Tips on Dealing with Bad Facts

In

Labor Arbitration Hearings

You are a labor arbitration advocate. Your client hands you a file telling you the grievance did not settle and it is going to arbitration. She also tells you the case has bad facts. This article provides tips on how to deal with bad facts in a labor arbitration.

Trying a labor arbitration pursuant to a collective bargaining agreement is different than trying a case in court. The pre-hearing discovery rules are different, and labor arbitrators are not bound by procedural or evidentiary rules. Facing bad facts is one of the similarities labor arbitration advocates confront. And just like trial attorneys, labor arbitration advocates cannot be intimidated by bad facts. Unlike trial attorneys, labor arbitration advocates have no appellate

safety net. In a labor arbitration, "it's all or nothing." This is why bad facts are so much more challenging in a labor arbitration.

Bad facts come in a variety of forms: damaging admissions, inconsistent statements, conflicting statement from co-workers/other supervisors, contract or policy violations, inconvenient past practices, waivers, and recently discovered criminal records. Email messages, digital messages, images and videos, and social media postings can further complicate a case.

TIP NUMBER 1: FIND ALL THE BAD FACTS IN YOUR CASE. Labor arbitration advocates should leave no stone unturned when preparing for a hearing. Make sure your case's "strong points" are as strong as you think they are.

Doublecheck your preparations. Maintain copies of the pre-hearing requests for information you submitted to the other side, along with copies of the information the other side provided, and the requests for information submitted by the other side along with copies of the information you provided. Having these pre-hearing requests for information and the responses handy will be imperative at the hearing.

The best way to uncover bad facts is to ask thorough questions and review records: (a) speak to your client's main representatives and witnesses (e.g., supervisors, grievants, union and shop stewards, co-workers) several times; (b) read, review and know all the documentary information exchanged by the parties prior to the hearing; (c) check and doublecheck your witnesses and file documents; (d) examine all relevant websites, social media postings and conduct web-engine searches of your witnesses and the other side's witnesses.

TIP NUMBER 2: ISOLATE BAD FACTS. Learn everything you can about those bad facts: ask who, what, when, where, how, and why regarding every aspect of all the bad facts.

Once you have learned everything about the bad facts, compare what you have learned with your case's strong points. Identify and isolate the differences. The more differences you can find and compare with your case's strong points, the more likely you can minimize the impact of the bad facts.

When dealing with bad facts, examine the case chronology. Compare the timing of the bad facts with the timing of your case's strong points. Look for chronological advantages.

TIP NUMBER 3: DISCLOSE BAD FACTS IN YOUR OPENING STATEMENT. In court cases, lawyers can eliminate or reduce the impact of bad facts with motions. Because labor arbitrators are not bound by procedural or evidentiary rules, exclusionary motions are not an option. The arbitrator will learn the bad facts. As the labor arbitration advocate, you can decide when and how the arbitrator learns the bad facts.

It is best to disclose bad facts early in the hearing. Especially, if you anticipate the opposition intends to use the bad facts against you. Litigation experts describe disclosing bad

facts early as the inoculation theory.[1] The advantages of disclosing bad facts early and inoculating the arbitrator are:

(1) Projecting credibility, even if the bad facts are extremely embarrassing.

(2) Minimizing the impact of the bad facts on your case's strong points.

(3) Controlling the narrative rather than ceding the persuasion initiative to your opponent.[2]

The best time to inoculate a labor arbitrator is in the opening statement. The opening statement should contain your case's overall theme and supporting factual premises. You should lay out the bad facts after presenting your case's overall theme and supporting premises. When presenting the bad facts, do so simply and honestly. Contrast the bad facts carefully, demonstrating how the bad facts do not undermine your case. Consider using a chart to contrast the bad facts.

Write out the argument you intend to make in your opening statement regarding the bad facts. Make sure it conveys your position honestly. Have another person familiar with the case read your opening statement and make suggestions. Revise if necessary. Keep the written draft handy so that you can use it again when preparing your post-hearing brief.

In a discharge/discipline case, the company goes first because it has the burden of proof. If the company's case has bad facts, the employer advocate should disclose the bad facts in its opening statement. When an employer discloses bad facts in their opening, the union advocate should pounce on the opportunity and respond with an opening statement that emphasizes the facts favorable to her case and detail all facts the company omitted. If however, in a discharge or discipline case, the union has bad facts, the union advocate should explain those bad facts immediately after the employer's opening statement. Either way, if there are bad facts, regardless of who you represent, plan on making an opening statement.

TIP NUMBER 4: ADRESSING BAD FACTS AT THE HEARING. In those cases where bad facts involve a witness's credibility, when volunteering the bad facts in the opening statement, invite the arbitrator to judge the witness's credibility against that negative information when the witness testifies. Prepare your witness thoroughly to explain the situation simply and clearly.

If your witness created the bad facts, have the witness explain the totality of the circumstances on direct examination. Make sure that what the witness tracks what was said in

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[1] Quentin Brogdon, *Cutting Edge Evidence Issues*, Presented at the 45th Annual Advanced Civil Trial Course, July 2020, State Bar of Texas, Chapter 1, pp. 1-14.

