

TABLE CONTENTS

PREFACE	i
CHAPTER 1: OVERVIEW OF THE LEGAL FRAMEWORK OF GRIEVANCE-ARBITRATION IN THE FEDERAL SECTOR	1
I. OVERVIEW	1
A. PRIVATE SECTOR LABOR LAWS: A VERY SHORT HISTORY	1
B. INFLUENCE OF PRIVATE SECTOR LABOR LAW ON THE DEVELOPMENT OF FEDERAL SECTOR LABOR RELATIONS	4
1. Federal Sector Collective Bargaining Arbitration Provisions Introduced by Executive Order.....	4
2. Executive Order Allowed Federal Sector to Mimic Private Sector.....	4
C. ENACTMENT OF THE CIVIL SERVICE REFORM ACT OF 1978 AND THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE.....	4
D. TRUMP AND BIDEN EXECUTIVE ORDERS	5
1. Trump Executive Order 13812	5
2. Trump Executive Orders 13836, 13837, and 13839	5
a. Executive Order 13836: Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining.....	5
b. Executive Order 13837: Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use.....	5
c. Executive Order 13839: Promoting Accountability and Streamlining Removal Procedures Consistent With Merit Systems Principles	6
CHAPTER 2: ADVOCATE SELECTION	9
I. OVERVIEW	9
II. SELECTING THE ADVOCATE WHO WILL WIN THE CASE	9
A. ASSESS THE REQUIRED SKILLS OF YOUR ADVOCATE	9
1. Active Listening	9
2. Organized, Focused, and Prepared.....	9
3. Reasoned Objectivity.....	9
4. Directness and Courage	9
5. Professional Courtesy	10
6. Personal Integrity	10
7. Personal Presence	10
B. GRAVITY AND COMPLEXITY OF THE ISSUE(S).....	10
C. FACTS, WITNESSES, AND TIME TO PREPARE	10
D. SKILLS OF OPPOSING ADVOCATE.....	10
E. WILL YOUR ADVOCATE BE A WITNESS?	10
F. WHO IS THE ARBITRATOR?	10
G. LEADS AND SECOND CHAIRS	11
CHAPTER 3: CASE INVESTIGATION	13
I. OVERVIEW	13
II. CONDUCT INITIAL FILE REVIEW	13
III. CREATE AN INVESTIGATION PLAN AND SCHEDULE.....	13
IV. ORGANIZE YOUR INVESTIGATION FILE.....	14
V. RESEARCH THE CONTRACT	15
A. ORIGINAL LANGUAGE.....	15
B. SUPPLEMENTAL AGREEMENTS	15
C. ARBITRATION DECISIONS	15
D. BARGAINING HISTORY	15
E. PAST PRACTICE	16
F. PRIOR SETTLEMENTS	16
G. TRADE USAGE.....	17
H. CONTRACT INTERPRETATION PRINCIPLES	17
I. REFERENCE MATERIAL	17
J. SUBJECT MATTER EXPERTS.....	17

K.	THE OPPOSITION	17
VI.	HOW TO INTERVIEW POTENTIAL WITNESSES	17
A.	THE RIGHT TO INTERVIEW WITNESSES.....	17
B.	UNION AND EMPLOYEE INTERVIEW RIGHTS	18
1.	Formal Discussions	18
a.	Elements of Formal Discussions	18
b.	Participants in the Discussion.....	19
c.	Subject Matter of the Discussion.....	19
d.	Notice of the Meeting.....	20
e.	Union Participation in the Meeting	20
2.	Investigative Examinations.....	20
a.	Conditions for Union Representation at an Investigatory Interview	21
b.	Reasonable Belief of Discipline	21
c.	Employee’s Request for Union Representation	21
d.	Notification of Employee’s Right to Representation in the Interview	21
e.	Role of the Representative During the Interview	21
f.	Refusal as an Unfair Labor Practice.....	22
VII.	INTERVIEW TIPS.....	22
A.	FACT WITNESSES	22
B.	ORDER OF FACT WITNESS INTERVIEWS.....	22
C.	LOCATION OF THE INTERVIEW	23
D.	THE ATTENDEES	23
E.	INTERVIEW TECHNIQUES.....	23
1.	Questioning Types	23
a.	Open and Closed Questions	23
b.	Probing Questions	24
c.	Leading Questions.....	24
d.	Rhetorical Questions.....	24
2.	The Funnel Questioning Technique	24
3.	Interview Preparation.....	25
4.	Conducting the Interview.....	25
F.	QUESTION WITNESSES ABOUT RELEVANT DOCUMENTS OR OTHER EVIDENCE	26
VIII.	SECURE RELEVANT DOCUMENTATION	26
A.	THE PRIVACY ACT	27
B.	THE CSRA AND NLRA RIGHT TO REQUEST DOCUMENTS	27
C.	THE COLLECTIVE BARGAINING AGREEMENT	27
IX.	RESEARCH AND KNOW THE LAW	28
	CHAPTER 4: CASE EVALUATION	29
I.	OVERVIEW	29
II.	CALENDAR TIME TO CONDUCT YOUR EVALUATION	29
III.	DEVELOP A PROOF MATRIX	29
A.	ELEMENTS OF CONTRACTUAL/LEGAL STANDARD.....	29
B.	TOPIC	30
C.	ELEMENTS OF CONTRACT/LEGAL STANDARD	30
D.	RELEVANT FACTS.....	30
E.	SOURCE.....	30
F.	CREDIBILITY	30
G.	ADMISSIBILITY	30
H.	OBJECTIVELY EVALUATE YOUR CASE	31
IV.	EVALUATE YOUR OPPONENT’S CASE.....	32
V.	DECISION TIME: MOVE FORWARD, REMAND, OR SETTLE	32
	CHAPTER 5: ARBITRATOR SELECTION	35
I.	OVERVIEW	35
II.	COLLECTIVE BARGAINING AGREEMENT PROCEDURES IN ARBITRATOR SELECTION.....	35
A.	SELECTION OF SEMI-PERMANENT ARBITRATORS	35
1.	Single Arbitrator	35
2.	House Panel.....	36
a.	Rotating Panel	36

