CHAPTER 1
OVERVIEW OF THE LEGAL FRAMEWORK OF GRIEVANCE-ARBITRATION IN THE FEDERAL SECTOR

I. OVERVIEW

Arbitration is generally defined as a voluntary method of resolution in which the disputing parties agree to be bound by the decision of a jointly selected third party. There are two types of labor arbitration. Interest arbitration is a process in which an arbitrator is authorized to *prescribe* the terms and conditions of a collective bargaining agreement because the parties are unable to reach agreement through collective bargaining. Grievance arbitration, in contrast, involves the interpretation and enforcement of the terms and conditions of an *existing* collective bargaining agreement. This book focuses on grievance arbitration advocacy.

This chapter provides a background of the development of private sector labor law and the outgrowth of arbitration as a viable forum for resolving employment disputes. Don't get bogged down in the legal details, but it is helpful to understand some of the historical biases attributed to grievance-arbitration.

A. PRIVATE SECTOR LABOR LAWS: A VERY SHORT HISTORY

Federal sector grievance-arbitration has its roots in private sector arbitration. At the federal level, private sector labor relations is governed by section 301 of the Labor Management Relations Act (LMRA), 29 USC § 185. Section 301 grants federal courts jurisdiction over contract disputes between an employer and a labor organization. Because collective bargaining agreements were previously subject to state law, section 301 was Congress' effort to federalize labor management collective bargaining. *See* Theodore J. St. Antoine, "The Legal Framework of Labor Arbitration in the Private Sector," *Labor Arbitration: A Practical Guide for Advocates*, p. 20-21 (BNA Books 1990).

The Supreme Court confirmed the congressional effort to expand the role of federal courts in *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 77 S. Ct. 923, 1 L. Ed. 2d 972 (1957). Rejecting a more narrow interpretation of some lower federal courts, the Supreme Court found that section 301 did more than simply grant federal courts jurisdiction over collective bargaining agreements—it also authorized the federal courts to fashion a body of federal substantive law for the enforcement of collective bargaining agreements, including promises to arbitrate grievances.

The Supreme Court outsourced much of the heavy lifting to labor arbitrators. In a series of decisions that would come to be known as the *Steelworkers Trilogy,* the Supreme Court established a strong presumption in the federal courts favoring grievance-arbitration. The Court found that: (1) an issue in dispute may be arbitrated if it is covered by the language of the arbitration clause, absent clear and unequivocal exclusion; (2) in a suit to enforce an agreement to arbitrate, courts should resolve all doubts in favor of arbitration; and (3) a court reviewing an arbitrator's award is to enforce the award, whether or not it agrees with the award, as long as the award draws its essence from the collective bargaining agreement. *See Steelworkers v. American Mfg. Co*., 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co*., 363 U.S. 574, 781–82 (1960); *Steelworkers v. Enterprise Wheel & Car Corp*., 363 U.S. 593 (1960).

The Supreme Court established the preference for arbitration over litigation based on the arbitrator's superior knowledge of the shop. As stated in *Steelworker's v. Warrior & Gulf Navigation Co*., 363 U.S. 574, 581–82 (1960):

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequences to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

The Supreme Court approved the role of arbitrators as interpreters of the collective bargaining agreement in the *United Steelworkers v. Enterprise Wheel & Car Company*, 365 U.S. 593, 599 (1960), component of the trilogy in the following language:

> The question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different than his.

Since the *Steelworkers Trilogy*, the Supreme Court has approved the use of arbitration beyond collective bargaining agreement disputes to resolve employment disputes based on statutory rights, including laws prohibiting discrimination based on age, color, disability, national origin, religion, and sex. The development of the law in this area has not been without its twists and turns. The following cases have addressed the interplay of arbitration, collective bargaining and statutory rights.

