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The Illinois Public Employee Relations Report provides current, nonadversarial information to those involved or interested in employer-employee relations in public employment. The authors of bylined articles are responsible for the contents and for the opinions and conclusions expressed. Readers are encouraged to submit comments on the contents, and to contribute information on developments in public agencies or public-sector labor relations. The Illinois Institute of Technology and the University of Illinois at Urbana-Champaign are affirmative action/equal opportunities institutions.

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POSSIBLE WISDOM AND WIT REGARDING THE ARBITRATION OF DISCIPLINE

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I. INTRODUCTION

In the authors' opinion, the most excellent quote about "Common Sense" (with all due deference to the work of Thomas Paine) is by none other than our first modern philosopher (who sported an incredible mustache), René Descartes. The man who gave

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us the gift of "cogito, ergo sum" gave us the perfect thought regarding common sense with the following from his *Discourse on Method*:

> Good sense is the most evenly distributed thing in the world; for everyone believes himself to be so well provided with it that even those who are the hardest to please in every other way do not usually want more of it than they already have. Nor is it likely that everyone is wrong about this; rather, what this shows is that the power of judging correctly and of distinguishing the true from the false (which is what is properly called good sense or reason) is naturally equal in all men, and that consequently the diversity of our opinions arises not from the fact that some of us are more reasonable than others, but solely that we have different ways of directing our thoughts, and do not take into account the same things. For it is not enough to possess a good mind; the most important thing is to apply it correctly. The greatest minds are capable of the greatest vices as well as the greatest virtues; those who go forward but very slowly can get further, if they always follow the right road, than those who are in too much of a hurry and stray off it.[1]

Whether the wise sages at the *Illinois Public Employee Relations Report* have utilized their common sense in asking the authors to contribute their thoughts and opinions regarding various tips and tricks for the beautiful world of disciplinary grievance arbitration remains to be seen; at a minimum, a little "cogito-ing" on the subject most certainly would not hurt. Therefore, this article will *attempt* to emphasize strategies to utilize in employee-discipline scenarios from beginning to end via a real-world example and the application of this example to some sage advice that may come in handy for practitioners. If you are a world-weary (i.e., exhausted) attorney who has done many, many discipline cases, much of this will strike you as "well, duh." But, if you're a new(er) practitioner or student, you may find the below helpful as you navigate the abyss.

Alternative dispute resolution procedures are ever-changing, tend to be more informal than formal court proceedings, and are generally not required in law school curriculums. Many unspoken rules come from experience and real-world practice. This article will hopefully serve as a crash course in arbitrating discipline for young attorneys and, overall, what life is like in the actual trenches. It will cover some tips for preparing and presenting your case in arbitration to have the most success, using a real-world case as a touchstone. This article is not inundated with caselaw or arbitral authority, which is purposeful. It is meant to discuss possible "tips and tricks" from experience. And before you, dear reader, believe this "common" sense to be "common," then think to yourself how many times you observed it is lacking in others (but not observed in yourself, of course). To that end, the following is submitted for discussion and consideration with some humor and humility. So . . . Once upon a short time ago (even accounting for COVID-19 time) in a land not too far, far away, an arbitration took place regarding the termination grievance of a public employee. It is most humbly suggested that this may be used to illustrate some principles of arbitration, learned along the way, that may be presented to others to make our weird little labor world we live in a better place.

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[1] RENÉ DESCARTES, DISCOURSE ON METHOD 1–2 (Collier Macmillan eds. 1956).