b.	Pool Selection.....	36
B.	SELECTION OF <i>AD HOC</i> ARBITRATORS	36
1.	Federal Mediation and Conciliation Service (FMCS).....	36
a.	<i>Ad Hoc</i> Selection Methods	37
(i)	Strike Method of Selection	37
(ii)	Strike-Plus-Rank Method of Selection.....	37
2.	American Arbitration Association	38
a.	AAA Arbitrator Select.....	38
(i)	AAA Arbitrator Select Fees (2021)	38
III.	DETERMINE THE BEST ARBITRATOR FOR YOUR CASE	39
A.	NATIONAL ACADEMY OF ARBITRATORS	39
B.	ARBITRATORS USED BY TRUSTED COLLEAGUES.....	39
C.	PUBLISHED DECISIONS OR ARTICLES	39
D.	UNPUBLISHED DECISIONS.....	40
E.	ARBITRATOR EVALUATION SERVICES.....	40
F.	THE INTERNET	40
G.	ARBITRATOR INTERVIEWS	40
H.	PROFESSIONAL ASSOCIATIONS.....	40
IV.	INABILITY TO AGREE ON AN ARBITRATOR	40
V.	NOTIFY THE ARBITRATOR OF SELECTION.....	41
A.	PROHIBITION ON <i>EX PARTE</i> COMMUNICATION WITH THE ARBITRATOR.....	41
VI.	CONDITIONS FOR ARBITRATOR ACCEPTANCE OR REJECTION	41
A.	FACTORS AFFECTING ACCEPTANCE.....	41
B.	DISCLOSURE OF POTENTIAL CONFLICTS OF INTEREST	41
C.	ARBITRATOR RECUSAL.....	42
VII.	QUALITIES OF AN IDEAL ARBITRATOR.....	42
A.	IMPARTIALITY	42
B.	PERSONAL INTEGRITY.....	42
C.	EDUCATION AND EXPERIENCE.....	42
D.	EFFICIENCY DURING HEARING.....	42
E.	PARTICIPATION IN THE HEARING.....	43
F.	PROMPTNESS AND CLARITY OF AWARD	43
G.	CONTRACT INTERPRETATION TENDENCIES	43
H.	FLUENCY IN A SECOND LANGUAGE.....	43
I.	FEES	44
J.	AVAILABILITY	44
CHAPTER 6: CASE PREPARATION		45
I.	OVERVIEWS	45
II.	DEVELOP A PERSUASIVE CASE NARRATIVE	45
III.	MEASURE TWICE, AND CUT ONCE: FINALIZE YOUR CASE STRATEGY.....	46
A.	IDENTIFY ALL CONTRACTUAL/LEGAL ELEMENTS OF EACH CLAIM OR DEFENSE	46
B.	SELECT THE BEST EVIDENCE FOR EACH CLAIM ELEMENT.....	46
C.	SPECIFY THE ARGUMENTS AND EVIDENCE TO BE PRESENTED	47
D.	DO NOT FORGET TO ADDRESS REMEDIES.....	47
IV.	ENSURE YOUR ARGUMENT IS SOUNDLY REASONED	47
V.	ENSURE THE EVIDENCE SUPPORTS YOUR ARGUMENTS	48
VI.	DETERMINE HOW EVIDENCE WILL BE ENTERED INTO THE RECORD.....	49
A.	STIPULATIONS.....	49
B.	ORAL TESTIMONY	49
C.	DOCUMENTS	49
D.	REAL AND DEMONSTRATIVE EVIDENCE.....	50
E.	JUDICIAL NOTICE	50
VII.	ANTICIPATE AND PLAN FOR EVIDENTIARY OBJECTIONS	50
VIII.	MAP THE SEQUENCE OF YOUR CASE: FOUR IMPORTANT PRINCIPLES OF PERSUASION	50
A.	PRIMACY.....	51
B.	RECENCY.....	51
C.	INOCULATION	51
D.	REPETITION	51
IX.	CREATE A TRIAL NOTEBOOK	51

