CHECKLISTS

These checklists are reproduced from the C.L.C. Education and Studies Centre Course on Arbitration, Instructors Manual, prepared by Jeffrey Sack, 1980

Grievance Investigation Report in Discharge or Discipline Case

1. **UNION:**

2. **NAME OF GRIEVOR:**

   Department:
   Address:
   Telephone No.:
   Hiring date:
   Job history:

3. **NAMES OF UNION REPRESENTATIVES:**

   Steward: Phone No:
   Local President: Phone No:

4. **STATEMENT OF GRIEVANCE REP:**

   Describe incident with details of what happened giving names, dates, places, times. State what was said by all those involved. Answer the questions who? what? when? where? why?

5. **CONTRACT PROVISIONS:**

   Specify clauses of contract involved. Why is management's action improper? How is employee being treated unfairly?

6. **GRIEVOR'S STATEMENT:**

   Ask the grievor to write full details of the incident on a separate sheet, including dates, times, places and names of persons involved. Suggest to the grievor that he try to put statements in the form of quotes. Make sure that the grievor signs and dates his statement. Ask the grievor for any relevant documents. Ask what it is that is really bothering him.

7. **EMPLOYEE'S RECORD:**

   Give details of discipline previously received by employee, including verbal and written warnings, suspensions, etc. Note details, including reasons for discipline, severity of penalty, employee's explanation, dates, etc. Check whether matter was grieved and disposition of grievance.

8. **NAMES OF WITNESSES:**

   Name all possible witnesses, pro and con, with telephone numbers.

9. **WITNESSES' STATEMENTS:**

On a separate sheet for each witness, set out what each witness remembers, pro or con, about the incident. Make sure the sheets are signed and dated by the witness or yourself.

10. **PAST PRACTICES:**

Check the past practices followed by the employees and supervision prior to the date of the grievance. Note whether these practices have been carried on with the knowledge of the parties and/or have been agreed upon by their representatives.

11. **TREATMENT OF OTHER EMPLOYEES:**

Have other employees been treated differently? Is there discrimination? Are documents available which establish discriminatory treatment?

12. **RULES:**

Does management have rules? Are they posted? Have the employees been given notice of them? Have they been consistently applied? Are they considered to be reasonable? If not, why not? If rules are in existence, have they been agreed upon by the parties? It is important, if there are rules, to obtain a copy.

13. **PREVIOUS GRIEVANCES:**

Have there been previous grievances relating to the same matter? Are there previous awards between the same parties dealing with the same issue?

14. **SIDE DOCUMENTS:**

Are there letters of intent or supplementary agreements bearing upon the matter? Are there other relevant documents or correspondence?

15. **MANAGEMENT'S POSITION:**

What is management's side of the story? Attach notes of meetings with management giving dates, persons present, statements made, and outcome.

16. **REMEDIES:**

What does the grievor really want? For example:

reinstatement
back pay
no loss of seniority
removal of disciplinary action
appointment or promotion
payment of wages
declaration that employer has violated agreement
direction to comply with agreement in the future
other — specify:

Checklist Re Grievance Investigation

1. Make sure the grievance states the nature of the complaint, alleges that management's action is contrary to the agreement, and sets out the specific relief requested in full. Keep a copy of the grievance.
2. Remember that you have to base your grievance on a violation of the collective agreement. You cannot grieve past practice.* Past practice will be considered by an arbitrator only to resolve an ambiguity in the agreement.
3. Make sure that, if an individual matter is involved — and especially if individual financial relief is sought — an individual grievance is filed. If you are in doubt as to whether a matter is an individual or a policy matter, file both an individual and a policy grievance and process them together.
4. Remember that, generally speaking, employees should be advised to "obey now, grieve later" unless an order is illegal, unhealthy or unsafe.
5. In processing the grievance, stay within the time limits. But, if you do breach the time limits, don't just abandon the grievance. There are a number of legal grounds upon which you may be able to overcome the defect.
6. Investigate promptly. Witnesses disappear. Memories fade. So don't delay.
7. Gather all available documents, e.g. seniority list, medical records, absentee records, etc. Check past practices. Review the collective agreement. Check the arbitration law.
8. Make sure you have the grievor write down the full story himself, giving names, dates, places. Advise the grievor to use actual quotes in relating things he heard or was told. Why? Because the precise language used may be important. Have the grievor sign and date his statement. It will be useful for refreshing his memory before the hearing and can be used by him for that purpose at the hearing where the notes were made at or about the time of the events in question. Don't forget to have the grievor give you a full statement regarding his employment and disciplinary record.
9. Collect statements from all available witnesses. ideally, such statements should be in the employees' own handwriting and should be signed and dated. If this cannot be done, write out the witness' story yourself and have the witness sign it to confirm that he has read the statement and that it is accurate. If he won't do that, add a note that you read the statement to him and that he confirmed that it was correct.

   Statements such as these are advisable in order to find out what occurred and substantiate the grievor's story. The information obtained can also be used to test the grievor's version against the version of others. The statements are also useful in attempts to settle a grievance with management and they can later be used to advantage at the hearing in order to refresh a witness' memory if he testifies for the grievor or to undermine a witness' testimony if he testifies against the grievor and changes or embellishes his earlier statement.

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* Unless the agreement contains a clause explicitly preserving past practice.

10. Interview not only those witnesses who support the grievor but also those who do not. Why? First, because you want to find out what really happened. Second, because you want to know what you are up against. Third, because you can, by this means, tie a witness down so that, should he change his story at the hearing, this may be established and the witness' testimony undermined.
11. In a discharge or discipline case, after the grievor has given you his statement, ask him whether the reasons that management has given are the real reasons or whether there are other reasons that he suspects. Also ask the grievor to tell you everything that is bothering him. A grievance may in fact be the only way for a grievor to bring his unhappiness to someone's attention, but it may not reflect his real source of concern. This may be so where the source of the grievor's concern is not something that can be grieved.
12. Make notes of meetings with the company and write down management's side of the story. This will help you prepare the case for the hearing. You will know what you have to meet. Don't forget to sign and date these notes and pass them on to the union advocate.
13. If management tells you that the grievance is not valid or arbitrable, don't accept this as true simply because management says so. This is for an arbitrator to decide. Also, if management does not reply to a grievance within the time limits, you don't have to wait; you can go on to the next step. Remember that doing so — even giving notice to arbitrate — doesn't prevent you from discussing the grievance with management and from withdrawing it if it later turns out to be unsupportable.
14. If you are going to withdraw a grievance, do so "without prejudice" so that management can't rely on your withdrawal as evidence of acquiescence in the company's action. You may indicate that you disapprove of the company's action or practice, but, for example, that, since the grievor has quit, you don't intend to proceed with a grievance against a suspension.
15. Remember: unions have a duty to represent employees in the bargaining unit without acting in a manner that is arbitrary, discriminatory or in bad faith. This doesn't mean that you have to carry every grievance to arbitration — and no one will second-guess the union's judgment on the merits of the grievance — but you must make the judgment in good faith and you cannot ignore the grievance or drop it for discriminatory reasons such as, for example, prejudice against the grievor.