In *Alexander v. Gardner-Denver, Co.,* 415 U.S. 36, 51–52 (1974), a unanimous Supreme Court held that a union member who grieved his removal based on race discrimination resulting in an adverse arbitration award could still file a lawsuit alleging race discrimination in violation of Title VII of

the Civil Rights Act of 1964. The issue in *Alexander* was whether a union's agreement to arbitrate employment claims could subsume the plaintiff's right to file a Title VII lawsuit. The Court found that it could not, citing the possibility of conflict between the interests of the union and its individual members:

> [T]here can be no prospective waiver of an employee's rights under Title VII. It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. These rights conferred on employees collectively to foster the process of bargaining and properly may be exercised or relinquished by the union as collective bargaining agent to obtain economic benefits of union members. Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.

The Court went on to express its mistrust of arbitration as an adequate forum to address statutory claims, *id*. at 56–58:

> Arbitrator procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. The conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation. Where the collective bargaining agreement conflicts with Title VII, the arbitrator must follow the agreement…. Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.
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> Moreover, the fact-finding process in arbitration usually is not equivalent to judicial fact-finding. The record of the arbitration proceeding is not as complete; the usual rules of evidence do not apply; the rights and procedures common to civil trials, such as discovery, compulsory process, cross examination, and testimony under oath, are often severely limited or unavailable. Indeed it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. These same characteristics, however, make arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.

In 1991, the Supreme Court revisited arbitration of statutory employment discrimination claims. In *Gilmer, Interstate/Johnson Lane Corp*., 500 U.S. 20 (1991), Gilmer, a stockbroker, signed a mandatory registration form with the New York Stock Exchange that contained an agreement to arbitrate "any controversy" arising out of his employment. Gilmer was not a member of a bargaining unit, there was no collective bargaining agreement, and he signed the registration form in his individual capacity. When he was discharged from employment, Gilmer filed suit in federal court alleging age discrimination in violation of the Age Discrimination in Employment Act (ADEA). The employer moved to dismiss the lawsuit and compel arbitration. Relying on *Alexander*, the trial court upheld Gilmer's right to maintain his ADEA lawsuit in federal court. The Fourth Circuit reversed, citing absence of evidence that Congress intended to preclude enforcement of arbitration agreements addressing ADEA claims. *Gilmer*, 500 U.S. at 24. The Court noted that Alexander was subject to a collective bargaining agreement, creating a "tension between collective representation and individual statutory rights," a tension that did not exist because Gilmer's dispute with his former employer was not controlled by a union. *Gilmer*, 500 U.S. at 35. The Court also noted that *Gilmer* involved the preclusive effect of an arbitration award on an employee's right to subsequently litigate a statutory claim, whereas the issue in *Gilmer* was whether an individual agreement to arbitrate a statutory claim could be enforced. *Id*.

The issue before the Supreme Court in *Wright v. Universal Maritime Services Corp*., 525 U.S. 70, 72 (1998), was whether a general arbitration clause in a collective bargaining agreement required an employee to use the arbitration procedures set forth in the contract rather than a civil lawsuit to pursue a remedy for an alleged violation of the Americans with Disabilities Act (ADA). In *Wright*, the CBA provided that all "matters under dispute" were to be submitted to a multi-step grievance process culminating in arbitration. *Id*. at 73–74. At the suggestion of his union, Wright filed disability discrimination charges with the Equal Employment Opportunity Commission followed by a lawsuit in federal court. *Id*. at 74–75. By unanimous decision, the Supreme Court held that the CBA's general arbitration clause did not require Wright to arbitrate his ADA claim. After noting the tension between its decisions in *Alexander* and *Gilmer*, the Court offered that a union's waiver of its members' statutory right to a judicial forum for discrimination claims must be "clear and unmistakable." *Id*. at 79–80.

Again, the general arbitration clause in the CBA at issue did not set forth a "clear and unmistakable" waiver of member statutory rights.