You are a young attorney (or business agent, or Human Resources Manager, or whoever is just plain unlucky enough to have the file dropped off on their desk) who has just been assigned to handle a disciplinary case. For purposes of this article, this will be taken from the side of the union advocate because, quite frankly, this is who the lead author represents. Your first case has hit your desk. After, of course, making sure the billing code is correct in your billing system to track your hours, you take a look at the file. Before you is a public employee with a long history of excellent service who is an alcoholic and possibly suffers from a mental illness. The employee has been in and out of treatment but has now been caught on camera leaving his workstation, returning with a bottle of liquor (or a brown paper bag that very well may contain a bottle of liquor), and acting seemingly intoxicated and impaired. The record also shows that the public employee drove a city vehicle to a nearby fast-food restaurant and passed out in the drive-thru lane. When police officers arrived on the scene, they smelled alcohol on his breath and caught body camera footage of him intoxicated, admitting that he had "drank" a lot. Finally, during the official investigation, the employee denied drinking alcohol at work and claimed his blood pressure medications caused his wobbly walk. The member was ultimately terminated for lying, consumption of alcohol while on duty, and using a department vehicle while intoxicated. Facing arbitration in a disciplinary matter like this can be, in the possible biggest understatement of the article, daunting to both legal counsel and the grievant whose career is at stake.

II. EIGHT TIPS

A. Tip No. 1: Ensure the members of the bargaining unit understand their rights right from the get-go.

The first tip starts WAY before the discipline even happens. Train your members! The best defense is a good offense, particularly in disciplinary arbitration. The best time to prepare for a discipline case is before an incident occurs. You want to steer clear of mistakes that can be proactively avoided by early communication with your members. Establishing a dialogue with bargaining unit members about their rights as union members can only help down the road when it comes to potential discipline cases. In short, train your members (Sorry, it bears repeating)! Set up remote lunchtime training. Bribe your members with pizza and sixteen-ounce cans of Old Style (the authors would, no doubt, participate in anything involving free pizza and cans of Old Style). Set up a weekly "Insta" or whatever the kids do these days. Place flyers with a "know your rights" section above the urinals. Snazzy business cards with *Weingarten* statements on the back. A bi-plane with a sign after it. Whatever.

Get in front of your members and train them. Training is merely the *essential* tool in the toolbox, so there is no pressure. Small workplace? Perhaps individual meetings with new hires. Large workplace? Bargain union orientation sessions into your current CBA. Ensure union members understand their rights and ask questions regarding the complexities of their rights. Distill the complicated case law into the beautiful bourbon (or whisky) that it deserves to be. Do you know how often the lead author has received a phone call from a Union Executive Board member that [Insert bargaining unit member's

name here who thinks they know everything] has already gone into the office to speak with management and spilled EVERY bean? **Answer**: A LOT. LIKE, A LOT . . .

In the discipline context, a member's knowledge of their rights under *N.L.R.B. v. J. Weingarten, Inc.*[2] ("*Weingarten*") is crucial. Under *Weingarten*, a union-represented employee may request that a union representative be present during an investigatory interview where the employee reasonably believes disciplinary action will result.[3] In addition, an employer who denies such a request, or retaliates against the employee for making such a request, will have violated the National Labor Relations Act of 1935[4] ("NLRA").[5] *Weingarten* rights only arise if the employee reasonably believes the interview will result in disciplinary action and if the employee requests representation.[6] As a consequence, members of a bargaining unit: (1) must be aware of these rights, (2) must be clear on how to invoke these rights, and (3) must be able to spot violations of these rights when they occur. Union stewards must be trained to provide advice and assistance to members *before*, during, and after these investigatory interviews. In addition to general *Weingarten* rights, it is just as important that members are aware of their specific rights under their collective bargaining agreement. A member will have particular responsibilities, obligations, privileges, and advantages. Assuring that employees comprehend and can practically invoke their rights will benefit any arbitration in the future and may even prevent it in the first place.

For a union advocate (steward, etc.), a member's knowledge of the ability to invoke *Weingarten* is critical. It slows the process down. It gives the affected member subjected to the questioning the ability to express their thoughts and recall what happened with their advocate. It allows for the formulation of strategy. Once statements are made, one cannot put the horse back in the barn; at this point, the horse is Seabiscuit (Google it) and is well beyond off to the races. Once statements are given without the benefit of representation, or good representation, those statements are now part of the record, and the unalterable path is starting to take shape.