Checklist on Preparation of Case

1. Review the information in your possession, including facts contained in the grievance, replies, notes of union-management meetings, statements of the grievor, and other witnesses, etc.
2. Decide what the issues are. Quickly review the arbitration law to determine what facts you have to establish in order to succeed on the issues.
3. Decide what witnesses you will call, and what facts each witness must establish. Collect the documents you wish to introduce and decide through which witness you will introduce them. Prepare a check-list noting the points you must prove, the witnesses who will testify to them, and the documents to be introduced and by whom they will be introduced.
4. Decide upon the order in which you will call witnesses. Try to lead off and end with a strong witness. While you must call those witnesses who are necessary to establish your case, do not call several weak witnesses to establish a point where you have one strong witness who will suffice.
5. Interview the grievor and other witnesses at length. If you suspect they are not being entirely forthright, speak to them alone. Ask them to give you a written statement of what occurred. This will refresh their memory and yours when the hearing is convened.
6. Advise your witnesses of the questions they may expect to be asked on cross-examination. Put yourself in the role of the opposing advocate and cross-examine your own witnesses so they will know what to expect and you will know how they will likely react. Decide, on the basis of this test, whether your witness will make a good impression and whether it is necessary or desirable to call him.
7. Make a list of the witnesses you expect to be called in opposition to your case and a list of the points you wish to cross-examine them on.
8. Prepare a sufficient number of copies of documents for the arbitration board and the opposing advocate. Put them in the order in which you intend to introduce them at the hearing.
9. If there is information in the possession of the company which you need — such as the reasons for discharge — consider requesting the company to provide you with particulars thereof in advance of the hearing. If the company refuses, ask the arbitrator in advance of the hearing for an order directing the company to supply you with such particulars.
10. If there are documents in the custody of the company which you need, decide whether to request the company to produce them in advance of the hearing, e.g. attendance records, personnel files, etc. If the company refuses to produce them for your inspection, ask the arbitrator to order production prior to the hearing.
11. Give the other side notice in advance of any medical reports you intend to introduce together with a copy thereof. This *may* enable you to dispense with the necessity of calling the physician himself to give evidence.

12. To ensure the attendance of witnesses, or to protect them from reprisal by the employer, you may want to arrange for the issuance of subpoenas from the arbitrator. If you want the witness to bring documents with him, you should specify them — this is referred to as a *subpoena duces tecum*. Make sure that the subpoena is served, together with appropriate conduct money *in cash*, in reasonable time before the hearing.
13. Research the law and prepare an outline of your opening statement, position regarding preliminary objections, and final argument. Be prepared to revise your argument in the event of unexpected developments at the hearing.
14. Be clear in your own mind who bears the burden of proof. This will determine the order in which opening statements are delivered, witnesses are called, and argument is presented. In discharge and discipline cases, the employer bears the burden of proof; in other cases, the union does.
15. If an employee may be affected by the result of a hearing — e.g. the incumbent of a job claimed by the grievor — make sure that he receives notice that he is entitled to participate at the hearing and be represented by counsel (at his own expense, of course). Give him a written notice setting out the nature of the dispute, and the date, time and place of the hearing.
16. If the case involves discharge, and you are going to be asking for compensation for back pay, the grievor may have to establish that he made reasonable efforts to obtain employment between the date of his discharge and the date of the hearing. So, have the grievor prepare a list of places where he sought employment, the dates of his inquiries, and the responses he received. The grievor should also detail income he has earned elsewhere, and unemployment insurance and other benefits received by him. These will normally be set off against any amounts claimed for back pay.

Checklist on Order of Proceeding at the Hearing

1. Both sides file a list of appearances giving the names of their respective representatives.
2. The parties agree and confirm that the arbitration board is properly constituted and that there are no preliminary matters to be dealt with. Or preliminary matters are raised and addressed.
3. Each advocate makes an opening statement, i.e. gives a thumbnail sketch of the facts, issues, and conclusions he will advance.
4. In terms of the opening statement, the calling of witnesses, and the presentation of final argument, the party which bears the burden of proof — in discipline and discharge cases, the employer; in other cases, the union — leads off, while the other party responds.
5. The party leading off calls its witnesses, and examines them in chief, one by one. Each witness is cross-examined by the opposing advocate, and re-examined by the advocate who called him.
6. After one side has presented its witnesses, the other side calls its witnesses to testify. These witnesses are also subject to cross-examination, and may be re-examined.
7. The side which led off has a right to call witnesses in reply to new points raised by the other side. Again, these witnesses are subject to cross-examination, and can be re-examined.
8. After the evidence has been presented, both sides present their final argument. The party which led off presents its argument first, the other side presents its argument in rebuttal, and the party which led off gives its reply to new points raised in the rebuttal.
9. The matter is then left to the arbitrator or arbitration board to decide. Normally, a decision is reserved so that the arbitrator or arbitration board can consider the evidence and argument. An award is usually issued in writing to the parties some weeks later.

Checklist on Preliminary Objections and How to Handle Them

Company Objection	Union Response
1. The time limits have been breached.	1. No they have not. or The time limits are not mandatory, but directory, i.e. a guideline only. or Even if the time limits have been breached, the Company waived the breach by not raising the objection before the hearing. or (In Ontario, Manitoba and B.C.) the labour legislation allows an arbitrator to cure a breach of time limits. or Where the grievance relates to a continuing or recurring course of conduct, time runs from the last recurrence of the violation.
2. The grievance involved an individual matter and should not have been filed as a policy grievance.	2. Either type of grievance may be filed — unless the agreement says that the union cannot bring a policy grievance where an individual grievance could have been filed. Some arbitrators will not, however, award individual financial compensation in the context of a policy grievance; they will generally only grant a declaration that a violation occurred and a direction to comply with the agreement.
3. The grievance has been withdrawn, abandoned or settled.	3. The withdrawal, etc. was intended to apply only to the specific instance and was not intended to be of general effect or to govern in the future.
4. There is no clause in the collective agreement covering the matter.	4. The clause does cover the matter. or The clause is ambiguous so that past practice can be used to interpret it.

5. The union nominee is biased because he is a staff rep employed by the union involved.	5. This does not matter in Western Canada where a nominee is regarded as a party's representative.
6. (Where the validity of the collective agreement is challenged), only a court can decide the matter.	6. An arbitrator has jurisdiction to decide this question as it is a question of arbitrability.
7. The provision breached is not in the collective agreement, but in a document, such as a letter of intent, that is not part of the collective agreement. Thus, the arbitrator has no jurisdiction to rule on the matter.	7. The document is part of the collective agreement or is incorporated by a reference either in the document or the agreement. or The agreement is ambiguous so that the document can be used to interpret it.
8. The grievance does not cover the issue.	8. A grievance should be liberally construed so as to resolve the real matters in dispute.
9. The arbitration hearing should be conducted in private since it is a proceeding between the parties.	9. Since labour legislation requires arbitration (except in Saskatchewan), the public has an interest in the process and an arbitrator has the discretion to include or exclude persons other than the parties.
10. The arbitrator should adjourn the hearing until the preliminary objection is decided.	10. The prevailing practice is for the arbitrator to reserve on a preliminary objection and proceed to deal with the merits so that delay and expense are not incurred.

Note: For cases supporting the union's position, see Sack & Goldblatt, Leading Cases on Arbitration.

