

Arbitration Advocacy Skills

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Courtesy of the George Meany Center for Labor Studies

Finding a Theme - Creating a “Hook”

1. The theme is a short statement describing what is most important in your case. It helps you to keep focused in trying to persuade the arbitrator. A “hook” is an image or catchy phrase that dramatizes the theme.
2. Brainstorm the facts.
 - a. List all the best facts.
 - b. Select the 3 or 4 best.
 - c. List all the worst facts.
 - d. Select the 3 or 4 worst.
3. Put the facts together as a story.
 - a. Emphasize the best facts.
 - b. Make a clear emotional connection. If you don’t care, why should anyone else.
4. Reduce the story to 10 words - a telegram. This is your *theme*.
5. Come up with a “hook.”
 - a. Keep in mind your theme.
 - b. Go back to the list of best and worst facts.
 - c. Think of an image or catchy phrase that captures your theme and your best facts.
6. Use your “hook” to start your opening statement. Work in the theme in the first 20 seconds.
7. Use the “hook” and theme in your direct & cross examinations, & closing.
8. Don’t use a “hook” that hurts.

Direct Examination - Spotlight on the Witness

1. Let the Witness Shine.
 - a. Let the witness talk - you should not be testifying.
 - b. Be a director, not an actor.
 - c. Ask questions that build the witness’ credibility (background, special knowledge).
 - d. Make the testimony more interesting by having the witness use an exhibit (chart, letter, blow-up, time line, something tangible).
 - e. Listen to the witness’ answers. Be interested!
2. Organize the Examination.

- a. Follow the rule of first and last questions. They should deal with the most important facts or issues. Put the less dramatic or bad stuff in the middle.
 - b. Organize the examination logically, e.g. in chronological order or by incident.
 - c. Use an outline to plan your questions.
 - d. Use “headline” transitions (“Now I’d like to ask you about ...”) following the outline.
 - e. Bring up obvious weaknesses to undercut later cross-examination.
 - f. Use language and points from your theme and “hook.”
3. Use Open Ended Questions.
- a. Use general open-ended questions (the “5 Ws” - who, what, where, when, why , explain, discuss).
 - b. Use words like “first,” “next,” and “last” to focus question (“When was the first time you complained?” “When was the next time?”).
 - c. To focus the witness, break down questions into topics.
 - d. Don’t use leading questions which obviously suggest the answer (“Isn’t it true that ...”)
 - e. Don’t comment on or repeat an answer before the next question.
4. Prepare the Witness.
- a. General Tips for Witnesses
 - i. Dress appropriately but comfortably.
 - ii. Rehearse the testimony, including anticipated cross-examination.
 - iii. Present facts, do not argue points.
 - iv. Do not exaggerate.
 - b. Tips for Witnesses on Direct Examination.
 - i. Listen to the questions.
 - ii. Answer only what is asked.
 - iii. Direct examination is not the time to give a speech or tell a story.
 - c. Tips for Witnesses on Cross-Examination.
 - i. Answer as briefly as possible without seeming evasive.
 - ii. Ask for clarification before answering a question you do not understand.
 - iii. Avoid arguing or getting angry.
 - iv. Remember that problems can be corrected with later questions on redirect examination.
5. Keep Redirect Examination Short.
- a. The questions should still be open-ended.
 - b. The questions should be limited to questions raised on cross-examination.
 - c. Only ask question that are short and clarify the points raised on cross.
6. Pursue the Reluctant Witness.
- a. Use informal means of persuasion (personal contact, guilt, appeal to self-interest, persuasion by common friend).

- b. Try to get an agreement - in writing - for the other side to produce a witness under its control.
- c. Ask the arbitrator to order it.
- d. Subpoena the witness, if state law permits.

Common Evidence Objections

1. *“Leading Question.”* Asking a question to your own witness that obviously suggests the answer (e.g. “Isn’t it true that ...”). Leading questions can be asked of the employer’s witnesses.
2. *“Calls for Speculation.”* Asking a question where the witness would have to guess the answer.
3. *“Incompetent.”* Asking a question that the witness has no personal knowledge about.
4. *“No Foundation.”* Asking a question without first showing, through earlier questions, that the witness has a basis for answering without guessing.
5. *“Not Relevant or Material.”* Asking a question that does not help prove what needs to be proved in the case.
6. *“Cumulative.”* or *“Asked and Answered.”* Asking a question that has already been asked and answered.
7. *“Badgering the Witness.”* Asking questions that are threatening, sarcastic, or an attempt to ridicule the witness.
8. *“Argumentative.”* Asking a question that is not intended to get information but to comment on the evidence (e.g. “That was pretty foolish of you, wasn’t it?”).
9. *“The Document Speaks for Itself.”* Objection to having a witness testify as to the contents of a document already admitted into evidence. Most arbitrators will allow it if it is a question leading to another point.
10. *“Hearsay.”* Asking a witness what someone else (a “declarant”) said or wrote, when you want the declarant’s statement in evidence for its truth. For example, it is hearsay to have Jones testify that Smith said the workplace is unsafe in order to prove that the workplace is unsafe. It is also hearsay to use Smith’s affidavit stating that the workplace is unsafe without Smith testifying.

Exceptions to Hearsay: Arbitrators will often allow hearsay into evidence even when a court will not. Courts will allow hearsay under a number of exceptions. Here are a few.

- a. A statement made by the opposing party, or an agent of that party, is admissible as an “admission.”
- b. A statement heard by the witness that shows the declarant’s then existing mental, emotional or physical condition is admissible as an “excited utterance.”
- c. A statement made to the witness may be admissible if it is not being used for the truth of the statement. For example, a declarant’s statement to a witness that the

workplace is unsafe may be used to show that the witness had “notice” of a problem but ignored the warning.

- d. A certified copy of a governmental record.
- e. A business record if the witness has personal knowledge that it is (1) a regular practice of the business to make and keep the record, and (2) the record was kept according to the practice.
- f. A newspaper or other commercial publication.