X.	PRODUCE AN EXHIBIT BINDER	53
XI.	DETERMINE HOW YOU WILL CLOSE: TO BRIEF OR NOT	53
XII.	TIPS FOR EFFECTIVE ARBITRATION ADVOCACY	54
CHAPTER 7: PREHEARING PRACTICE.....		57
I.	OVERVIEW	57
II.	REMOTE OR IN-PERSON HEARING.....	57
A.	OVERVIEW.....	57
B.	ADVANTAGES AND DISADVANTAGES OF REMOTE AND IN-PERSON HEARINGS	58
1.	Remote Video Hearings	58
2.	In-Person Hearings	59
C.	HEARING PROTOCOLS	60
1.	COVID-19 In-Person Hearing Protocols.....	60
a.	Prehearing Conference	60
b.	Hearing Room	60
c.	Witness Waiting Room	61
d.	Witnesses	61
e.	Exhibits.....	61
f.	Additional Protocols	61
2.	Remote Video Hearing Protocols.....	61
a.	Preconditions.....	62
b.	Participant Arrangements.....	62
c.	Prehearing Conference	62
d.	Dry Run	62
e.	Responsibility of Each Party.	62
f.	Establish Process for Technical Difficulties.	62
g.	Standard Hearing Ground Rules	63
h.	Initiating, Joining, and Participating in a Video Hearing	63
D.	OTHER CONSIDERATIONS BEFORE SETTING A HEARING DATE: CASE COMPLEXITY, URGENCY OF RESOLUTION, AND PARTICIPANT AVAILABILITY	64
E.	IN-PERSON HEARING SITE ACCOMMODATIONS: SEQUESTRATION.....	65
1.	Hearing Room Size	65
2.	Caucus Room	65
3.	Witness Waiting Area	65
4.	Table Configuration.....	65
5.	Other Amenities	66
F.	SAFETY AND SECURITY ISSUES OTHER THAN COVID-19	66
G.	HEARING TRANSCRIPTS AND RECORDINGS	66
H.	INTERPRETERS.....	67
I.	DISAGREEMENT ON HEARING, DATE, TIME, REMOTE OR IN-PERSON, LOCATION, AND RELATED MATTERS	67
III.	PREHEARING CONFERENCES, SCHEDULING ORDERS, AND MOTIONS.....	68
A.	PREHEARING CONFERENCE AND SCHEDULING ORDER.....	68
IV.	CHALLENGES TO ARBITRABILITY	68
A.	PROCEDURAL ARBITRABILITY	68
B.	SUBSTANTIVE ARBITRABILITY.....	69
1.	Grievances and EEO Discrimination Complaints	70
2.	Grievances and Chapter 43 and Chapter 75 MSPB Actions	70
3.	Prohibited Personnel Practices (Other Than Discrimination).....	70
C.	BIFURCATION.....	71
V.	MOTIONS <i>IN LIMINE</i>	71
A.	THIRD PARTY INTERVENTION	71
B.	REASONABLE TIME FOR UNION TO PREPARE FOR HEARING	72
VI.	DISCOVERY DISPUTES: MOTIONS, SUBPOENAS AND UNFAIR LABOR PRACTICE CHARGES	73
A.	MOTIONS.....	73
B.	SUBPOENAS	74
C.	UNFAIR LABOR PRACTICE CHARGE	74
VII.	CONTINUANCE (POSTPONEMENT) REQUESTS	75
VIII.	PREHEARING PRACTICE POINTERS	76

CHAPTER 8: WITNESS SELECTION AND PREPARATION	77
I. OVERVIEW	77
II. CRITERIA FOR WITNESS SELECTION	77
A. TYPES OF FUNCTIONAL WITNESSES	77
1. Fact Witnesses	77
a. Participating Witnesses	77
b. Eyewitnesses	77
c. Explanatory Witnesses	77
2. Foundation Witnesses	77
3. Character Witnesses	78
4. Expert Witnesses	78
B. WITNESSES' PERFORMANCE ON THE STAND	78
III. WITNESS PREPARATION	79
A. GENERAL CONSIDERATIONS	79
B. TIMING OF WITNESS PREPARATION	79
C. INDIVIDUAL VS. GROUP PREPARATION	79
IV. STEPS FOR PREPARING WITNESSES	79
A. DESCRIBE THE CASE'S BACKGROUND	79
B. EXPLAIN THE ARBITRATION PROCESS	79
C. PROVIDE THE FACTUAL, CONTRACTUAL, AND LEGAL CONTEXT OF THE DISPUTE	80
D. REVIEW DOCUMENTS AND OTHER EVIDENCE TO BE SUBMITTED THROUGH THE WITNESS	80
E. DO'S AND DON'TS OF TESTIFYING	81
F. REHEARSE DIRECT AND CROSS-EXAMINATION	83
V. PREPARE YOUR WITNESS FOR DIRECT EXAMINATION	83
A. CREATE AN OUTLINE OF WITNESS TESTIMONY	83
1. Draft Questions or "Wing It" at Hearing?	83
a. Write Out Questions in Full	84
b. Outline Questions	84
2. Presentation of Testimony	84
a. Chronological Order	85
b. Primacy Order	85
B. CRAFT QUESTIONS WITNESSES CAN ANSWER	85
C. REHEARSE WITH YOUR WITNESSES	85
D. YOUR WORST NIGHTMARE	85
E. PRACTICE MAKES PERFECT	87
VI. PREPARE YOUR WITNESS FOR CROSS-EXAMINATION	87
A. PREPARING EXPERT WITNESSES	87
VII. OTHER WITNESS ISSUES	88
A. CONFIRM DATE, TIME, AND PLACE OF TESTIMONY	88
B. FOR IN-PERSON HEARINGS, CONFIRM TRANSPORTATION	88
C. FOR REMOTE HEARINGS, CONFIRM THE PROCESS	88
D. CONFIRM CONTACT INFORMATION	88
E. IN CASE OF EMERGENCY	88
F. PAY ISSUES	88
G. ASK ABOUT SPECIAL NEEDS	88
CHAPTER 9: HEARING DAY PRELIMINARIES	89
I. OVERVIEW	89
II. ARRIVE EARLY	89
A. IN-PERSON ROOM ARRANGEMENT	89
B. REMOTE VIDEO HEARINGS	89
C. GET ORGANIZED BEFORE YOU ATTEND TO OTHER ISSUES	89
III. PROCEDURAL ISSUES	89
A. ADMISSION OF EXHIBITS INTO THE RECORD	89
B. STIPULATION AGREEMENTS	90
C. AGREEMENT ON STATEMENT OF THE ISSUE	90
D. WHERE ARE THE WITNESSES?	90
E. WHERE IS MY GRIEVANT?	90
F. DISCOVERY DISPUTES	90
G. ARBITRABILITY CHALLENGES	91