Checklist on Presentation of Opening Statement

1. An opening statement is a brief outline of what your case is all about. Both sides are entitled to give an opening statement. The party who bears the burden of proof goes first in making an opening statement, just as it does in calling witnesses and presenting final argument. In discipline and discharge cases, the employer bears the burden of proof, and so goes first; in other cases, the union bears the burden of proof and accordingly leads off.
2. Do not write out your opening statement verbatim in advance of the hearing. Write down the essential points you wish to cover. This will enable you to think on your feet and to direct your attention to the arbitrator rather than just to your notes.
3. Do not file a written brief, although you may prepare one for your own use if you so wish. A written brief may commit you to an argument you do not wish to pursue after you have heard the evidence and may set out the facts differently from the way they come out at the hearing. This may cause you embarrassment and occasionally serious prejudice. It is important to be flexible so that you can accommodate your approach to the direction in which the hearing develops.
4. Start off by giving the arbitrator a list of appearances, i.e. the names of persons representing the union. Include the address to which the award should be sent. Introduce yourself and the members of your party. It is not necessary to identify your witnesses before they are called.
5. Confirm that the board is properly constituted and deal with any preliminary objections that are raised, e.g. breach of time limits, etc.
6. File the "basic" documents as exhibits, i.e. collective agreement, grievance, replies, discharge notice, etc. Be sure to have sufficient copies available for members of the arbitration board and for the opposing advocate.
7. Proceed to deliver your opening statement. Give a thumbnail sketch of the case you intend to establish. State briefly the nature of the issue or issues so that the arbitrator can evaluate the relevance of the evidence as and when it is subsequently introduced. Indicate what your position is on the issue or issues. Refer to the relevant contract clauses. Thus, for example, in a discharge case, state that the grievor was discharged for refusing to obey the order of a supervisor and that your case will be that the order was not clearly communicated or involved dangerous consequences, or was illegal, etc. Refer to the collective agreement provision requiring just cause for discharge and take the position that the grievor was discharged without just cause.
8. In delivering your opening statement, it is preferable to speak only in general terms about the evidence you intend to call. For one thing, you may not wish at this point to alert the opposing advocate to the precise nature of the evidence because he will then have that much more time to consider how to meet it. Furthermore, if the evidence does not turn out precisely as you have predicted, your case will be to some extent undermined even if only psychologically.
9. Include in your opening statement facts which are agreed to or are not in dispute, e.g. the name of the grievor, his seniority, etc. If you have been able to agree with the management advocate regarding the admission of certain documents, e.g. seniority lists, file these as exhibits.

10. Do not conclude your opening statement without specifying the remedies that you will ultimately be requesting, e.g. in a discharge case, reinstatement with compensation for wages and other benefits lost. In this respect, it is always advisable to ask the arbitrator to "reserve jurisdiction" to deal with implementation of the award.
11. In a discharge or discipline case, ask the arbitrator to remain "seized" of the case, i.e. reserve jurisdiction, in the event the grievance is upheld, but the parties cannot agree on the amount or quantum of compensation. If the management advocate will not agree to this, then you will have to have the grievor testify regarding how much pay he has lost, and you will have to prepare him for questions as to what attempts he has made to lessen or "mitigate" his salary loss by seeking employment elsewhere. In this respect, you should ask the grievor in advance to list the employers from whom he has sought employment, the dates of his inquiries, and the responses he has received. You should also obtain from him a summary detailing his period of unemployment, the amount of income (including overtime) he has lost, the sum of remuneration earned elsewhere, and the total of unemployment insurance benefits and other benefits received by him during his period of unemployment.
12. If matters of credibility are involved, it is ordinarily advisable to ask for the exclusion of witnesses. This does not include the grievor, who is entitled as of right to remain, and one other person who may be a witness but whom you need to advise you regarding the circumstances of the case. It is of course not necessary to exclude observers who will not be testifying. The purpose of excluding witnesses is to prevent them from tailoring their testimony so as to accord with evidence they have already heard. Of course, an order for exclusion, if made, will apply to your witnesses as well as to those of the other side. Thus, before asking for such an order, you must consider whether it is to your advantage from the point of view of testing credibility.
13. Finally, do not let the management advocate interrupt your opening statement so as to take over the role of explaining what the case is all about. This is your chance to put the issues from your point of view. Do not give it up.
14. Remember that the mood of a hearing is set at an early stage. Your opponent may well test you at the outset, particularly if he senses you are a novice, by attempting to "take control" of the hearing through bluster, interruptions, and disparaging comments. Do not raise your voice or respond in kind. Be calm, but firm, in objecting to such interruptions. If you stand your ground, you will gain the respect of the arbitrator while retaining control of your case.

Checklist on Examination-in-Chief, or Examining Your Own Witness

1. Do not write down your questions verbatim, but rather list the points you want to cover. This will enable you to concentrate on your witness rather than your notes.
2. Introduce your witness with a few personal details so as to humanize him. Ask him to direct his mind back to the events in question. Then give him as much opportunity as possible to tell his own story in his own words. Do not interrupt him excessively.
3. Be clear and concise in your questions. Do not ask compound questions or questions which contain other questions within themselves. In short, ask one question at a time.
4. You are not allowed to lead your own witness, i.e. hint or suggest at the information you wish him to give. But you can point the witness in the direction you wish him to head, e.g. "Would you take your mind back to the day on which the foreman fell off the ladder. — What did the grievor do?" This is called a "transition" question. If the witness leaves something out, you may also be able to point him in the right direction with a "transitional" question, provided that you do not supply the answer.
5. Do not ask your witness a question when you do not know in advance what he will answer. You must always talk to your witness and prepare him before you put him on the stand.
6. You are not allowed to ask your own witness leading questions on matters in dispute. A leading question is one which is so framed that it suggests the answer or contains information which the witness has not himself given in evidence. In short, ask your witness, "What happened?", rather than, "Did you turn the other cheek when the foreman punched you on the nose?" You may, however, lead on non-essential facts, or on facts which are not in dispute.
7. You are not allowed to cross-examine your own witness, for example, you are not allowed to repeat a question when you are not satisfied with the answer that he has given. You may cross-examine your own witness, however, if he is "hostile" in the legal sense, e.g. the evidence that he gives is contradictory to a previous statement that he has made. If you establish this, by confronting him with his "prior inconsistent statement", you may then cross-examine him on the inconsistency. This turn of events is obviously rare. Normally, you should not call a witness unless you are certain as to the evidence he will give.
8. Avoid asking your witness for information which is irrelevant, or which is based upon hearsay.
9. Try to make your witness feel comfortable. Advise him to watch the chairman, and to speak slowly enough so that the chairman can take notes. And loudly enough so that the chairman can hear him!
10. Tell the witness in advance to answer clearly and firmly as to the facts without giving any opinion unless requested to do so. The witness should not state, "I *think* that this is what occurred," but rather, "This is what occurred."

11. As much as possible, allow your witness to give narrative answers, but make sure that he does not leave out some vital detail. If he does you will have to ask him further questions, in a non-leading way, to draw out the information.

12. Make sure that you prepare a foundation for the questions you ask. For example, before you have a witness give his observations, make sure that he supplies details regarding the background in which his observations are made.

13. Try to make your questioning interesting. Questions which relate to a particular topic are usually more interesting than a plodding process of chronological questioning. Try to look as if you haven't heard the whole story before. Attempt to inject a note of drama into your questioning by affecting, for example, a particular interest in the grievor's answers.

14. Introduce documents through the person who prepared them. Have the witness identify the signature. This process of "authentication" is the method by which documents are properly introduced.

