evaluate the evidence presented during the hearing.

G. ADMISSIONS AND OMissions

For some arbitrators, the content of your opening statement may impact the substance of your claim. These arbitrators will hold you to specific admissions of adverse facts made during your opening remarks. Let us say that you claim a grievant struck a coworker with a closed fist in your
opening statement, and the grievant later testifies that he only pushed the coworker. The arbitrator may strike the grievant’s testimony in favor of the opening admission or sustain an objection from the opposition to rule in favor of the opening statement. Arbitrators who follow this school of thought believe that admissions made during opening statement are binding. Some arbitrators may find that you have waived a claim or defense if it was omitted from your opening remarks. For example, failure to allege in your opening remarks that discipline violated your client’s due process rights because of an inadequate investigation may preclude you from offering evidence or argument to support such a claim during the hearing.

While most arbitrators do not apply the rules of admissions and omissions, the practice may be used by arbitrators who were formerly judges and trial attorneys. Non-attorney arbitrators and attorney-arbitrators who did not live in the courtroom generally do not follow these rules. Research the background of the selected arbitrator in your case.

If you have properly prepared your case, the fact that you have selected an arbitrator from the admissions-omissions school should not be an issue. Prepared advocates can back up everything they say in opening with evidence. Prepared advocates also do not omit claims or defenses. Of course, sometimes even prepared advocates inadvertently make misstatements or omissions. To avoid inadvertent mistakes you could preface your opening by requesting the arbitrator not hold any misstatement of fact or omission of a claim or defense against your client. You could also answer any attempt by your opponent to hold you to an adverse fact or omission by arguing that the opening statement is not evidence, and court rules do not apply in arbitration. Point out that the collective bargaining agreement does not provide that admissions or omissions during opening statement are binding or that the rules of court govern. Remind the arbitrator that arbitration is an alternative dispute resolution system specifically intended to avoid the formality of court procedure, including the rule binding parties to admissions or omissions made during opening statements.

H. COMMENTS REGARDING THE OPPOSITION’S OPENING STATEMENT

If you are the responding party, you have the advantage of responding to your opponent’s opening statement. Take advantage of this unique opportunity. Listen carefully to your opponent’s opening. What does he or she claim he or she will prove? What does he or she fail to address? Where are the strengths? What weaknesses are evident? In your opening remarks, you will respond to your opponent’s claims while advancing your version of the case.

Remember, argument is not permitted. You must refute the opposition’s claims without arguing them. As you are laying out the facts and contractual positions of your persuasive opening story you can strategically note your disagreement with the representations made by your opponent. If the disagreement is factual, you can simply note that you will prove otherwise. Where the disagreement centers on whether the undisputed facts satisfy the elements of a claim or defense, your opening story should inexorably lead the arbitrator to the correctness of your position. Your opponent’s disagreement, in contrast, should appear to draw the wrong conclusions from the facts. After laying out your version of the facts, you should state as much to the arbitrator on every issue where you believe that is the case.

Finally, whether you should highlight your opponent’s omission of critical facts or arguments will depend on the circumstances. The responding advocate should be cautious about highlighting the omission of a critical element of a claim or defense in the opening of the party with the burden of proof. By pointing out the omission in your opening you may inadvertently educate your opposition of a critical deficiency in his or her case with sufficient time for your opponent to recover. You may want to reserve addressing this type of omission until your closing argument.

In contrast, the responding advocate should always put a spotlight on the opponent’s failure to address adverse evidence in his or her opening. Similarly, the responding advocate should note in his or her opening those claims or defenses that were not included in the opening of the party with the burden of proof. The responding advocate should assert that the opposition’s failure to reference those claims constitutes a waiver. Of course, that may provoke a response by the other side seeking to preserve those claims. Such a discussion has its advantages. First, you may convince the arbitrator that the opposition has waived the right to pursue those claims. Second, even if you fail to so convince the arbitrator, you will force your opposing advocate to identify the claims he or she is actually pursuing.

I. OBJECTIONS TO OPENING REMARKS

In summary, you have the right to object if your opponent includes the following impermissible content in his or her opening statement:

- Argument;
- Statements based on the personal knowledge of the opposing advocate;
- Statements based on the personal opinion of the opposing advocate;
- Discussions relating to excluded evidence;
- Issues or matters outside of the pleadings;
- Appeals to resolve disputes in your favor;
- Negative comments regarding the opposing advocate, witnesses, or party;
- Exaggeration or misstatements of evidence;
- Misstatements of contractual language or the law;
- References to other similar cases; and
- Offers to settle or compromise.

Arbitrators tend to disfavor objections made during parties’ opening statement. Objections disrupt an advocate’s ability to articulate his or her position as well as the arbitrator’s ability to understand the basic nature of the dispute. Objections to opening statements may be perceived by the arbitrator as a harassing tactic intended to throw the opposition off his or her game.