In our sample case, the member was afforded union representation under *Weingarten* during his interviews with the employer. One major issue during arbitration was the proper procedure for taking a day off. The union argued that the member had intended to take the day off and would have contacted the supervisor later and therefore should have been considered properly off duty for that day. This, as the grievant testified to, was his understanding of an acceptable procedure. The employer argued that the only procedure was to inform the supervisor before taking time off. The ability of the member to meet with the union advocate to discuss this issue and the ins and outs of how this agreed-upon procedure for taking time off operated in practice was crucial to explain the workings of this particular employer. Developing the case in the proper way with advance notice and the ability to meet with your Union advocate will help explain the ins and outs of your particular Employer. This is extremely important and helpful to an arbitrator who just

[2] 420 U.S. 251 (1975).
[3] *Id.* at 257.
[4] 29 U.S.C. §§ 151-166 (1935).
[5] *Weingarten*, 420 U.S. at 257.
[6] *See id.*

flew in last night for the arbitration today and may, or may not, have ever heard of this particular employer community before. Unsuccessful or not at arbitration, having union representation allowed for precise and consistent testimony (starting from the time of interrogation through testifying at arbitration) that would put the union in the best position to change the entire trajectory of the case, especially if the complained-of conduct would have been considered off-duty. There was no chance that the member's statements would be considered confusing or unclear. The past practice of taking time off and then articulating which category of benefit time to be used at a later date to a supervisor (while it may seem strange to you and us) was communicated. While you cannot control any individual member's actions (the second tremendous understatement of this article), a member who understands their rights and gets union assistance as fast as possible can prevent issues down the road.

B. Tip No. 2: Keep one eye on the member now.

Once a discipline case hits your desk, you are stuck with the facts already established. So, all lawyer billing jokes aside, the bargaining unit should get counsel involved as fast as possible. The incident(s) that gave rise to the case, the reaction by both sides, and any intervention or interrogation have already occurred and cannot be changed if the advocate is the last clown to enter the circus. Therefore, as the member's attorney, you can only proceed by preparing your client and any potential witnesses to the best of your ability. Most importantly, this entails preventing any lying or inconsistency (more about that later). It is essential to understand the events leading up to the case in an organized and intentional way, so you can best understand what happened and identify areas where there may be variability or a question. Through your client and witness preparation, you can ensure your client is evaluated purely on the merits of their case and not for any inferences about their dishonesty or inconsistencies.

This ended up being the nail in the coffin for our sample case. In his decision to uphold termination of the member (the big reveal: the termination was upheld), the arbitrator noted that the member had to change his story and walk certain statements back. The arbitrator found that the most significant day involved in this case was **not** the actual day with the events giving rise to the discipline (the member screwing up), but rather the interrogation day when the member lied about the screw-up. The arbitrator even stated that if the member had just been honest, he might not have been terminated in the first place. The union needs to understand that consistency in these matters is crucial and to be human is to be fallible. The path away from consistency can happen quickly. Everything (EVERYTHING!) that takes place after the incident in question is part of the record. A good advocate wants to design their case from start to finish, to shape and control it in a way that the grievant (and, consequently, the union) is in the best position to succeed. This was the specter that hung over the entire proceedings. In the sample case we are discussing, the member decided he was going to bring in outside counsel to represent him at the formal interrogation. This unfortunately happens and, in the lead author's personal opinion, is not the wisest decision, as attorneys who actually practice labor law 100% of the time are experts in, you guessed it, labor law. In this case, the outside counsel was, let's say, not as well versed in labor and employment matters as the readers of this piece most certainly are. But, it is what it is.

Consequently, the formal interrogation transcript was certainly not what the lead author would have found credible. Unfortunately, the arbitrator agreed with this assessment no matter how hard the union fought. Once in a transcript, always in a transcript (transcripts: the original social media). A good practice is that while union stewards may handle lower-level discipline ("You backed the rig into a light pole? Again?"), for anything that involves severe punishment, it may be time for one Maverick to handle the Fighter Jet from beginning to end.