15. Ask a witness for his first-hand knowledge. Do not ask questions which elicit hearsay answers. This means that a witness should not repeat a statement made by someone else, who is not also called as a witness, if it is your intention to rely on the truth of the information contained in that statement. This is so because the other party would then be deprived of an opportunity to cross-examine the person who made that statement. It is all right, however, if you just want to prove the statement was made and nothing turns on its truth. Also, there are exceptions to the "rule against hearsay" such as admissions against interest. It is pursuant to this exception that union witnesses may repeat statements made by management personnel, and vice versa. See *Re Girvin* (1974), 40 D.L.R. (3d) 509, on the impropriety of an arbitrator basing his decision on hearsay.

16. Medical certificates and business records *may* also be introduced, without calling the persons who prepared them, provided that copies thereof have been delivered to the other side in advance of the hearing. If proper notice has not been given, you should ask the arbitrator to exercise his discretion to admit the evidence anyway, since an arbitrator is not a court of law and has broader latitude regarding the admission of evidence. Or, you may actually call the physician who prepared the medical certificate, or the clerk who drew up the business records, to testify regarding them.

17. If you know of a matter which reflects adversely upon your witness, and which is certain to be brought out by opposing counsel on cross-examination, you may want to consider bringing it out yourself during examination-in-chief, together with an explanation which minimizes the adverse impression.

18. Your witness is allowed to use notes to refresh his memory provided that they were made at the time of the events in question. But be sure to review these notes with the witness before you put him on the stand so that his testimony does not conflict with them.

19. In describing spatial arrangements and the movement of people, you may find it useful to have your witness draw a diagram, and mark the position of various people on it. This can then be filed as an exhibit.

20. Keep a record of the exhibit numbers of the documents that you file. Make sure you keep copies of them in the order in which they have been filed. You will need them for cross-examination and for argument. Try to have someone who is with you take notes of the testimony which is given while you question the witness. Try to note down the important responses yourself.
21. Ask your witness factual questions, not questions which require an opinion unless the witness is qualified as an expert. Ask him to give his observations, not conclusions. The witness should just state that someone had glassy eyes, and gave off the odour of alcohol, rather than that he was drunk.
22. Try to conclude your examination-in-chief on a high note that permits the witness, in effect, to summarize the thrust of his evidence.
23. If the opposing advocate objects to one of your questions, deal with the objection before proceeding with your question. In dealing with the objection, address your remarks to the arbitrator, not the opposing advocate.
24. Affidavit evidence is not normally admissible since it is not subject to cross-examination.
25. Steer clear of questions relating to "privileged" matters, e.g. conversations during the grievance procedure.
26. File the "best evidence", e.g. original documents with signatures, unless it is not available.
27. If you fail to call a material witness, the opposing advocate may ask the arbitrator to draw the inference that his evidence would have been adverse to you. Of course, you may do the same if he fails to call a material witness.

Checklist on Cross-Examination

1. Decide first whether you wish to ask any questions on cross-examination. If the witness has not given any evidence damaging to your case, it may make no sense to cross-examine him. If you do cross-examine him, do so with a view to undermining evidence which is damaging to your case.
2. Do not feel that you have to question a witness regarding each and every matter upon which he has given evidence. Much of his evidence may not have been damaging to your case and may not need to be pursued by cross-examination. On the other hand, remember that you are not restricted in cross-examination to asking questions only upon matters to which he has testified. You are free to ask the witness questions about any matter that is relevant to the proceedings or even about any matter that is irrelevant if the questioning is for the purpose of testing the witness' credibility. However, if your question goes to a matter which is not direclty in issue, i.e. a collateral matter, then you are stuck with the witness' answer.
3. Do not ask your questions too quickly. Make your questions short and intelligible. Wait until the witness has answered one question before you ask another. You will find it difficult to make notes of what the witness says while you are cross-examining him. Try to have one of your colleagues take notes while you are cross-examining. But try to note down important admissions yourself.
4. Once a witness has made an admission, do not repeat the question in case the witness uses the opportunity to water down the answer.
5. Do not repeat to the witness, one by one, the answers that he has given on his examination-in-chief, with the suggestion that he is lying. By doing so, you will only succeed in giving him an opportunity to reiterate his earlier answers with greater emphasis.
6. Do not ask questions which call for information based on hearsay. If you do, the source of the information may not be called as a witness and you will have lost your opportunity to cross-examine.
7. The scope of cross-examination is very broad. You can ask leading questions, suggesting the answers, if you want, and you may repeat questions in several ways. Do not, however, be rude or overbearing, especially to a witness who is mild-mannered. If you do so, you will only create sympathy on the part of the arbitrator for the witness.
8. If a witness is belligerent and will not answer your questions directly, be firm and insist that he be responsive to the questions you have asked.
9. Remember that a witness' answers can be undermined, not only by his contrary admissions, but also by the testimony of other witnesses called by the opposing advocate, as well as other witnesses called by yourself. For this reason, where issues of credibility are involved, it may be desirable to have witnesses excluded.
10. Do not write down your questions verbatim, but rather note the points you wish to cover. In this way, you can concentrate on the witness rather than on your notes.
11. Before you pose a direct question on a critical matter, try to close the escape hatches so that the witness cannot explain away his conduct.

12. Try to frame questions in such a way that the witness has no option but to answer the question with the information you want from him, or with a yes or no answer.
13. Approach critical areas, where a witness may give a damaging answer, cautiously, on a step-by-step basis, so that you can retreat quickly before any damage is done.
14. It may be useful to ask a witness whether he has discussed the matter in advance of the hearing with other witnesses or with his counsel in the presence of other witnesses so that you can later suggest that evidence has been fabricated.
15. Try to bring out a motive that would explain the self-interest of the witness in giving the answer that he has so that you can later argue that he is biased, partial, or lacking in objectivity.
16. Be cautious in suggesting directly to a witness that he is lying. The witness will probably only deny it. But, if you are testing the reliability of a witness' recollection of an event, you may explore the mental state and opportunities for observation of the witness, as well as his powers of recall. For example, you may ask him what time it was, and then how he knew that that was the time. You can ask him whether he has a clear recollection, how it is that his recollection is so clear, whether he was in a position to see and hear what occurred, why it is that he was paying so much attention, whether he made notes of the event in question, whether his ability to observe was affected by anything relating to his own condition (e.g. eyesight, hearing) or to external circumstances (e.g. bad weather, darkness). In short, if you cannot attack a witness' honesty by suggesting improper motive, you may be able to undermine the reliability of his evidence by suggesting impaired perception.
17. If the witness gives answers which are inconsistent with those of other witnesses, you may confront the witness with the contradictory answers of other witnesses, and demand that he explain.
18. In order to test a witness' credibility, you may question him regarding matters of detail that may be irrelevant. If he is seen to be untruthful regarding these details, you can then argue that his evidence as a whole is not to be relied upon.
19. Although you should be careful not to suggest misconduct of which you have no proof, you may suggest a state of facts in order to extract admissions of the witness.
20. Take care to avoid signalling or telegraphing the goal of your questions to the witness since, if you do, the witness will contrive to prepare an escape.
21. Use the cross-examination to elicit information that is helpful to your case, as well as information which is destructive to your opponent's case.
22. Be careful about open-ended questions since they may allow the witness to supply information favourable to his position.
23. Do not feel that you must accept the witness' answers. You may want to test them by further questioning. You may later be able to extract a contradictory answer from another witness called by your opponent. Or you may be in a position to call contradictory evidence through your own witnesses.
24. Remember that you may be able to introduce documents, which you have not been able to "authenticate" through your own witnesses, by putting them to the other side's witnesses on cross-examination. Remember to properly mark the exhibits clearly with an identifying number.