In *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1426 (2009), the Supreme Court was presented with a CBA that explicitly required union members to arbitrate all employment discrimination claims, including applicable federal statutory claims, through a specified grievance and arbitration procedure. 129 S. Ct. at 1461. The case involved claims of age discrimination as a result of the reassignment of three employees performing night watchman duties to service as night porters and cleaners. The union initially grieved the reassignment alleging age discrimination, as well as violation of seniority and overtime rules. The union subsequently withdrew from arbitrating the age discrimination claims although it offered the employees the opportunity to continue to arbitrate those claims at their own expense. Instead, the employees elected to file complaints of age discrimination with the EEOC and, subsequently, file an ADEA lawsuit in federal court. The employer moved to compel arbitration. Relying on *Alexander*, the district court denied the employer's motion to compel, and the U.S. Court of Appeals for the Second Circuit affirmed. A divided (5-4) Supreme Court reversed.

The Supreme Court decided that an arbitration agreement in a negotiated CBA that "clearly and unmistakably" waives employees' right to bring statutory discrimination claims in court is enforceable unless the statutory right itself precludes employee or union waiver—which was not the case in *Pyett*. 129 S. Ct. at 1465–66, 1474. The Court reasoned that Section 9(a) of the National Labor Relations Act (NLRA), which governs federal labor-relations law, broadly affords unions and employers the right to bargain collectively regarding the terms and conditions of employment of bargaining unit members, including statutory claims. 129. S. Ct. at 1463. Neither the NLRA nor the ADEA exempt statutory age claims from arbitration. 129 S. Ct. at 1466. The Court distinguished *Alexander* because the CBA did not expressly cover statutory claims and addressed a different issue: whether an employee waived the right to a judicial forum for the statutory claims by arbitrating contractual claims arising out of the same nucleus of operative facts. 126 S. Ct. at 1463.

More importantly, the Supreme Court in *Pyet* walked back its stated mistrust (in *Alexander)* of arbitration as an adequate forum for the adjudication of individual statutory employment rights. Characterizing its criticism of arbitration in *Alexander* as "broad dicta," the Court noted that its prior distrust of arbitration had been effectively satisfied. 126 S. Ct. at 1469–70. The Court explained that subsequent cases established arbitration is as effective a forum as federal courts for the enforcement of statutory discrimination statutes because arbitrators are readily capable of handling the factual and legal complexities of antitrust claims, and there is no reason to believe arbitrators will not follow the law. 127 S. Ct. at 1471. The Court found the duty of fair representation imposed by the NLRA on unions protected employees from arbitrary decisions by unions subordinating the employees' individual statutory rights to collective interests.

The *Pyett* decision permits employers and unions to bargain away individual employees' rights to pursue the resolution of statutory discrimination claims in federal court, leaving employees to prosecute their discrimination claims in arbitration. To avoid the high cost of litigation, the uncertainty of jury trials, and to maintain the confidentiality of hearing determinations, employers will likely insist that unions bargain on this mandatory subject of collective bargaining. Of course, unions are not required to agree to the arbitration of statutory discrimination claims.

Relying on *Penn Plaza*, the Fourth Circuit in *Gilbert v. Donaho*e, 751 F.3d 303 (4th Cir. 2014), found a clear and unmistakable waiver of the judicial forum in the CBA for Rehabilitation Act claims. While the CBA did not expressly waive statutory rights, the court found a waiver based on language in the CBA that prohibited disability discrimination in violation of the Rehabilitation Act. Separately, the court declined to find a specific waiver of Family and Medical Leave Act claims, which were not referenced in the CBA but in separate employer rules.

In the federal sector, *Pyett* is limited to Postal employees whose labor relations are governed by the NLRA. Federal employees whose labor relations are governed by the Civil Service Report Act of 1978 have the option to have their discrimination claims heard by an arbitrator or by the Equal Employment Opportunity Commission. 5 USC 7121(d).

B. INFLUENCE OF PRIVATE SECTOR LABOR LAW ON THE DEVELOPMENT OF FEDERAL SECTOR LABOR RELATIONS

1. Federal Sector Collective Bargaining Arbitration Provisions Introduced by Executive Order

With the exception of the U.S. Postal Service, section 301 of the LMRA does not govern federal sector labor management relations. The right of federal employees to engage in collective bargaining was first recognized in 1962, with President Kennedy's issuance of Executive Order 10988 (Jan. 17, 1962), which granted federal employees the right to form, join, and assist a labor organization. It directed agencies to recognize labor organizations as the exclusive representative of bargaining unit members and permitted labor and management to negotiate collective bargaining agreements. It also allowed collective bargaining agreements to include provisions for the arbitration of grievances. Arbitrations, however, were merely advisory.