IV.	ATTENDEES AND WITNESS SEQUESTRATION	91
V.	PRACTICE POINTERS FOR HEARING DAY	91
CHAPTER 10: OPENING STATEMENTS.....		93
I.	OVERVIEW	93
II.	OPENING STATEMENT PROCEDURES	93
A.	THE ARBITRATOR'S GENERAL RULE.....	93
B.	NEVER WAIVE YOUR OPENING STATEMENT	93
C.	ADVANTAGES OF THE RESPONDING PARTY TO RESERVE ON OPENING STATEMENT	94
1.	Revealing Information Useful to the Opposition.....	94
2.	Opposition Cannot Prove Its Case.....	94
3.	First Impressions Matter	94
III.	OBJECTIVES OF AN OPENING STATEMENT	94
IV.	CONTENT OF AN OPENING STATEMENT	95
A.	PROHIBITION OF ARGUMENT	95
B.	INAPPROPRIATE COMMENTS.....	95
C.	DISCUSSION OF THE CONTRACTUAL OR LEGAL STANDARD	95
D.	DISCUSSION OF THE FACTS	96
E.	ETHICAL CONSIDERATIONS FOR ATTORNEY ADVOCATES	96
F.	REMEDY SOUGHT	96
G.	ADMISSIONS AND OMISSIONS	97
H.	COMMENTS REGARDING THE OPPOSITION'S OPENING STATEMENT.....	97
I.	OBJECTIONS TO OPENING REMARKS	97
V.	PREPARATION AND PLANNING	98
A.	LENGTH OF STATEMENT	98
B.	ELEMENTS OF AN EFFECTIVE OPENING STATEMENT.....	98
C.	THEORY AND THEME.....	98
D.	USE THE PRINCIPLES OF STORY CONSTRUCTION	99
E.	INCORPORATE THE TOOLS OF PERSUASION USED BY PROFESSIONAL SPEAKERS	99
1.	Aristotle and Cicero	100
F.	PRIMACY, RECENCY, AND REPETITION	100
G.	TOPICAL ORGANIZATION.....	100
H.	PRESENT OR PAST TENSE?	101
I.	PERSPECTIVE	101
J.	USING YOUR BAD FACTS TO WIN.....	101
K.	RULE OF THREE	102
L.	USE EXHIBITS, PLEADINGS, AND VISUAL AND OTHER AIDS	103
1.	Pleading.....	103
2.	Exhibits	103
3.	Visual Aids.....	103
4.	Audio and Video Recordings.....	103
M.	OUTLINING AN OPENING STATEMENT.....	103
N.	SHOULD YOU WRITE OUT YOUR OPENING STATEMENT?	104
O.	PRACTICE	104
VI.	DELIVERY.....	104
VII.	PUTTING IT ALL TOGETHER: EFFECTIVE AND INEFFECTIVE OPENING STATEMENTS	105
VIII.	SUMMARY AND ADDITIONAL CONSIDERATIONS	105

CHAPTER 11: MAKING YOUR RECORD **107**

I.	OVERVIEW	107
II.	ARBITRATORS' DISCRETION TO CONDUCT THE HEARING	107
III.	BASICS OF EVIDENCE.....	108
A.	DIRECT AND CIRCUMSTANTIAL EVIDENCE.....	108
B.	RELEVANT AND MATERIAL EVIDENCE.....	108
IV.	RULES OF EVIDENCE	108
A.	INTRODUCTION.....	108
B.	THE FEDERAL RULES OF EVIDENCE.....	109
1.	Exclusion of Relevant Evidence.....	109
a.	Exclusions to Promote Other Social Policies	109
(i)	Compromise and Offers of Compromise (FRE 408).....	109