25. You may vary the pace and tone with which you cross-examine. You may focus intensely upon a particular subject, or you may zig-zag from subject to subject. You may also try to speed up the pace of questions and answers so the witness has less time to give a considered, self-protective response.

26. Frame your questions with a view towards maximizing agreement by the witness. Usually, you should begin cross-examination in a friendly tone, giving the witness the impression that you expect him to answer fairly. Your tone should be matter-of-fact, not accusatory. It is only after you have exhausted this approach, and the witness has been evasive or aggressive, that you should be sharper in your questioning. Remember that any arbitrator will resent an advocate bullying a witness, unless he considers that the witness is well able to take care of himself.

27. If you intend to call a witness in reply to undermine the evidence of the witness you are cross-examining, then you must give the witness you are cross-examining a full opportunity to explain his position. Thus, for example, you should put previous statements made by the witness to him before you call a witness in reply to testify regarding them.

28. Remember that it may be in your interest to ask a witness questions not only regarding what he has said, but what he has left out, or not said. For example: "You have stated that the grievor struck the foreman. What did the foreman say to the grievor before he did so?"

29. Before you confront a witness with a prior inconsistent statement, set the hook by committing the witness to the prior statement before proceeding to discredit him with the contrast between that statement and the statement he now makes.

30. Try to avoid being argumentative, i.e. commenting on the answers of the witness. Sometimes you may wish to make a point, so that the arbitrator knows where you are headed, but on the whole you should avoid mixing evidence with argument.

31. Do not simply proceed from one question to the next. Listen to the answers that are given. You *may* wish to pursue them further with supplementary questions.

32. Ask for one fact per question. Do not ask compound questions which contain several questions within themselves. It is best to ask questions related to particular topics, rather than chronologically. However, you may switch topics, change your pace, and moderate your tone.

33. If the witness is evasive, you may ask the arbitrator to direct him to be responsive to your questions.

34. Try to ask questions that require a "yes" or "no" answer, i.e. "closed" questions, rather than open-ended questions which allow the witness to advance his own case or explain away his conduct. If the opposing advocate argues that you are cutting off the witness, state that the witness has an opportunity to explain his answers on re-examination.

35. Pick out the weak spots in the witness' evidence and zero in on them.

36. It may be in your interest to flatter the witness in order to get him to agree as much as possible to the suggestions you make to him. Ask him things that he can agree with, but don't go overboard.

37. Be careful not to ask one question too many. Stop at the right point. If you get an admission helpful to your case and damaging to your opponent, be cautious about gilding the lily. You may undo all the good you have done.
38. Be careful not to elicit sympathy for the witness. If the witness is belligerent, you may approach him sharply. If he is mild-mannered, you must be careful to approach him gingerly, although not too much so. Be careful not to badger a witness.
39. In asking questions on cross-examination, you may not give evidence yourself, but you can suggest that the facts were such and so, and ask the witness to confirm or deny it.
40. Be sure that the arbitrator has an opportunity to write down your questions and the witness' answer before proceeding to the next question. Don't lose the attention of the arbitrator.
41. If the witness has given an answer that is damaging, do not ask the same question in the same words again. You may later want to approach the same subject matter through a different set of questions.
42. Do not allow yourself to get excited or angry in questioning a witness. If the witness should become angry, it is even more important that you remain icily cool.
43. Do not be repetitious and do not ask questions as to areas of fact that are of no importance to the case.
44. If you have a witness on the ropes, and the other lawyer interjects in an effort to distract attention, or to give the witness time to think, or to suggest an answer, then demand that the witness be excluded and point out to the arbitrator the strategem of the opposing advocate. Object to his conduct as an attempt to interfere with legitimate cross-examination. Ask the arbitrator to direct the other lawyer not to disrupt your cross-examination. Even if the arbitrator does not respond to your request, it will have a dampening effect on the readiness of the opposing advocate to interrupt you further.
45. Watch the opposing advocate to make sure that he does not counsel the witness as to how to answer by nods of his head. If he does, point it out to the arbitrator. Point out to the arbitrator that counsel is assisting the witness.
46. If there is a break in the proceedings during cross-examination, ask the arbitrator to remind the witness that he may not discuss the case with anyone during cross-examination including his own counsel. Detail one of your own party to keep an eye on the witness. If he is seen in discussion with his counsel, you are entitled to ask him, at the resumption of the hearing, if he has discussed the matter with anyone during the recess.
47. Do not mis-state evidence in framing your question. Do not allow the other counsel to do so either.
48. Above all: Don't ramble! All questions should be "directed" to a specific goal, calculated to extract a particular expected response. There is no room for aimless interrogation.

Checklist on Re-Examination

1. After your witness has been cross-examined, you can question him again but only on new matters which arise out of the cross-examination. You cannot question your witness again about matters that were already the subject of the examination-in-chief or that you forgot to ask about unless the same subject was brought up in the cross-examination.
2. If your witness has given answers on cross-examination that leave confusion in the arbitrator's mind, you can ask questions on re-examination to clarify the confusion.
3. You are not allowed to ask leading questions of your own witness on re-examination any more than you could when questioning him in chief.
4. There is no need to re-examine a witness unless important new evidence arises on cross-examination, or unless the cross-examination results in a distortion or confused version of the facts.
5. Where you want to have a witness explain an answer, where he has only been permitted to respond "yes" or "no" on cross-examination, you may use re-examination for this purpose, i.e. to bring out the rest of the story.

Otherwise, the rules as to permissible questions on re-examination are the same as those applicable to questions posed on examination-in-chief.

Checklist of Common Objections

A — To Questions Asked in Chief

1. The question is leading, i.e. it hints or suggests the answer.
2. The question has already been asked and answered.
3. The question invites or requires a hearsay answer. Or the answer given or in the course of being given contains hearsay.
4. The question calls for an opinion which the witness is not qualified to give. Or the answer being given or about to be given involves an opinion, although the witness has not been qualified as an expert.
5. The question lacks a foundation, i.e. it presumes a background of fact which has not been established.
6. The question calls for a legal opinion, e.g. regarding interpretation of the contract.
7. The question calls for speculation or for a hypothetical answer.
8. The question involves several questions which cannot be answered at the same time, i.e. it is a compound question.
9. The question includes a mis-statement of evidence that has previously been given.
10. The question is designed to elicit self-serving evidence. Or the answer given is self-serving.
11. The question is argumentative, i.e. it is really a comment upon the witness' evidence rather than a question as to the facts.
12. The advocate posing the question is, in fact, giving evidence rather than the witness.
13. The question is irrelevant to the issues in dispute.
14. The question relates to a "privileged matter", e.g. statements made during the grievance procedure.

B — To Questions Asked on Cross-Examination

1. The question is irrelevant to the issues in dispute. (The arbitrator may decide, if the relevance of the question is not clear, to admit it and decide later upon the weight to be given to it. Note, also, that questions which are not relevant to the issues may be asked on cross-examination provided they are posed for the purpose of testing the witness' credibility. In this case, however, the advocate is stuck with the answers given.)
2. The question requires a hearsay answer. Or the answer given or about to be given contains hearsay.
3. The question involves several questions which cannot be answered at the same time, i.e. it is a compound question.
4. The question includes a mis-statement of evidence that has previously been given.
5. The question calls for an opinion which the witness is not qualified to give. Or the answer given involves an opinion, although the witness has not been qualified as an expert.