2. Executive Order Allowed Federal Sector to Mimic Private Sector

In 1969, President Nixon expanded federal employee collective bargaining rights through Executive Order 11491 (Oct. 29, 1969). EO 11491 sought to bring federal labor management relations in line with practices in the private sector. Incorporating six major changes into the federal labor management program, the new order:

- Established the Federal Labor Relations Council as the central authority to administer the program and make final decisions on policy;
- Established the Federal Services Impasses Panel to resolve negotiation impasses;
- Provided an election system for handling unit determinations and majority representation cases;
- Offered a binding third-party arbitration process to resolve unfair labor practices, grievances, and standards of conduct;
- Clarified the status of "supervisor" within the federal service; and
- Established government unions, election, bonding and financial reporting and disclosure requirements.

C. ENACTMENT OF THE CIVIL SERVICE REFORM ACT OF 1978 AND THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

At the urging of President Carter to reform the civil service system, Congress passed the Civil Service Reform Act of 1978 (CSRA). Title VII of the CSRA is the Federal Service Labor-Management Relations Statute (FSLMRS), 5 USC 7101 *et seq*., which governs most federal-sector labor management relations. The CSRA replaced the Federal Labor Relations Council with the Federal Labor Relations Authority, which administers the FSLMRS. The FLRA, much like the NLRB in the private sector, was given broad authority to make rules, investigate, and remedy unfair labor practices, as well as address negotiability disputes. FLRA's decisions were subject to judicial review.

The CSRA, which remains in force today, requires that collective bargaining agreements contain negotiated grievance procedures terminating in binding arbitration. 5 USC 7121. The statute broadly defines a grievance as any complaint concerning employment, the terms of a collective bargaining agreement, or the interpretation of any law, rule, or regulation affecting conditions of employment. 5 USC 7103(a)(9). Grievance procedures (5 USC 7121(a)–(c)) must:

- Be fair and simple;
- Provide for expeditious processing;
- Provide procedures for the settlement of grievances;
- Assure collective bargaining representatives the right to present a grievance on its own behalf or on behalf of a bargaining unit employee;
- Assure bargaining unit employees the right to present their own grievance provided the labor organization is afforded the right to be present at the proceeding; and

- Assure binding arbitration at the election of the agency or exclusive bargaining representative in the event the grievance is not settled.

The CSRA, 5 USC 7121(c), mandates the following five subjects be excluded from coverage by a negotiated grievance arbitration procedure:

- Claimed violations regarding the prohibition on political activities;
- Retirement, life insurance, or health insurance;
- National security suspensions or removals under 5 USC 7532;
- Any examination, certification, or appointment; or
- The classification of any position which does not result in the reduction in grade or pay of an employee.

Parties are allowed to exclude any other matter from coverage by the grievance arbitration procedure. 5 USC 7121(a)(2).

Federal-sector arbitration differs from private sector arbitration in other significant aspects. In the private sector, the grievance procedure primarily enforces terms and conditions of the parties' CBA. In the federal sector, the negotiation grievance process may enforce not only CBAs, but also laws, regulations, and agency policies. Regarding discrimination claims, bargaining unit employees have the option to file either a grievance or an equal employment opportunity complaint (EEO) through the agency's EEO process. 5 USC 7121(d). If the employee grieves a discrimination claim, the grievance is processed much like any other grievance, except the employee may request an EEOC review of the arbitrator's award. 5 USC 7121(d). The employee also retains the right to file a civil action in an appropriate U.S. District Court. 29 CFR Part 1614.