C. Tip No. 3: Keep one eye on the member in the future.

For the love of all of the gods on Mount Olympus (with the possible exception of Moros, the god of doom): Don't lie to your own legal counsel! An advocate needs to know all the terrible, horrible, weird, titillating, and awkward things a person did or did not do. Or, the advocate needs to be able to say that the advocate told the client to tell you everything, and they ignored this sage advice (which happens. A LOT, LIKE, A LOT). While you are in the process of preparing your client and witnesses to ensure consistency now, you must also play the long game. While each case and set of facts are different, prepare for a case as if preparing for the worst-case scenario. No matter the severity of the subject or the evidence against your client, preparing a case with the most detrimental facts, evidence, and circumstances in mind (or even hypothesized) ensures that you will cover all bases. Assume your client is lying to you. This will involve acknowledging or conceding points seemingly hurtful to your case to receive the best possible judgment for your client. As our friends in the 2008 *Baylor Law Review* succinctly stated, "the advocate should focus on a few inferences and a few improbabilities that appear to support the strongest arguments for the advocate's case"[7] which will help identify any needed information, affirmative arguments, and rebuttal. While a client may not be happy to admit the pitfalls of their position (or the inexplicable weirdness in their private life), in the long run, it can save time and energy, and the arbitrator will appreciate your ability to recognize the real issues in dispute and focus on those issues.

In our sample case, there was heavy evidence against the employee between the footage at the workplace, the evidence from the police officers at the drive-thru, and the documentation of the member's addiction issues. Therefore, trying to argue that he should not have been terminated because nothing terrible happened or that he does not have addiction issues is futile. What's the point? The best course of action was to admit (to a degree) the shortfalls in the case, argue the member's significant positive work history, and ensure the arbitrator knew this man suffered from a severe disease and the actions that took place were not intentional. This is what SHOULD have been stated at the formal interrogation, not what actually was said (Denial is not just a river in Egypt). Prepare the case with the facts you have. Prepare the case by putting your grievant in the best place possible to explain the reasons for the grievant's actions. In this matter, where there is Led Zeppelin-heavy evidence against the member, it made sense to argue that the member was off-duty and that the member had been treated differently from similarly

[7]Ariana R. Levinson, *Lawyering Skills, Principles and Methods Offer Insight as to Best Practices for Arbitration*, 60 BAYLOR L. REV. 1, 148 (2008).

situated members who had similar issues with alcohol addiction. Combined with incredibly mitigating circumstances for his alcohol use (childhood mental illness treated with medications, family issues), this was a straight-faced argument a union advocate could make. This was not the course of action used in the formal interrogation, and the union had to work within that "interesting" framework.

Finally, "To Loudermill" or "Not to Loudermill" that is the question. *Loudermill* is the Supreme Court case that found that because certain public-sector employees have a property interest in their employment, there must be "some kind of hearing" before being terminated coupled with a right to oral or written notice of charges against the employee, an explanation of the employer's evidence, and an opportunity to present the side of the story from the member's perspective (but not a full evidentiary hearing).[8] Given this requirement, to determine whether there are reasonable grounds to believe that the charges against the employee and discipline contemplated are accurate and fair, should your member proceed? Of course, this is voluntary, and your member need not attend. If your member attends, then what is the scope of that participation? Do you always know what the employer knows? Does your member answer questions? Should they? Or should they simply read a prepared statement? What happens if the member does not participate in the *Loudermill* hearing? Does the employer's attorney "hammer" that at arbitration? "Madam Arbitrator, we gave EVERY (insert very sarcastic eye-rolling *EVERY* here) opportunity for the grievant to participate in a *Loudermill* hearing to let us know his side of the story, but he decided not to participate. What is he hiding? Uphold the termination and let us all go to lunch."

D. Tip No. 4: Temper client expectations early.

Any lawyer who can guarantee a win is lying to their client or is part of what eventually will become an Operation Greylord (Google it) and should be removed from the case immediately. Every advocate in the bizarro world of labor law will tell you stories of cases they thought were no-brainers (they lost) and cases they thought were the epitome of Dante's "Abandon Hope All Ye Who Enter Here" (they won). You never know what the case will hinge upon and what the arbitrator will decide. But, as always, you should put your best foot forward. Tempering client expectations early is crucial while preparing for the worst-case scenario. There will be instances where this can feel like being the villain in the never-ending (and exhausting) Marvel movies, and that's ok.