6. The advocate posing the question is, in fact, giving evidence rather than the witness.
7. The question is argumentative, i.e. it is really a comment on the witness' evidence rather than a question as to the facts.
8. The question is "loaded", i.e. it cannot be answered without incriminating the witness, e.g. "When did you stop beating your wife?"
9. The question is put in a manner which bullies or badgers the witness.
10. The question relates to a "privileged matter", e.g. statements made during the grievance procedure.
11. The question calls for a legal opinion, e.g. an interpretation of the contract.
12. The question calls for speculation or a hypothetical answer.

C — To Questions Asked on Re-Examination

1. All those objections that can be made to questions posed on examination-in-chief may also be put to questions posed in re-examination.
2. In addition, the advocate may object that the question put in reply does not arise out of something that was raised for the first time in cross-examination but simply goes over the same ground which was covered in chief, or enters upon an entirely different subject.

D — To Documents Tendered as Exhibits

1. They are not relevant.
2. The documents contain hearsay.
3. They have not been properly proved, i.e. no witness has acknowledged or identified the signature on the document or the preparation of the document.
4. The documents are not the best evidence, e.g. they are not originals when originals should be available.

NOTE: When you are listening to the opposing advocate examine his own witness, or cross-examine your witness, you must listen on several levels. In the first place, when he is examining his own witness, you must note down the salient points of his testimony. You must, at the same time, consider which of those points you wish to cross-examine upon. Then you must continually be alert to object to questions that are improper, e.g. leading questions, questions requiring hearsay answers. You must be quick to make your objection *before* the answer is blurted out. Thus, you must learn to recognize a leading or hearsay question from the very words with which it begins. As soon as the opposing advocate asks, "What did he say?" you should jump to your feet and object. As soon as the opposing advocate starts to suggest an answer or information to the witness, interrupt with the words, "I object. The question is leading."

When the opposing advocate is cross-examining your witness, you must again note down the answers of your witness. Then you must determine what points the opposing advocate has raised for the first time that you wish to clarify by further questioning on re-examination. Finally, you must be alert to object to questions that are improper, e.g. questions that call for hearsay answers, etc. You should make your objections as noted above.

Checklist on Advice to Witnesses for Cross-Examination

1. Be fair, factual, concrete. Don't venture opinions unless asked. Don't exaggerate or argue. Don't try to make debating points. Speak in a simple, matter of fact fashion. Remember: arbitrators take notes in longhand. Watch them to make sure they have finished writing before you go on to your next point.
2. Be polite. Do not be sarcastic, quarrelsome, or argumentative. If counsel attempts to brow-beat you, you will gain the sympathy of the tribunal; if you attempt to answer back in kind, you will lose it; the tribunal will figure that you can handle yourself, and counsel will have a free hand to take you on.
3. Respond directly to the questions. But be brief. Often, a "yes" or "no" is all that is called for. Do not volunteer information not asked of you. If you think the question is unfair, or you wish to explain or qualify your answer, don't attempt to rush out with an explanation. Simply answer the question directly and then add: "May I explain?"
4. If you don't know or don't remember something, e.g. a date or the precise time, say: "I don't know" or "I don't remember". If you do remember something, be firm. Don't say "*I think* X was wearing a blue suit". These words — "I think" or "I believe" — suggest that you are not sure. However, if you don't understand the question, say so and ask counsel to repeat it.
5. Don't conclude, just because counsel suggests something to you, that he really has information to back it up. He may just be testing you. For example, counsel may say: "Are you sure X was wearing a blue suit? Are you sure it wasn't brown?" There may be no basis in fact for the suggestion made by counsel. He may only be trying to shake your confidence. If you're sure, remain firm; if not, then acknowledge it freely.
6. If counsel asks you: "Did you discuss this case with anyone before the hearing?" don't be afraid to say that you have discussed it with the union representative or counsel. There is nothing wrong with this. It is indeed expected that a union's advocate will review the testimony of a witness with him or her in advance of the hearing. If you are asked what advice if any your counsel gave to you, it is not inappropriate to say that he told you to tell the truth, assuming that is what he did tell you.
7. Don't get angry, loud or belligerent. A clear, calm, confident approach is required. Don't speak too fast or feel that you have to answer the questions at the speed at which they are asked. Respond at your own pace. Don't look sideways before answering a question. Try not to hesitate excessively before answering and don't parrot the question before responding.
8. Don't try to figure out the purpose of the question or argue with opposing counsel. For example, don't say: "If what you're driving at is that I don't know the colour of X's suit, then I want you to know that I do." It is dangerous for a witness to fence with counsel. Furthermore, the purpose of the question may be quite different from what you suppose. Thus, counsel may imply that the answer to a question, e.g. the colour of X's suit, is important to the case when in fact it is quite immaterial. He may say "I put to you that you can't remember the colour of X's suit". It may not matter one way or the other whether you can or not. But, if you fib, even in a small matter, it may discredit your entire testimony, whereas the answer, honestly given, may not matter one way or the other.

9. Don't say: "Do I have to answer that question?" Remember: your own counsel will object if a question is improper, or you are being badgered. It's his job to protect you. Let him be the one to do it. On the other hand, if your counsel intervenes, stop speaking immediately.
10. If you are asked a question with an unpleasant innuendo — e.g., "Aren't you a friend of the grievor?" — answer forthrightly "yes, I am." Remember: Don't rise to the bait.

Note: Xerox this advice sheet. Give it to your witnesses the night before the hearing.

Checklist on Presentation of Argument

1. The order of presenting argument depends upon who bears the burden of proof. In discharge or discipline cases, since the employer bears the burden of proof, the management advocate will normally go first and, after the union advocate gives his rebuttal, will have a right of reply. In other cases, the order is reversed.

ARGUMENT IN CHIEF

2. Do not write out your argument verbatim in advance of the hearing. Rather, prepare an outline of the points you wish to cover. This will enable you to think on your feet, to direct your attention to the arbitrator rather than to your notes, and to retain flexibility so that you can accommodate your argument to any unexpected turns that the evidence may have taken. For the same reason, although you may wish to prepare a written brief for your own use, do not file it with the arbitrator. The situation is different, of course, if a direction is given, because of lack of time, that written arguments be submitted following the hearing; then, you will have full opportunity to consider the evidence as it was given in preparing your written brief.
3. Be prepared to revise the content of your argument in light of the evidence that has been heard. Do not persist in an argument which has been prepared in advance where the evidence given at the hearing clearly does not support it.
4. An argument is a summation of the evidence, the contract and the law as they relate to the issues in dispute. It is directed toward persuading the arbitrator of a particular conclusion, e.g. that the contract has been breached, and of the necessity for the granting of certain remedies, e.g. reinstatement with back pay.
5. You should begin your argument by advising the arbitrator that you will proceed to deal with matters in the following order:
   (a) the issue or issues
   (b) the applicable provisions of the collective agreement in detail
   (c) the general principles of arbitration law applicable to the case
   (d) The evidence in review as it relates to the issues
   (e) the relevant authorities (i.e. texts, awards, legislation, if applicable), and how they apply
   (f) remedies requested.
6. Then proceed to give your argument in the order indicated. Speak in a measured voice so that the arbitrator can make notes of what you say. At the end of your argument, you may wish to sum up very briefly the crucial points of your case.
7. Remember that your goal is to persuade the arbitrator. The process of presenting argument is much more a dialogue than it is a debate. You should at all times be polite and courteous both to the arbitrator and your opponent although you should be firm and should not permit your opponent to interrupt your argument. If your opponent continually interrupts your argument — probably a tactic to knock you off your stride — do not rise to the bait by becoming equally belligerent. Address yourself to the arbitrator and point out that you have not interrupted your opponent

and that he will have his chance to make his case. If necessary, ask the arbitrator to direct your opponent to refrain from continual interruption of your case.