	(ii) Offers to Pay Medical and Similar Expenses (FRE 409)	109
	(iii) Subsequent Remedial Measures (FRE 407).....	110
	(iv) Inadmissibility of Pleas, Plea Discussions, and Related Statements (FRE 410).....	110
	(v) Sexual Predisposition and Behavior (FRE 412)	110
	(vi) Privileged Communication (FRE 501, 502).....	110
	(vii) Probative Value Substantially Outweighed Prejudice, Confusion, or Waste of Time (FRE 403)	111
	(viii) Hearsay (FRE 801–807)	112
C.	SPECIAL EVIDENCE ISSUES	114
1.	Arbitrator’s Objections	114
2.	Judicial (Arbitral) Notice (FRE 201).....	114
3.	Presumptions (FRE 301)	114
a.	Mailbox Rule	114
b.	Notice of Plant Rules	114
c.	Unchallenged Prior Discipline.....	114
d.	Improperly Secured Documents	115
e.	Privacy Rights	115
(i)	Need to Know Within Agency (5 USC 552a(b)(1))	115
(ii)	Required FOIA Disclosure (5 USC 552a(b)(2))	115
(iii)	Routine Uses (5 USC 552a(b)(3))	115
f.	Effect of Determinations Made in Other Proceedings— <i>Res Judicata</i> and Collateral Estoppel.....	115
g.	Offers of Proof (FRE 103(b))	116
h.	Contractual Limitations on the Admission of Evidence: New Evidence and New Argument	117
V.	FUNDAMENTALS OF CONTRACT INTERPRETATION	117
A.	OVERVIEW.....	117
B.	INTENT OF THE PARTIES.....	117
C.	PLAIN MEANING RULE	118
D.	PAROLE EVIDENCE RULE	118
E.	PRINCIPLES OF CONTRACT INTERPRETATION	119
F.	EXTERNAL SOURCES OF EVIDENCE TO DETERMINE MEANING OF CONTRACT LANGUAGE	120
1.	Bargaining History	120
2.	Contract Interpretation Agreements	121
3.	Prior Arbitration Decisions as Precedent.....	121
4.	Grievance Settlements	121
5.	Grievance Settlement Offers.....	121
6.	Agency Handbooks and Manuals	121
7.	Industry Practice.....	121
8.	Past Practice	121
a.	Past Practices Defined	122
b.	Factors to Establish a Past Practice	122
c.	Subjects of Past Practice	122
d.	Uses of Past Practice.....	122
e.	Clarify Ambiguous Contract Language	123
f.	Modify or Amend Unambiguous Contract Language.....	123
g.	Create a Separate, Enforceable Condition of Employment	123
h.	Termination of a Past Practice	123
i.	Contractual Clauses and Past Practices.....	124
j.	Summary.....	124
VI.	EFFECT OF LAWS, RULES AND REGULATIONS.....	124
A.	OVERVIEW.....	124
1.	CSRA Cases	124
2.	Non-CSRA Cases	125
B.	SUMMARY	126
VII.	BURDEN OF PROOF: THE BASICS	126
A.	INTRODUCTION.....	126
1.	Who Bears the Burden of Proof?	126
2.	Amount or Quantum of Proof	127
VIII.	BURDEN OF PROOF IN DISCIPLINE AND PERFORMANCE-BASED ACTIONS	128
A.	INTRODUCTION.....	128
B.	DISCIPLINE.....	128
1.	Just Cause	128

a.	Notice	129
b.	Reasonable Rules and Orders	129
c.	Pre-Disciplinary Investigation	130
d.	Proof	130
e.	Equal Treatment	130
f.	Penalty	131
2.	Procedural Due Process	131
3.	CSRA.....	132
4.	Performance.....	132

CHAPTER 12: WITNESS TESTIMONY..... 135

I.	OVERVIEW	135
II.	THE RIGHT TO REPRESENTATION	135
III.	ORDER OF PRESENTATION.....	135
IV.	IDENTITY OF WITNESSES; WITNESS LISTS	135
A.	SEQUESTRATION OF WITNESSES.....	136
V.	THE ADVOCATE AS WITNESS.....	136
VI.	CALLING ADVERSE WITNESSES	136
VII.	CALLING HOSTILE WITNESSES.....	137
VIII.	WITNESS ANONYMITY AND THE RIGHT TO CONFRONT ADVERSE WITNESSES.....	137
IX.	FAILURE OF A PARTY TO CALL A WITNESS: ADVERSE INFERENCES	137
X.	MISSING WITNESSES	138
XI.	PERSUADING A WITNESS NOT TO TESTIFY.....	138
XII.	FAILURE OF A PARTY TO APPEAR: <i>EX PARTE</i> ARBITRATION HEARINGS.....	138
XIII.	SWEARING OR AFFIRMATION OF WITNESS	139
XIV.	PERJURY AND FALSE STATEMENTS	139

CHAPTER 13: DIRECT EXAMINATION: PUTTING ON YOUR CASE-IN-CHIEF 141

I.	OVERVIEW	141
II.	PURPOSE.....	141
III.	BASIC RULES GOVERNING DIRECT EXAMINATION.....	141
A.	FACT VS. OPINION.....	141
B.	OPEN-ENDED AND LEADING QUESTIONS.....	141
1.	Leading Questions on Direct Are Allowed in Limited Circumstances	141
C.	LAYING A FOUNDATION.....	143
D.	RULES OF EVIDENCE.....	143
IV.	HOW TO ASK A DIRECT QUESTION: TECHNIQUES THAT WORK.....	143
A.	ASK SHORT, CONCISE OPEN QUESTIONS.....	143
B.	USE HEADLINES.....	144
C.	ASK WHO, WHAT, WHEN, WHERE, WHY AND HOW QUESTIONS	144
D.	USE ORDINARY LANGUAGE.....	144
E.	CHOOSE YOUR WORDS CAREFULLY.....	144
F.	USE THE SAME TERMS CONSISTENTLY.....	144
G.	GET TO THE POINT	144
H.	SET THE SCENE.....	145
I.	USE DEMONSTRATIVE AIDS OR VISIT THE SITE.....	145
J.	LISTEN TO YOUR WITNESS.....	145
K.	PAUSE AND PACE	146
L.	ASK STRATEGIC FOLLOW-UP QUESTIONS.....	146
M.	REFERENCE THE DOG THAT DID NOT BARK	146
N.	LEAD YOUR WITNESS.....	146
O.	LEAD YOUR WITNESS IN A NON-LEADING MANNER AROUND PROBLEM AREAS.....	146
P.	CONSIDER CONTRARIAN LEADING	146
Q.	DISCLOSE WEAKNESSES.....	147
R.	REPEAT IMPORTANT RESPONSES	147
S.	DEMONSTRATE TIME, DISTANCE, SPEED, AND SIZE	148
T.	USE PRESENT TENSE	148
U.	SPEAK CLEARLY	148
V.	"WHAT HAPPENED NEXT?".....	148
W.	REFRESH RECOLLECTION; PAST RECOLLECTION RECORDED.....	148