With the exception of cases involving adverse and performance-based actions that, if not adjudicated in arbitration, can be appealed to the Merit Systems Protection Board, the CSRA allows a party dissatisfied with an arbitrator's award to file exceptions with the FLRA. 5 USC 7122(a). Exceptions may be filed where the award is deficient because it is contrary to a law, rule, or regulations or on other grounds similar to those applied in the federal courts in private sector labor management relations. The FLRA is empowered to take necessary action that is consistent with applicable law, rules, or regulations. 5 USC 7122(a). If no exceptions are filed, the award becomes final and binding. 5 USC 7122(b). Exceptions to arbitration awards are addressed in Chapter 17.

The CSRA does not apply to all federal employees. Labor management relations in the U.S. Postal Service are covered by the LMRA. Labor management relations for members of the U.S. Foreign Service are governed by the Foreign Service Act of 1980. CSRA coverage has also been modified to exclude various other federal employees. While it is certainly easier to overturn an arbitrator's award in the federal sector than in the private sector, it remains a difficult undertaking.

For additional information on labor management relations in the federal government, *see* Peter Broida, *A Guide to Federal Labor Relations Authority Law and Practice* (Dewey Publications, Inc.).

- DO NOT to expend too many brain cells memorizing the legal history of grievance arbitration. The history is presented to provide a full picture of how we got to where we are now. Be here now!
- DO be aware that the rules governing federal sector grievance arbitration are not uniform. Some federal entities follow the private sector model whereas others follow a uniquely federal sector model. The rules governing these two models are sometimes identical, other times similar, and still other times very different. As the advocate, it is incumbent on you to know what labor-management rules apply to your grievance arbitration.
- DO understand that the fundamental concepts of effective grievance arbitration advocacy addressed in this book apply in whatever forum you practice.

CHAPTER 2
ADVOCATE SELECTION

I. OVERVIEW

Once the demand for arbitration is made, the parties must separately select an advocate(s) to champion their cause. The importance of selecting the right advocate cannot be overstated. As the face and voice of the party, the advocate bears the considerable burden to persuade the arbitrator that they are the believable and reliable source of truth on the issue in dispute. Advocates who persuade arbitrators that they are the source of truth generally win; less believable advocates who do not generally lose.

Advocates come to the table with different skill sets. The key is to match the advocate's skill set to the needs of the matter in dispute to maximize the probability of success. A mismatch of skill sets—selecting a passionate and fiery orator for a case requiring calm nuance—can mean the difference between winning and losing a case.

This chapter addresses the factors that should be considered in selecting an advocate who best fits the case.

II. SELECTING THE ADVOCATE WHO WILL WIN THE CASE

Which advocate will successfully represent your party's interests? The individual making the assignment should consider: (1) the advocacy skills needed to win the case; (2) the gravity and complexity of the issue(s) in dispute; (3) the skills of the opposing advocate, if known; (4) whether the advocate will also be a witness; and, (5) the known competencies of the arbitrator. Selecting an advocate because it is "their turn" or "they have the time" is rarely ideal. A brief discussion of these considerations follows.

A. ASSESS THE REQUIRED SKILLS OF YOUR ADVOCATE

Advocacy has a single objective: persuasion. Arbitration advocacy is the ability to persuade the arbitrator to the advocate's point of view.

Successful arbitration advocates possess qualities that help them in win cases, minimize losses, and secure favorable settlements. To some, these qualities come naturally. For others, these skills may be acquired and developed through education and experience. Here are seven proven skills of successful grievance arbitration advocates:

1. Active Listening

Successful advocates understand that listening is more than passively hearing another person speak. Active listening is a process in which the advocate makes a conscious decision to fully understand the speaker's message without judgment, bias, or belief that they know what the speaker is going to say. Rather than trying to stay one step ahead of the speaker, advocates use active listening to fully understand the nuances behind the speaker's words. This skill allows advocates to deftly alter their line of questioning with witnesses before and during the hearing, to exploit the opposition's testimony during the hearing, and to better craft their argument during post-hearing briefs. Active listening is the single most important component of interpersonal communication skills.