[2]Weitz, "Direct Examination of Lay Witnesses," in *Excellence in Advocacy* 598 (1992).

the opening statement. Have the witness address the totality of the bad facts to minimize cross-examination that implies dishonesty or incompleteness.

If your opponent controls the witness or records regarding the bad facts, have one of your witnesses explain those documents on direct examination. This allows you to take some of the wind out of the opposition's sails.

Avoid the temptation to defend the bad facts solely by cross-examining adverse witnesses. Adverse witnesses are difficult to control on cross. You are always better off having your witnesses explain bad facts using your case's strong points. Controlling the narrative is crucial.

TIP NUMBER 5: AMBUSHED AT HEARING WITH BAD FACTS. If despite your best efforts to be thoroughly prepared, the other side surprises you with bad facts, do not panic. Ask the arbitrator for a brief recess.

During the break, talk to your clients and find out what they know about the newly disclosed bad facts. Check all pre-hearing requests for information you submitted to determine whether the other side should have disclosed the bad facts or adverse documentation prior to the hearing. If the bad facts are relevant and should have been disclosed, ask that the hearing be recessed. Most labor arbitrators will grant a short recess to allow the surprised party time to review undisclosed documentation. This is precisely why labor arbitration advocates should always have all the pre-hearing requests for information and responses within reach.

If, however, the undisclosed testimony does not fall within the scope of any requests for information, you are likely going to have to let the bad facts come out. Objecting for the sake of objecting is not effective. Make sure the testifying witness has personal knowledge of the bad facts. For example, if the testifying witness did not see the bad facts but only heard about the incident, this is hearsay. Establish that the witness has no personal knowledge and challenge the probative value of the testimony. Pay close attention to the testimony, looking for relevancy, standing or authentication objections.

Ask for a recess at the conclusion of the testifying witness's testimony and consult with your clients and hearing participants. On cross-examination, solicit testimony supporting your case—get as many admissions as possible reinforcing the factual strengths of your case. Keep your cross-examination simple. Avoid venturing into areas the adverse witness did not discuss fully for fear of opening the door to worse facts. Remember: never ask a question you do not know the answer to.

Call witnesses in rebuttal that have sufficient personal knowledge to counter the bad facts and support your case's strong points.

TIP NUMBER 6: ADDRESSING BAD FACTS IN YOUR POST-HEARING BRIEF. Immediately after the hearing, honestly assess the impact the bad facts had on the arbitrator. What was the arbitrator's reaction to the bad facts? Was the arbitrator receptive to your explanations? How did your witnesses comport themselves? Were they credible when

explaining the bad facts? How effective was the other side in presenting the adverse facts? Were their witnesses credible? Ask your assistant and designated representative who attended the hearing to share their observations and opinions on the impact of the bad facts. Write out the observations and then think about how to present them in your post-hearing brief.

Use the draft of your opening statement to restate the theme of your case in your post-hearing brief. When addressing the bad facts, use the draft of your opening statement, and compare what you told the arbitrator to the evidence offered at the hearing. The closer the evidentiary record tracks your opening statement, the more credible your brief.

If the case warrants the expense, consider using a focus group to review your post-hearing brief. Bryan Garner, one of the most respected written advocacy legal scholars, recommends using focus groups to evaluate post-hearing briefs.[3] Have a focus group evaluate your brief—particularly how you address the bad facts. Retain two or three experienced appellate or trial lawyers to serve on your focus group. Avoid using members of your law firm, your client's HR or Labor Relations managers or union officers or staff members as focus group members. You do not want them telling you what you want to hear. Instead, you need an outsider to offer credible objective critiques and suggestions.

Have the focus group evaluate your arguments and your treatment of the bad facts. Is your treatment of the bad facts credible? Listen to what the focus group suggests. The focus group's reaction will likely preview how the arbitrator reacts to your brief.

Conclusion. No case is perfect. All experienced labor arbitration advocates, at some point in their careers, get thrown a curve ball and must deal with bad facts. How a labor arbitration advocate handles those bad facts determines his/her effectiveness. During the Civil War, President Abraham Lincoln became frustrated with General George McClellan, his top commander, because he would not attack. When asked why he wouldn't attack, McClellan always had an excuse: insufficient manpower, unfavorable terrain or bad timing. In effect, McClellan was telling Lincoln he had bad facts. Having tried hundreds of cases, Lincoln knew how to deal with bad facts. Lincoln needed a general who was not intimidated by bad facts and would press on. So, he fired McClellan and replaced him with a general who was not afraid of bad facts—Ulysses S. Grant. Grant took over; he assessed the situation and attacked—despite the bad facts. Grant prevailed.

While you may not win all your cases, learning how to deal with bad facts will give you experience and confidence. It will make you a better advocate. If you've never tried a labor arbitration with bad facts, it's likely that you haven't tried many cases! Bad facts are part of the process. Learn to deal with them. Good luck!

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[3] Bryan Garner, *The Winning Brief*, (1999) at pp. 385-88,