V.	USE OF WITNESS NOTES	149
VI.	CORRECTING ERRONEOUS TESTIMONY.....	150
VII.	DIRECT EXAMINATION OF AN EXPERT WITNESS	150
	A. WHY USE AN EXPERT?.....	150
	B. QUALIFYING THE EXPERT	150
	C. EXPERT TESTIMONY	152
	D. INOCULATING THE EXPERT	152
	E. EFFECTIVE EXPERT EXAMINATION TECHNIQUES	153
VIII.	WITNESS EXAMINATION BY THE ARBITRATOR	154
IX.	<i>VOIR DIRE</i> OF LAY AND EXPERT WITNESSES	154
X.	PEREMPTORY MOTIONS: MOTION TO DISMISS.....	154
	A. PURPOSE	154
	B. PROCEDURE.....	155
XI.	REDIRECT EXAMINATION	155
CHAPTER 14: CROSS-EXAMINATION		157
I.	OVERVIEW	157
II.	BASIC RULES OF CROSS-EXAMINATION	157
	A. LEADING QUESTIONS PERMITTED	157
	B. SCOPE OF CROSS-EXAMINATION.....	157
	C. GOOD FAITH BASIS FOR QUESTIONING	157
III.	GOAL OF CROSS-EXAMINATION	158
IV.	PREPARATION.....	158
	A. KNOW YOUR PERSUASIVE CASE NARRATIVE.....	159
	B. KNOW THE FACTS	159
	C. LIST HELPFUL INFORMATION	159
	D. LIST HARMFUL INFORMATION	159
	E. LIST IMPEACHMENT EVIDENCE.....	159
	F. ASK, "WHY DO I THINK THIS WITNESS IS WRONG?".....	159
	G. USE YOUR CLOSING STATEMENT TO FRAME CROSS-EXAMINATION QUESTION	160
	H. IDENTIFY YOUR CROSS-EXAMINATION GOAL.....	160
V.	CROSS-EXAMINATION ORGANIZATION	160
	A. ORGANIZE BY TOPIC	160
	B. DO NOT IGNORE THE PRINCIPLES OF PRIMACY, RECENCY, REPETITION, AND DURATION	160
	C. START WITH YOUR BIGGEST BANG	161
	D. OPEN WITH A CONCESSION	161
	E. IMPEACH	161
	F. END ON A HIGH NOTE.....	161
VI.	HOW TO ASK QUESTIONS ON CROSS.....	161
	A. LEADING	161
	B. PROPOSITIONAL	161
	C. SHORT QUESTIONS.....	162
	D. ONE FACT PER QUESTION	162
	E. USE CLEAR, ORDINARY WORDS.....	162
	F. "YES" RESPONSES ONLY	162
	G. ELIMINATE CHARACTERIZATIONS AND CONCLUSIONS	162
VII.	WRITTEN QUESTIONS OR OUTLINE	163
VIII.	TO CROSS OR NOT TO CROSS, THAT IS THE QUESTION	163
IX.	TECHNIQUES AND POINTERS FOR QUESTIONING	163
	A. EMBELLISHING.....	163
	B. THE ROAD NOT TAKEN.....	163
	C. LEADING THE HORSE TO WATER.....	164
	D. HOISTED ON THEIR OWN PETARD	165
	E. BURN DOWN THE HOUSE.....	165
X.	CONTROLLING THE RUNAWAY WITNESS.....	166
	A. USE NONVERBAL CUES TO CONTROL THE WITNESS.....	166
	B. HANDLING THE IMPATIENT WITNESS	166
	C. REVISIT THE GROUND RULES	166
	D. ASK FOR THE SAME COURTESY THE WITNESS SHOWED YOUR OPPONENT.....	166
	E. REPEAT THE QUESTION	167