8. While presenting your argument, keep your eye on the arbitrator. Check from time to time to make sure that you have not lost his attention and that you are not boring him. Try to sense what is of concern to him and deal with that. For that reason, you should welcome any questions the arbitrator may ask because these will give you an indication of what he is thinking about. If you cannot answer immediately, indicate that you would like to consider the question further before responding or, if such is the case, that you will be coming to the point later in your argument. At the end of your argument, ask the arbitrator if he has any further questions he would like to ask you.
9. When you set out the issues, it is most important that this be done with care and clarity. The way in which the issues are framed may well affect the outcome of the case. For example, is the issue whether the grievor quit, or whether he was discharged for just cause? Is the issue whether the grievor disobeyed an order or whether the order was illegal?
10. In referring to the applicable provisions of the collective agreement, make sure you have a clear understanding as to how they fit together. Decide whether it is in your interest to urge that the contract be interpreted strictly or that it be construed liberally with a view to achieving the purpose of the parties. Remember that you cannot refer to "extrinsic evidence" such as past practice or negotiating history unless the agreement is ambiguous. If a plain reading of the agreement favours you, but past practice does not, you will want to argue that the agreement is clear and should be given its plain meaning. If the agreement is not crystal clear, but past practice is in your favour, you will want to argue alternatively that the agreement should be read with a view to its purpose, with a resulting interpretation favourable to yourself, or that it is ambiguous so that past practice should be considered in order to resolve its meaning. In presenting argument regarding the construction of a collective agreement, review the checklist on principles of drafting and construing contract language.
11. When you are summarizing, in general terms, the principles of arbitration law applicable to the case, do not at this point make reference to the particular authorities, i.e. texts, awards, etc. What you are doing at this point is setting out the legal propositions in a simple fashion so that the arbitrator can better evaluate the evidence when you review it. Thus, you may state: "The arbitration law, Mr. Chairman, is to the effect that an order does not have to be obeyed if it involves a breach of the law". Or, in another case, you might say: "Arbitrators are consistent, Mr. Chairman, in holding that a sick or disabled employee may not be discharged unless the employer establishes, with medical evidence, that the employee is not likely in the reasonably forseeable future to be able to return to work".
12. In reviewing the evidence, do not simply regurgitate the testimony of the witnesses. Relate the evidence, briefly, to the issues before the Board. Do not under any circumstances mis-quote evidence that has been presented. Suggest to the arbitrator any inferences or conclusions you consider should be drawn from the evidence.
13. Where there is a conflict between the testimony of union witnesses and company witnesses, you will have to give reasons as to why the evidence of the union witnesses

should be preferred. This can be done in a number of different ways. While it is rare that you will be able to show that a witness is deliberately lying, you will quite often be able to show that a witness does not have a clear recollection of events or that he did not have a proper opportunity to observe them. Your case will be advanced considerably if your witness has testified directly and with certainty regarding the matter. Again, you may be able to point to contradictions between the evidence of a management witness and the evidence of union witnesses, other management witnesses, or the evidence of the management witness himself on cross-examination. A major test for assessing the reliability or credibility of evidence is its consistency with probabilities. You will likely argue that the evidence of management witnesses is not consistent with the probabilities in terms of human nature, known behaviour, or factual circumstances. You may be able to point to some particular piece of circumstantial evidence corroborating the testimony of your witnesses. Or, you may be able to point to some motive which would cast doubt upon the reliability of the testimony of the management witness, for example, that he wishes to bail a friend out of trouble and that the effect of his testimony is to do just that. Finally, you may want to comment directly upon the demeanor of the management witnesses in comparison with the union witnesses. Were they evasive? Were they halting? Were they argumentative? All these approaches are useful, although it has been said that the most important test in evaluating evidence is its consistency with probabilities.

14. Go over in your own mind in advance the arguments which your opponent may raise, but be careful about "anticipating them", i.e. raising them before he does. He may in fact not raise them because he may simply not have thought of them or have rejected them. On the other hand, do not avoid dealing with arguments opposed to your position. Try, in short, to present an argument which is proof against those you anticipate will be raised against it.

15. When referring to authorities, start off with relevant passages from the leading texts on arbitration, i.e. Brown and Beatty on Canadian Labour Arbitration and Palmer on Collective Agreement Arbitration in Canada. Refer also to the relevant excerpts from the most recent leading case in your favour. Analyse it so that you know the facts of the case as well as the principle for which it stands. Be prepared in advance to distinguish the cases against you. You may do this on the ground that the facts in your case are different or that the collective agreement provisions in your case would lead to a different result. If opposing cases cannot be distinguished, you may still argue that the reasoning in cases which support you is to be preferred.

16. When you are referring to other arbitration awards, do not forget that the influence of an award may be enhanced by the stature of the particular arbitrator. Awards of respected arbitrators obviously have more influence than others, especially if they contain a careful analysis of the law. Be especially alert to previous awards of the arbitrator before whom you are appearing since these may give you a hint of his general attitude if not of his specific viewpoint. Look for relevant earlier awards between the same parties.

17. When you are referring to a text or an award, you should under no circumstances make misleading statements about the law by being selective about the passages you read. Do not mis-state the law. To do so will only serve to undermine the reliance which an arbitrator places in your entire argument. You are of course entitled to

emphasize the correctness of your own position and you are not required to make your opponent's case. In short, you may put your own legal position in as favourable a light as you can, but be accurate regarding your references to the law.

18. Check the various sources of arbitration law: (1) the texts by Palmer and Brown and Beatty on arbitration law; (2) the report system, Labour Arbitration Cases (L.A.C.) containing verbatim reports of arbitration awards across Canada; (3) the monthly commentary Labour Arbitration News (L.A.N.), which reviews recent leading cases; (4) the casebook by Sack and Goldblatt containing verbatim reports of leading cases, together with a glossary of labour arbitration terms; (5) specialized report services issued by particular governments, tribunals, universities, unions, etc.

19. At an actual hearing, bring with you sufficient copies of awards and excerpts from texts, etc. for the members of the arbitration board, as well as for your opponent. It will be enormously helpful to your case if the arbitrator can read the award as you refer to it. The importance of this cannot be over-estimated. Also, do not forget, in referring to authorities, to give the required detail regarding their citation, i.e. in the case of a text, the title, the name of the author, the year of publication, the page reference; in the case of an award, the names of the parties, the identity of the arbitrator, the date of the award, the volume number of the report, the page number where the case begins and the page number where the passage you are referring to may be found. When citing from the report system, Labour Arbitration Cases, (L.A.C.), make it clear whether you are referring to the first series (volumes 1 to 24) or the second series (volumes 1 to 22 and continuing).