2. Organized, Focused Prepared

Persuasive advocates are prepared. They do the unglamorous but necessary work of chasing down the facts, interviewing witnesses, securing exhibits, and researching the contract, the law, past precedent and past practice. When prepared and organized, advocates are free to focus and actively listen to the evidence presented at hearing and adjust their case as needed. Focused advocates develop a persuasive case strategy and prepare the evidence and witness testimony before the hearing, not the night before or during the hearing. Persuasive advocates are self-motivated.

3. Reasoned Objectivity

Winning advocates are curious. They constantly evaluate their case and do not blindly accept what they are told without question. Successful advocates test even seemingly favorable evidence from the perspective of the opposing party to confirm strengths and identify case weaknesses. They ask whether witness testimony, favorable or unfavorable, makes logical and practical sense, and is supported by other evidence. Persuasive advocates judge the case based on what they can objectively prove with admissible evidence, not what they or the client wishes they could prove.

4. Directness and Courage

Successful advocates are direct and straightforward. They may need to be candid in order to secure necessary documents in a timely manner or with witnesses during the hearing. Advocates should openly and honestly discuss the prospects of success and the need for settlement with clients and superiors. And, successful advocates need courage to stand their ground when they believe strongly in their case even if it means they must respectfully but firmly disagree with the arbitrator and continue to press their position.

5. Professional Courtesy

Persuasive advocates remain courteous to opponents, witnesses, and the arbitrator. They address people by their names and correct titles and are respectful when pressing witnesses for responses or in addressing an issue in dispute with the opposing advocate. They refrain from name calling or quarreling with witnesses and the opposing advocate, particularly in front of the arbitrator. Professional courtesy means being on time, prepared and properly attired. Trust me, it matters.

6. Personal Integrity

An advocate's integrity—with clients, witnesses, the opposing advocate, and the arbitrator—is essential to successfully winning the case. Advocates who persuade the arbitrator that they are the reliable source of information generally enjoy success. This is particularly important when advocates will appear before the arbitrator in future cases. Those who mislead the arbitrator run the considerable risk of doing long-term damage to their reputation, to the detriment of the client.

7. Personal Presence

Persuasive advocates show confidence in their case. Confidence is demonstrated by a thorough understanding of the facts and the standards at issue as a result of focused preparation and organization. Before and during the hearing, winning advocates execute their trial plan by actively listening, concisely posing questions, and addressing objections with poise and confidence. Presence often comes with experience.

Individual advocate skills should be considered before case assignment. This does not have to be a time consuming, soul-searching exercise. However, the assignment manager should be aware of the strengths and weaknesses of advocates on the receiving end of assignments. Rarely does one advocate possess all fully-developed advocacy skills. It may be beneficial to team up advocates to maximize the skill level. Remember that case assignments are not irreversible, at least not at first. The more time and effort an advocate invests in a case decreases the benefit of reassigning the case. You may be better off assigning another advocate with complementary skills to assist.

B. GRAVITY AND COMPLEXITY OF THE ISSUE(S)

Parties may want to assign a junior advocate when the number and complexity of issues are minimal or when the downside of a loss is limited. If resources are limited, assigning a more experienced advocate to conduct a limited, straight-forward case may not be an efficient use of their talents and your resources. As a general rule, the greater the number of procedural or substantive issues in dispute, and the greater the upside potential or downside risk, the more important it is to appoint an experienced advocate. Of course, to build advocacy skills, a more junior advocate could be paired with a more senior advocate to serve as a technical assistant to "second chair" the arbitration. Similarly, if selection of a junior advocate can't be avoided, consideration should be given to assigning a more seasoned advocate to "second chair" or serve as a mentor to the junior advocate.

C. FACTS, WITNESSES, AND TIME TO PREPARE

The complexity of the facts, the difficulty in securing evidence, the status and resistance of witnesses and clients, and the time to prepare are legitimate considerations in determining advocate selection. Generally speaking, greater factual complexity, difficulty in securing evidence, or cases involving high-level clients or witnesses requires more experienced advocates. Junior advocates can be teamed with experienced advocates to ensure they gain experience while client interests are protected.