However, with the proper delivery and the correct tone, the reasonable grievant will understand a bad decision and be happy with a good one. Tempering client expectations involves not only the likelihood and the implications of a bad decision but also whether this case should even go to arbitration in the first place ("settlement" is the most beautiful word in English).[9] Sometimes, this process entails telling the client that a one-day suspension is a gift from Santa Claus. There will also be times when this process involves telling the client that it is likely that termination will be upheld, so let's work on preserving work history and negotiating some payments and benefits so the grievant can move on to

[8] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985).
[9] Actually, in the opinion of one of the authors of this piece, Jerry Marzullo, "chocolate" is the most beautiful word in the English language, followed by "settlement," but we'll leave it at that.

greener pastures. As attorneys, we all want to be able to tell our clients that they will get exactly what they want in the end. Sadly, some attorneys make the mistake of doing just that. Honesty is the best policy, and it most assuredly isn't easy telling a person the percentage chance of their success is that of an icy spherical object lasting in Hades. However, you will save yourself and your client aggravation down the road if you nip expectations in the proverbial bud as early as possible. Empathy here is critical. Your client likely has a family, bills, and (up until now) a career. As far back as 1997, the *Tulsa Law Journal* noted, "attorneys should analyze the costs of going forward, the costs of losing, and the costs of winning" as well as any wanted or unwanted publicity when preparing for an alternative dispute resolution environment.[10] Having the "Come to Jesus" meeting with a client can be the most challenging (and heartbreaking) part of the process if you're doing it right.

In the instant matter, discipline was a given. The only real issue was whether or not there would be termination. Conversations about the likelihood of success were had. Written correspondence documenting these conversations regarding the possibility of success was sent. Ultimately, the grievant decided to move forward with fighting his termination, and the union respected that decision and found it a possible meritorious grievance. Therefore, as legal counsel, fully explain the consequences of a potentially harmful decision and the likely outcome.

E. Tip No. 5: Resolve as many issues as possible before arbitration and KNOW YOUR ARBITRATOR.

When the list of arbitrators comes in from the Federal Mediation and Conciliation Service (FMCS), research them. Ask colleagues for their opinions and read previous arbitration decisions for trends in reasoning and how they come to their conclusions. Understanding an arbitrator's trends, quirks, and consistencies (or inconsistencies) within their decisions will allow you to choose the suitable arbitrator for the proper case and tailor your approach even further.

The labor and employment law community is a small and tight-knit world. Each aspect of your practice has consequences and implications. Therefore, when working on a discipline case, your arbitrator will greatly appreciate it if you and the opposing counsel can resolve any issues ahead of the formal proceedings. Most arbitrators do not want to get bogged down in evidentiary matters. Most often, the arbitrator's response will be to "let it in and argue the weight and credibility." Arbitrators are excellent and talented and have seen hundreds and hundreds of discipline cases. They want to get to the bottom of the case (and make that flight home). To accomplish this, you will need to approach opposing counsel with authority to resolve such issues, and courtesy helps (more on that later). While preparing your case with the worst-case scenario in mind and tempering your client's expectations, you can identify problems that you can concede, those that the other side may be able to concede, and those that can be easily and quickly resolved. Get the documents in evidence beforehand. The *Nichols Illinois Civil Practice Alternative*

[10] Martin A. Frey, *Representing Clients Effectively in an ADR Environment*, 33 TULSA L.J. 443, 458 (1997).

Dispute Resolution Handbook incorporates some good advice for how to, initially, approach the arbitrator: "[t]elling the arbitrators what is not in issue is almost as important as telling them what is in dispute."[11] This will hone the issues, make the arbitration process faster, save money, and show good faith overall, which will go a long way in the labor and employment law community. And try to agree on the stipulation! What, exactly, do you want the arbitrator to consider? How is the stipulation framed? Normally, for discipline, it is: whether the employer terminated the grievant for just cause and, if not, what is the remedy?