20. While reference to the authorities is important, do not be dazzled by them. The arbitrator wants to know not only what other arbitrators have done, but — more importantly — what is the right thing to do. So, emphasize the *rationale*, i.e. the basic reason behind the principle. For example, don't content yourself with a reference to the numerous awards which rule that an employee should be paid for a statutory holiday which falls on what is for him a non-working day. Make it clear that the *rationale* for this is that statutory holiday pay is part of the total monetary package along with wages and other fringe benefits. It is the soundness of your rationale which will utlimately be the most persuasive influence upon an arbitrator.

21. Remember that it is open to you to make alternative arguments, e.g. that the grievor did not assault the supervisor, but that, if he did, it was only because he was provoked. It is for the arbitrator to determine what the facts really are. You may argue different conclusions as to the facts, and you may advance alternative positions regarding the law.

22. In requesting a remedy, be precise: you may request a declaration that the contract has been violated; a direction to the employer to comply with the contract; compensation for wages and other benefits lost; etc. In requesting reinstatement, make sure that you request reinstatement to the position previously held by the grievor; this will forestall a company which is a sore loser from transferring the grievor to another position with less favourable working conditions.

23. Finally, do not forget to ask the arbitrator to retain jurisdiction for the purpose of supervising implementation of the award including, if necessary, the fixing of the amount or quantum of compensation in a proper case.

REBUTTAL

1. The rebuttal should follow the same form as the argument in chief, save of course that it presents the other side of the case. Rebuttal also offers the opportunity to reply to the argument in chief. From this point of view, you should make notes recording the points made by your opponent and flagging in particular which of those points you intend to cover in rebuttal.
2. You may wish to deliver your own argument and then rebut directly the points made by your opponent in his argument in chief. Or you may do the reverse. Or you may integrate your own argument with the rebuttal of your opponent's case. This is a matter of individual style and may vary from case to case.
3. Do not mis-state your opponent's position, or ignore it, or treat it with disdain. Attempt to state your opponent's argument fairly and then give a clear, cogent and concise answer to it. If your view is that your opponent's argument is not relevant, then say that and explain why.
4. Remember that rebuttal will be your only opportunity to make your case and respond to your opponent's submissions, so use the opportunity in full.

REPLY

1. The purpose of reply is to allow an opportunity to respond to new arguments or submissions that have been advanced in rebuttal. If you are delivering a reply, you may not use it as another opportunity to repeat and expand upon arguments that you have already made in your argument in chief. On the other hand, it does allow you to separate the wheat from the chaff and focus attention once more upon the crucial issues in the case.

WHAT DOES BEING A WITNESS INVOLVE?

In many respects, the calling of a witness before a tribunal or hearing is similar to what we see on television — although, not nearly as dramatic.

Basically, the witness is asked to step forward, to state his or her name, to swear an oath to tell the truth and then respond to the questions asked by those representing the various parties or sides.

But there is more to properly giving evidence than just that. To ensure an arbitrator or tribunal has confidence in what you are saying, a number of other factors can play a role.

An arbitrator looks for believability and trustworthiness in a witness. For example, the arbitrator wants to know how well the witness knows the facts and how clear and candid they are in their presentation. So, to be fully prepared, it's important for a witness to make and review their own notes and recollections before the hearing.

Generally, there are at least 10 rules or "commandments" to keep in mind when preparing to be a witness.

THE 10 COMMANDMENTS OF WITNESS PREPARATION

1. Remember Why You Are There

As a witness, your role is to provide facts and information to the arbitrator and tribunal proceeding. You are not there to be judgmental or to tell the arbitrator how the case should be settled.

Perceptions, however, are important in any hearing. The more balanced and fair your account of the matter is perceived to be, the greater will be the weight or authority given to it. That said, this does not mean you must relate only the dull, dry facts in an unemotional or colourless manner. The authority or credibility of your evidence may be reinforced by the tone of your voice or your obvious commitment to your version of events.

2. Treat People With Respect

A hearing is expected to be fair and impartial in its search for the truth and the same is expected of all of its participants. Do not try to be a "smart-ass", flippant, arrogant or patronizing. If a witness does not act appropriately, his or her credibility is reduced in the eyes of others. Arbitrators are only human and they may be quick to disregard someone who appears to be wasting time or unwilling to help in a matter.

Indeed, improper behaviour in a proceeding could

haunt a witness well after the hearing has ended. For example, some arbitrators will comment on the credibility and behaviour of witnesses in the final award — a public and written document that could easily be read by present and future employers.

3. Think Before You Answer

As mentioned above, it is practical and valuable for a witness to sit down well before the hearing and think about what questions will be asked and to write down everything one can remember about facts and events. In fact, it is also important to take note of the events you do not remember or know well.

All this pays off during the hearing itself. If your preparations have been thorough, you will have a good idea what to expect. Even when an expected question is asked, it is important to take your time in responding. As well, answer the question as accurately and honestly as you can.

4. Answer the Question, Shut Up and Wait

Accurate answers are not necessarily lengthy ones. In many respects, the answer that will serve both you and the tribunal best is the one which deals directly with the question asked. Don't babble on.

A witness's role is not to make a speech, to advance a cause or to sell a point of view. If you stray from the facts of the question asked, you could get into trouble by introducing information that confuses the issues or diverts attention from the central point.

For this reason, it is important to listen carefully so you can state facts, not opinions.

5. If You Don't Understand the Question, Say So

A witness is under sworn oath and legally obliged to tell the truth. If the truth is not told, there could be legal consequences for a witness, such as allegations of perjury.

The key to handling questions is to be honest. Even if there is just one word or aspect of the question that is not understood, tell the proceeding you don't understand.

6. If You Don't Know, Don't Guess

Answering questions in a hearing is not a contest. It is the witness's role to state the facts and it is not expected that each witness will remember or know everything. Do not be embarrassed if you are unsure about something. Be honest and, if possible, ask to refer back to your notes if need be.

7. Don't Get Mad

Just as in television programs, all participants in hearings can get emotional or upset because of what is alleged. It is not unusual for people to be angry, frustrated, bitter or upset at various stages of a hearing.

Indeed, lawyers and representatives of various sides in a proceeding may deliberately needle witnesses. Their strategy is to make you stop thinking clearly. If you get mad you will also lose your credibility as a witness.

8. Remember, You are Not on Trial

You likely know more than anyone else about the events you are being questioned on. Speak clearly, calmly and precisely. If you stick to the facts and don't try to embellish your evidence, you have nothing to fear, be apprehensive or nervous about.

9. Focus on the Person Asking the Question

It is important for you to concentrate on exactly what is being asked. Forget everyone else in the room. True, you may be feeling odd or uneasy about your role. But you are not the first witness to feel this way. To a witness, the surroundings can be unfamiliar and it's easy to be confused and distracted.

But it is your job to accurately relay your information and this will only happen if you remain focused on the questions being asked.

10. Don't be Witness and Counsel at the Same Time

If the legal counsel or a representative in a proceeding is, in your opinion, being too abusive, aggressive or unfair in questioning you, realize your own counsel will do something if it is a serious matter.

Again, credibility is the key to being a good witness and you try to battle opposing counsel or "take charge" of the hearing in some way, you run a distinct risk of losing the credibility.

CONCLUSION

Being a witness is an important responsibility. At first the task may seem overwhelming or cause a feeling of apprehensiveness. But by following these simple rules and by being prepared, there will be no cause for undue nervousness or discomfort.