D. SKILLS OF OPPOSING ADVOCATE

The advocate selected by the opposing party is a legitimate factor in your advocate selection. If the opposing party selects an attorney as its representative, it may be advisable to match that skill level by selecting an attorney or a senior non-attorney advocate. If the opposing party selects a senior advocate or subject matter specialist, you may want to respond in kind. Do not make assignments based solely on the advocate selected by the opposition, and do not feel obligated to match the skill level of the advocate selected by your opponent. The assignment manager must decide the right advocate for each case.

E. WILL YOUR ADVOCATE BE A WITNESS?

Consider the wisdom of appointing an advocate who may also be a fact witness. Although arbitrators generally permit advocates to testify as a fact witness in a case, they generally make notoriously bad witnesses. During cross-examination, advocates are often baited into the role of biased advocate, find it difficult to stick to the facts, and answer only the questions asked. The overall effect often diminishes the weight placed on the testimony by the arbitrator. If the advocate's testimony is offered in support of a material fact in the case, the arbitrator's assignment of diminished weight to the evidence could be critical to the case outcome. State Bar disciplinary rules governing attorneys' conduct may limit or preclude their appearance as both an advocate and as a witness in arbitration.

If possible, avoid selecting an advocate who may also serve as a material fact witness, or limit the scope of the advocate's testimony to a minimum. The advocate should be reminded to stick to factual responses, specifically answer cross-examination questions, and avoid sparring with the opposing advocate. Consider having a second advocate take over the questioning of the primary advocate. As a matter of professional courtesy, such an arrangement should be disclosed to the opposing advocate and the arbitrator beforehand.

F. WHO IS THE ARBITRATOR?

The experience or expertise of the arbitrator on a particular issue may influence advocate selection. The assignment manager may want to assign an advocate with expertise in an area to ensure that an arbitrator lacking that area of expertise understands the issues.

Arbitrators, like advocates, have styles and personalities. Some personalities and styles work well together, and others do not. Given the choice between two advocates of equal ability, one with a history of getting along with the arbitrator and an advocate who has historically clashed with the arbitrator, you may be well-advised to select the former advocate.

An advocate may be selected from within or outside the organization. A major consideration in hiring outside counsel is cost. Even if local counsel with the requisite knowledge, skills, and abilities is available, the cost, usually charged at an hourly rate, can be very high.

Of course, reality often forces less than ideal circumstances, and parties do not always have the luxury to choose among advocates. A small local union may not have the personnel or financial resources to provide a meaningful choice of advocates. Even if several advocates are available, workload, training commitments, medical issues, and vacation schedules may limit their participation.

Selecting the most qualified advocate to fit the needs of your case is only the first step. Without careful preparation and organization, the most

talented advocate is reduced to mediocrity. Mediocrity is not a prescription for success in any endeavor, including arbitration. The next section discusses how to begin to prepare for an arbitration hearing.

G. LEADS AND SECOND CHAIRS

Resources permitting, it is often a helpful to staff a case with more than one advocate. As they say, two heads are better than one. The extra assistance can help ensure facts and issues are not missed and provide a back up ready to go in the event the lead or primary advocate is unexpectedly unavailable. It allows junior advocates to work with more experienced advocates. The lead advocate has primary responsibility for the case. The second chair advocate assists the lead advocate in gathering evidence, preparing witnesses, organizing the case, and taking responsibility for a witness or other aspects of the hearing.

- DO assign an advocate who has the technical knowledge, presence, and stature to be a worthy match to the opposing advocate.
- DO ensure the advocate possesses the winning skills to actively listen, prepare and present a focused case, display reasoned objectivity, and professional courtesy.
- DO NOT assign the case to an advocate simply because it is their turn or they happen to be available.
- DO consider the complexity of the case, the status and challenges of witnesses, the experience of the opposing advocate, and the known traits of the arbitrator as factors when deciding case assignment.
- DO consider assigning a lead advocate and a second chair, or back up, advocate to assist.