Looking at precedent is critical when dealing with a discipline case. This can include your arbitrator's past decisions, past decisions from other arbitrators that involve similar facts, issues, and discipline, the history of collective bargaining between the parties, and any history of discipline for similarly situated parties within the bargaining unit. This can be done through database research, FOIA requests, information requests, or talking to colleagues and peers in the labor and employment law community. Other people in your network (members of your firm or the wonderful world of labor law contacts, generally) may access unreported interest arbitration and discipline decisions that could prove crucial to your preparation that would not be available online or through typical research channels. Finding out as much as you can about how similar cases have been decided in front of your arbitrator is one of the best ways to temper client expectations, resolve issues ahead of time, and prepare your client and witnesses as best as possible. Finally, and most importantly, ALWAYS have a copy of the Bible on hand. Not the St. James version; instead, I am speaking of the holiest of holies, our St. James, our Torah, our Holy Book, Elkouri & Elkouri.[12] This is an incredible resource for cases and issues relating to discipline arbitrations. It is mandatory on every labor attorney's bookshelf. Learn it, love it, and take it to bed with you.

Throughout the parties' positions and the arbitrators' decisions, references are made to other arbitration decisions. These citations include cases about standards of review for particular arbitrators, mitigation or reduction of penalties, facts an arbitrator may look for regarding a member to be considered "off-duty," remedies, tests of discipline, and plausibility of claims. In the instant matter, there were references in our arbitrator's past decisions to similarly situated members and their treatment because of their issues with alcoholism. The union argued that termination was not acceptable even if the on-duty alcohol use could be proven. All these past decisions and history shaped how the parties prepared and discussed and ultimately, how the arbitrator decided the case.

In our case, there was little dispute regarding what went into evidence. What that evidence meant was another story. And that's what a good advocate does. What does the evidence suggest? What does it show? Most likely, the evidence is coming in. Both the union and the employer agreed on the timeline of the events. The dispute and arguments, therefore, came down to the implications and the circumstances surrounding the events in question. Agreeing upon most facts will save all parties involved much time, energy, and money and put a smile on the arbitrator's face.

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[11] LEE HUGH GOODMAN, NICHOLS ILLINOIS CIVIL PRACTICE WITH FORMS ALTERNATIVE DISPUTE RESOLUTION HANDBOOK, § 5:76. (2022 Update).

[12] ELKOURI & ELKOURI, HOW ARBITRATION WORKS (8th ed. 2017).

F. Tip No. 6: Decorum—Live it, love it, learn it.

Decorum, with a polite but firm tone, goes a long way in this field of work, especially when you are working with the same attorneys, arbitrators, and employers over and over and over. Like Patrick Swayze says in *Road House*, "Be Nice" (Google it). A simple online search will reveal dozens and dozens of examples of the practice of law gone wrong. One of the best ways to pass a few moments is to watch the exchange between the completely insane Senator Joseph McCarthy and then Chief Counsel for the United States Army Joseph N. Welch.[13] Welch ("You've done enough. Have you no sense of decency, sir, at long last? Have you left no sense of decency?") is remarkable throughout the entire exchange between the parties. The soft-spoken Welch dismantled the loudmouth McCarthy using his incisive wit and intelligence. Seeing the power of demeanor and words is incredible and worthy of viewing. When Walter Payton would score a touchdown, he would hand the ball to the referee and "Act like he has been there before."[14]

Be a professional. In all cases, be friendly, courteous, and kind. As Salvatore Tessio said to learned counsel Tom Hagen, "Tell Mike it was only business. I always liked him."[15] Even if a tense exchange or anger gets the better of you, reset. Again, our friend Mr. Nichols in his Illinois Civil Practice Handbook states (and as we all know from terrible first dates), initial impressions are stressed, and attorneys should "conduct themselves in a way that will cause the neutral to concentrate on the attorney, the client, and the case, and not on extraneous information."[16] There is always the ability to be decent in the next line of questioning, the next trial day, and the next witness. And lawyers and arbitrators are human as well. Meaning they talk, especially after a glass of Lagavulin 16 (or three). Unkindness and unreasonableness get around. Withholding evidence and being untruthful are the things that follow a lawyer throughout their career (or what is left of it), and not in a good way. Always remember, if there is an attorney who is the loudest person in the room and has to prove to everyone how smart he or she is, that is most definitely, not the most competent attorney in the room (every reader is now picturing someone in their mind. Wait, it's not me, right?).