F.	LET THEM RUN	167
G.	ASK THE ARBITRATOR FOR HELP	167
XI.	KNOW WHEN TO STOP	167
XII.	DO'S AND DON'TS OF CROSS-EXAMINATION	167
XIII.	CROSS-EXAMINATION OF EXPERTS	168
A.	CREDENTIALS CHALLENGE.....	169
B.	BIAS	169
C.	GARBAGE IN, GARBAGE OUT.....	169
D.	PREVIOUS PUBLICATIONS AND TESTIMONY	169
E.	LEARNED TREATISES	169
F.	HIRE YOUR OWN EXPERT	169
XIV.	IMPEACHMENT: DISCREDITING A WITNESS AS A RELIABLE SOURCE OF INFORMATION	169
A.	PURPOSE	169
B.	WHO MAY IMPEACH	170
C.	TYPES	170
1.	Impaired Memory or Perception	170
2.	Bias or Interest.....	170
3.	Prior Inconsistent Statements	170
4.	Prior Inconsistent Actions	171
5.	Character or Reputation	171
a.	Criminal Convictions (FRE 609)	171
b.	Past Untruthfulness (FRE 608)	171
D.	IMPEACHMENT PROCEDURE	172
1.	Recommit the Witness.....	172
2.	Validate the Prior Act, Statement, or Omission	172
3.	Confront the Witness With the Inconsistency.....	172
E.	REHABILITATION OF THE IMPEACHED WITNESS.....	172
F.	PREEMPTIVE BOLSTERING OF WITNESS CREDIBILITY IS NOT PERMITTED	173
G.	PARTING ADVICE FOR EFFECTIVE IMPEACHMENT.....	173
XV.	REDIRECT, RECROSS, AND REBUTTAL	173
A.	INTRODUCTION.....	173
B.	REDIRECT EXAMINATION.....	174
C.	RECROSS-EXAMINATION	174
D.	THE REBUTTAL CASE	174
XVI.	OBJECTIONS TO TESTIMONY	174
A.	INTRODUCTION.....	174
1.	The Federal Rules of Evidence (FRE).....	174
2.	Form of Objection	175
3.	Timing	175
B.	OBJECTIONS BASED ON THE FORM OF A QUESTION	175
1.	Lack of Personal Knowledge or Foundation.....	175
2.	Relevance	175
3.	Vague or Misleading	175
4.	Assumes Facts Not in Evidence.....	176
5.	Misstates the Evidence	176
6.	Leading	176
7.	Compound Question	176
8.	Calls for Narrative Answer	177
9.	Hypothetical Questions.....	177
10.	Calls for Speculation.....	177
11.	Calls for a Conclusion	177
12.	Argumentative	177
13.	Harassing or Badgering the Witness	177
14.	Asked and Answered Questions.....	178
15.	Cumulative Testimony.....	178
16.	Voluntary or Nonresponsive Answers	178
17.	Tactical Objections.....	178
C.	SUBSTANTIVE OBJECTIONS	178
D.	STANDING OR CONTINUING OBJECTIONS.....	178

CHAPTER 15: EFFECTIVE USE OF EXHIBITS.....	181
I. INTRODUCTION	181
II. PURPOSE OF OFFERING AN EXHIBIT	181
III. TYPES OF EXHIBITS	181
IV. WHEN EXHIBITS MAY BE OFFERED	181
V. STIPULATIONS	181
VI. HOW TO OFFER AN EXHIBIT FOR ADMISSION INTO EVIDENCE	182
A. STEP 1—HAVE THE EXHIBIT MARKED FOR IDENTIFICATION	182
B. STEP 2—SHOW A COPY OF THE EXHIBIT TO THE OPPOSING ADVOCATE.....	182
C. STEP 3—PROVIDE THE WITNESS WITH A COPY OF THE EXHIBIT	182
D. STEP 4—LAY THE FOUNDATION FOR THE EXHIBIT	182
1. Documents.....	182
2. Real Evidence	183
3. Demonstrative Evidence	183
E. STEP 5—OFFER THE EXHIBIT FOR ADMISSION INTO THE RECORD.....	183
VII. <i>VOIR DIRE</i>	184
VIII. OBJECTIONS TO EXHIBITS.....	184
A. CONTRACTUAL LIMITATIONS ON THE ADMISSIBILITY OF EXHIBITS	184
B. RELEVANCE.....	184
C. PAROLE EVIDENCE RULE.....	185
D. BEST EVIDENCE RULE.....	185
E. HEARSAY.....	185
1. Past Recollection Recorded (FRE 803(5))	185
2. Business Records (FRE 803(6)-803(7))	185
3. Government Records (FRE 803(8))	186
4. Statements for Purposes of Medical Diagnosis or Treatment (FRE 803(4))	186
5. Prior Testimony (FRE 804).....	186
6. Statement Against Interest (FRE 804(b)(3)).....	186
F. NAKED HEARSAY.....	187
G. SUMMARY EVIDENCE (FRE 1006)	187
IX. DEMONSTRATIVE EVIDENCE	187
CHAPTER 16: CLOSING ARGUMENT	189
I. OVERVIEW	189
II. DECIDING HOW TO CLOSE: ORAL ARGUMENT OR WRITTEN BRIEFS	189
III. CLOSING ARGUMENT CONTENT	190
IV. PREPARATION	191
V. ORAL ARGUMENT.....	191
A. PROCEDURE	191
B. ORGANIZATION	192
1. Configuration.....	192
a. Organization by Claim.....	192
b. Chronological Organization.....	192
c. Witness-By-Witness Summary.....	192
2. Other Organizing Principles	192
a. Primacy and Recency: Start Strong, End Strong	192
(i) Start Strong.....	192
(ii) The Middle.....	193
(iii) End Strong.....	193
b. In the Beginning: Establishing Your Case or Debunking Your Opponent's Case	193
C. CONTENT OF AN EFFECTIVE CLOSING ARGUMENT	193
1. Tell a Persuasive Story.....	193
a. What Happened	193
b. Why it Happened the Way You Say it Did	193
c. Address Weaknesses	193
d. Contractual or Legal Significance	194
e. Remedy.....	194
D. PERSUASIVE DELIVERY.....	194
E. SUPPORTING AUTHORITY	194
F. OBJECTIONS TO CLOSING ARGUMENT	195