In addition to your own behavior, as noted in the aforementioned Handbook, attorneys should tell their clients how they would like them to behave before the hearing (some grievants do need to be told that Led Zeppelin T-shirts and cargo shorts are not appropriate). This can be done through methods like giving clients a standard list of instructions. Preparing your client will not only make your client look better to the arbitrator, but also will put the client's mind at ease about their role during the process. This preparation should also include a preview of how things go. The authors love Perry

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[13] *See* McCarthy-Welch Exchange: *"Have You Left No Sense of Decency?"* (June 9, 1954), https://www.americanrhetoric.com/speeches/welch-mccarthy.html.
[14] Dan Pompei, *NFL 100; At No. 8, Walter Payton's Recipe of Toughness, Versatility, and Dedication Created Sweetness*, THE ATHLETIC (Sept. 1, 2001), https://theathletic.com/2793751/2021/09/01/nfl-100-at-no-8-walter-paytons-recipe-of-toughness-versatility-and-dedication-created-sweetness/.
[15] This quote is from Francis Ford Coppola's *The Godfather*, a masterpiece of cinema. THE GODFATHER (Paramount Pictures 1972).
[16] GOODMAN, *supra* note 11, at §5:66.

Mason, you love Perry Mason, we all love Perry Mason. There are no Perry Mason moments. Instead, there is months of preparation and the laying of groundwork so that the arbitration is the culmination of the building of something grand. Pounding on the table doesn't work and there should be no eleventh-hour witness who dramatically storms into the courtroom (actually that did happen to me once).

G. Tip No. 7: Embrace the weird.

Jerry Marzullo, the lead author, circa February 2020: "What the hell is COVID?" It cannot be overstated how the COVID-19 pandemic has fundamentally changed many aspects of the practice of law (show of hands, who is tired to the point of tears upon mentioning the word "COVID?" Omicron sounds cool, though). In this context, one of the most fundamental changes is the shift to online arbitration procedures. This shift changed how attorneys prepare for and present their cases and can have positive and negative effects.

For example, in a disciplinary matter, you can better organize your witnesses since they can easily Zoom into the proceedings and are not angry sitting in the proverbial hallway all day. However, Zoom should also be aptly named "Murphy's Law." Whatever can go wrong will go wrong. A witness will not know how to sign in (it's hard to press a button on your phone). A witness will be unable to hear you or will be unable to connect to audio. A witness will be in their car with the radio in the background, and the phone pointed anywhere but at the witness to give everyone motion sickness. Attorneys can bet on the over/under of how many times the court reporter is going to yell, "What? I didn't get that!" These things will happen. Have a practice run with your witnesses. Know that anyone over the age of 50 is going to struggle with this the first time (I kid, but not really). Make sure lawyers and witnesses are in a good place with a Wi-Fi connection not from 2003. What does the lighting look like? Do your witnesses (or even more horrifyingly, yourself) look like Svengoolie? (Google it… BERWYN!!!). An ounce of prevention is worth a pound of arbitral victory.

Also, the online proceedings may change how your arbitrator perceives your client. For example, when telling their story in person, your client may foster sympathy in the listener, which would help your case. However, the sympathetic factor, the emotional component, may not come across as easily when describing the same story in the same manner over Zoom. Therefore, judge the intangibles and do not underestimate how powerful the emotional element of your case is in your preparation. Remote proceedings will forever be a part of our community now. Some arbitrators, regardless of COVID, love remote arbitration and have truly embraced it (they don't have to make the flight!). Remember a few moments ago when we learned you should research your arbitrator? Also, listen to your arbitrator. If the arbitrator is really, REALLY suggesting remote, should you force an in-person hearing? How is that going to work out for you?

Our member had documented issues with addiction, mental illness, and trauma. He met with his supervisor to seek help for his problems, sought treatment on multiple occasions, and took medication for his condition. This situation is where the grievant's story would be more sympathetically received in person. The ability to see this person, perceive their body language, and to be in the room is essential to convey sincerity. The sincerity may

not be the same over a thirteen-inch screen with slow Wi-Fi that requires logging back in every forty minutes or so. While Zoom simulates the experience, there are situations where we cannot underestimate the raw factor of looking into someone's eyes as they tell their story.

H. Tip No. 8: Keep things brief (pun intended) and reasonable.

The painful preparation is over; it's "go" time. The door to the landing craft is down and obscured by the smoke and flame; Omaha Beach is waiting before you. First, do not ever waive the opening statement. Your arbitrator may or may not have ever heard of your municipality before being hired. The arbitrator knows this is some discipline case where the member is facing termination. Set the path and give an opening. Tell the arbitrator the story that comes to life through evidence and testimony. Do it clearly and concisely. Those classy hep cats at the *Baylor Law Review* did it again when stating that the best practice is that the advocate should argue in the opening statement, but overall the statement should focus on the facts at issue.[17] Keep motion practice as informal and reasonable as possible and then use the exhibits to tell your story.

While demonstrating your grasp of the law and the facts of your case is crucial in any case, your arbitrator will appreciate the conciseness. How many discipline cases do you, dear reader, think Arbitrator Marvin Hill has heard and handled? That arbitrator could hold a discipline arbitration blindfolded listening to The Doobie Brothers. Arbitrator Clauss is a former Cook County State's Attorney. Do you think he needs a primer on the criminal prosecution process? Arbitrators "get it"; they want to get to the issues and move on (see the aforementioned making the flight).

The hearing is over; the case is back in your beautifully leather-bound files that smell of rich mahogany. The transcripts are in. Write the arbitrator's decision and language for them (as if you were writing the Award). Ask explicitly for the outcome you want in your brief or closing statement. If you spell it out for your arbitrator in a clean, thoughtful, and indisputable manner, your arbitrator will only be that much more likely to (1) side with your client and (2) give your client the outcome you want. This means making sure your grammar is perfect, your citations are rock solid, and your arguments are easy to follow. Edit your brief to be just that, brief (what a shocker!).

In our case, the outcome each side wanted was clear and explicit in the parties' positions. The employer found termination to be appropriate and wished for it to be upheld. The union asked explicitly for anything less than termination (notice that the Union did not ask for no discipline, which, in this case, would have been Fantasyland absurd). With this, the arbitrator could see exactly where the parties stood and make what he felt to be the best decision. The briefs got right to the issues. The arbitrator "got it" and ruled. The lawyers moved on to the next case on the docket, it's all we can do.

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[17] Ariana R. Levinson, *Lawyering Skills, Principles and Methods Offer Insight as to Best Practices for Arbitration*, 60 BAYLOR L. REV. 1, 64 (2008).

III. CONCLUSION

Again, the arbitrator in the case we have been following upheld the discharge. There was not much for the union to complain about with that result. However, the union made every argument it could. The client was happy and appreciative of the effort on behalf of the grievant, and understood and accepted the decision. It is how you win and lose. Arbitration, with its nuance, emotional factors, and unspoken rules, can be tricky, especially for an advocate new to arbitration. A lawyer in a disciplinary arbitration case faces much writing and arguing. There are also just as significant unspoken roles the attorney takes on in these cases from beginning to end. Between laying the groundwork to avoid issues in the first place, taking steps to ameliorate problems as soon as they arise, and taking specific steps throughout preparation and presentation, the job goes beyond the normal parameters one might think (and learn about in law school). However, with these tips, you can hopefully take on any such case and get the best possible outcome for your client.

Canto I of Dante's Divine Comedy (Inferno) begins, "Midway upon the journey of our life I found myself within a forest dark, For the straightforward pathway had been lost. Ah me! how hard a thing it is to say What was this forest savage, rough, and stern, Which in the very thought renews the fear."[18] All the abovementioned steps will help ensure the path stays as straight as possible and an advocate may see the path through the trees. Enjoy.

[18] DANTE ALIGHIERI, THE DIVINE COMEDY: CANTO I (1320).