G.	DO'S AND DON'TS OF ORAL CLOSING ARGUMENTS	195
VI.	POST-HEARING BRIEFS.....	196
A.	OVERVIEW	196
B.	PROCEDURES FOR FILING BRIEFS	196
C.	FORMAT	197
1.	Caption	197
2.	Introduction	198
3.	Statement of the Issue.....	198
4.	Summary of the Facts.....	198
5.	Relevant Contract and Legal Provisions	198
6.	Argument	198
7.	Conclusion	200
D.	PRACTICE POINTERS FOR WRITING A WINNING POST-HEARING BRIEF	200
VII.	POST-HEARING PRACTICE	200
A.	CHALLENGES TO THE OPPOSITION'S BRIEF	201
1.	Untimely Filed Brief	201
2.	Improper Content	201
B.	MOTION TO REOPEN HEARING	201
VIII.	ADDRESSING LATE AWARDS	201
A.	ARBITRATOR BIAS	201
	CHAPTER 17: POST-AWARD PRACTICE.....	203
I.	OVERVIEW	203
II.	REVIEWING THE ARBITRATOR'S AWARD	203
III.	REMEDIES	203
A.	OVERVIEW	203
1.	Sources of Remedial Authority.....	204
a.	The Collective Bargaining Agreement	204
b.	External Law	204
c.	Private Sector Model.....	204
d.	Federal Sector Model.....	204
B.	REMEDIES IN DISCIPLINE, DISCRIMINATION, UNFAIR LABOR PRACTICE CASES	205
1.	Reinstatement	205
2.	Reduction of Discipline	205
3.	Monetary Remedies	205
a.	Back Pay	205
b.	Mitigation of Damages	205
c.	Compensatory Damages.....	205
d.	Liquidated Damages.....	206
e.	Punitive Damages.....	206
f.	Interest	206
g.	Attorney Fees.....	206
h.	Costs.....	207
4.	Cease and Desist	207
C.	REMEDIES IN NONDISCIPLINARY CASES.....	207
IV.	MOTIONS: CLARIFICATION, CORRECTION, REOPENING, AND RECONSIDERATION	207
A.	<i>FUNCTUS OFFICIO</i>	207
1.	Correct Mistakes	208
2.	Incomplete Awards	208
3.	Clarify Ambiguous Awards	208
B.	ATTORNEY FEES.....	208
C.	RETENTION OF JURISDICTION TO CURE REMEDIAL PROBLEMS	208
D.	REOPENING OR RECONSIDERATION	208
V.	COMPLIANCE WITH ARBITRATION AWARDS	208
VI.	CHALLENGING THE AWARD	209
A.	OVERVIEW	209
B.	DIRECT APPEALS TO FEDERAL COURT	209
1.	Performance and Misconduct Cases.....	209
2.	Postal and Other Labor-Management Relations Schemes Modeled After the Private Sector	210
a.	Arbitrator Bias.....	211

b.	Denial of Fair Hearing	211
c.	Arbitrator Exceeded Authority	212
d.	Award Fails to Draw its Essence From the Agreement	212
e.	Award Is Contrary to Public Policy	212
C.	OPM REVIEW OF PERFORMANCE AND ADVERSE ACTION CASES	213
D.	DIRECT EEOC REVIEW OF PURE DISCRIMINATION CLAIMS	213
E.	APPEAL OF "MIXED CASES" UNDER 5 USC 7702	213
1.	EEOC Review of Mixed Cases	214
2.	Judicial Review of Mixed Cases	215
F.	REVIEW OF PROHIBITED PERSONNEL PRACTICE CASES UNDER 5 USC 2302	215
G.	APPEAL OF UNFAIR LABOR PRACTICE CLAIMS	216
H.	FLRA EXCEPTIONS TO ARBITRATION AWARDS	216
1.	Who May Seek FLRA Review	217
2.	Time Limits to File Exceptions	217
3.	Procedure for Filing Exceptions	217
4.	Opposition to Exceptions	217
5.	Standard of Review	217
a.	Contrary to Law, Rule, or Regulation	218
(i)	Grievance Precluded by Law	218
(ii)	Merits	218
(iii)	Government Wide and Agency Regulations	219
b.	Private Sector Grounds	220
(i)	Award Based on Nonfact	220
(ii)	Incomplete, Ambiguous, or Contradictory Awards	220
6.	Judicial Review of FLRA Decisions	220

BIBLIOGRAPHY 223

I.	BOOKS	223
II.	ARTICLES	224
III.	MONOGRAPHS	226
IV.	YOU TUBE ADVOCACY VIDEOS	227
A.	ADVOCACY	227
B.	OPENING STATEMENTS	227
C.	DIRECT EXAMINATION	227
D.	CROSS EXAMINATION	228
1.	Excellent Cross Examinations From the Wiliam Kennedy Smith 1991 Rape Trial	228
E.	WITNESS PREPARATION & TESTIMONY	228
F.	EVIDENCE	228
G.	CLOSING STATEMENTS	228
H.	BRIEF WRITING	228
I.	ADVOCACY DRILLS	228