



A Basic Guide

to

Understanding Objections

AS a Postal Service advocate, during a typical arbitration hearing you will be called upon to 1) listen to the question, 2) recognize any potential objection, 3) decide whether to make the objection, and 4) actually make the objection in a timely manner *in a matter of a few seconds*. Time is critical because the simple purpose of an objection is to prevent potentially damaging and inadmissible evidence from being presented to the arbitrator. You will be called upon to recognize, in an instant, that what you are hearing seeks inadmissible evidence, know why that evidence is inadmissible and make the appropriate objection to exclude that evidence. The following is presented to assist you in handling hearing objections.

Preparation

The key to objections, like the key to success in the overall case, is *preparation!* You cannot wait until you are in the flow of the hearing to begin to consider whether or not you may encounter objectionable testimony or documents. You must prepare yourself for the possibility of objections during your hearing well before you ever set foot into the hearing room. Identifying the potential for objections to expected testimony and evidence must become part of your overall pre-hearing case preparation.

Begin your case preparation by developing the evidence of your case. Identify the contract provision(s), or law, applicable to your case. Identify all potential witnesses for both management and the union and the favorable and unfavorable facts that each will bring forward. Carefully review those facts to determine if they are admissible or raise admissibility problems. Then, prepare a summary of your case using only admissible facts.

Once you have developed your case summary, analyze it! What does it say to you? How do the events flow? What story does it tell? With your story in mind, develop your case theory (how you adapt your story to the contractual issues of the case) and the theme (the moral justification for a decision in your favor) of the case you will present to the arbitrator. Once you have developed your theory and theme you can plan your direct and cross examinations, recalling, of course, the potential admissibility of evidence supporting both sides.

Knowing during your earliest case preparation that certain evidence may raise admissibility questions will permit you to readily recognize that challengeable evidence when you hear it raised during the hearing.

Types of Objections

There are basically two types of objections – general and specific. General objections do not specify the reasons the evidence is inadmissible. Objections such as “irrelevant,” “immaterial,” and “incompetent” are general objections. An objection such as “no foundation” is also a general objection. “No foundation” means only that you failed to do something required for admission of the evidence. Perhaps you failed to lay a foundation establishing the authenticity of a document or a foundation showing the witness has personal knowledge. Once you cure the failure, you lay the proper foundation; the objection to admissibility is removed.

Whenever you make a general objection be prepared to specify why the evidence is not admissible. Whenever the opposing union advocate’s general objection is sustained always ask that the ground for the objection be specified. For example:

In response to your question to a Postal Inspector / OIG Agent the witness refers to their notes before answering.

Union Advocate: Objection!

Arbitrator: Sustained.

Management Advocate: Mr. Arbitrator, I ask that the Union Advocate state a specific ground for the objection?

Arbitrator: What is the basis for your objection?

Union Advocate: No foundation.

The union advocate’s response to the arbitrator still states a general reason for the objection since it does not mean that your evidence is inadmissible, only that you have not laid the proper foundation for that evidence to be admitted. You can get the union advocate to point you in the right direction by asking for more specificity:

Management Advocate: That’s still a general objection. Could the Union advocate specify the type of foundation objection that is being made?

Union Advocate: No foundation laid for the witness’ use of notes to refresh memory or as past recollection recorded.

You should now be able to rephrase your question to ensure admissibility of your evidence.

As indicated above, specific objections identify the legal basis for the inadmissibility of the evidence that is sought to be introduced. When you raise a specific objection, offer a legal basis for the objection and then avoid further argument or discussion until the arbitrator asks for your further response. If the union advocate has raised a specific objection, avoid responding until asked to do so by the arbitrator. The arbitrator may be about to deny the objection without any response from you and you do not want to give him a reason to change his mind by speaking unnecessarily. Remember the old adage to speak only when spoken to.

Whether making a general objection or a specific objection, make the object in a proper and professional manner. Not every objection must be made utilizing technical legal terms; layman's terms may also be used. An objection based on relevance may be stated simply as "that matter is not before the Arbitrator today." Stating objections in such terms may also help you when you know that what is being said is objectionable, but you cannot recall the legal prohibition or specific rule that is applicable.

Continuing Objections

When your objection to a question or evidence is first raised and overruled by the arbitrator, a continuing objection may be useful in those instances where further objectionable questions or evidence regarding the subject will be presented by the union advocate. In such case, tell the arbitrator that you request a continuing objection to all further questions or evidence on that subject without the necessity of raising repeated objections. Make sure the arbitrator agrees to your continuing objection. Once your continuing objection is acknowledged by the arbitrator do not simply fall asleep at the table – you must be alert in case the grounds for objecting to a later question or evidence differ from the original ground stated.

Offer of Proof

During your direct examination if evidence has been excluded you should utilize an "offer of proof" to place the evidence before the arbitrator, and in the record. When making an offer of proof you must understand the grounds for the objection so that you can address those grounds in your

offer of proof. When evidence has been excluded on direct, you must show:

1. That you asked a pertinent question;
2. What the answer would have been;
3. That the testimony is both material and relevant and how it would have benefited the case; and
4. Why you believe it is admissible.

Whenever you make an offer of proof you want to be detailed enough so that the evidence you seek to have admitted appears important and credible. In the narrative form of an offer of proof, you should factually state what you expect to prove. Lay necessary foundations; state what the testimony will be and how it relates to the case. Do not offer conclusions.

If the union advocate is the one asking to make an offer of proof, always ask to have the witness excluded from the hearing room so as not to have their testimony influenced by what the union advocate may say in making their offer of proof.

Irrelevant, Immaterial & Incompetent

Irrelevant, Immaterial, and Incompetent are referred to as the three tests of admissibility.

Something is "relevant" when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without. Something is irrelevant when it is "collateral", or totally unrelated to the charges or the contract provisions that apply in the case. Asking an offbeat question like "Do you believe in Santa Claus?" would be an example of an irrelevant question.

Something is "material" when it has an effective influence or bearing on the decision of the case. Something is immaterial when the arbitrator doesn't need to be bothered with it. Materiality is the main standard for determining if something leaves an impression on the arbitrator's mind, and anything that would clutter up their mind, annoy them, or just plain isn't necessary. "Materiality" also has another meaning, as in "material" witness, one who doesn't wish to testify, but because they are an eyewitness or needed to convict, they are compelled to testify. Examples of immaterial questions affecting the arbitrator would be requests to visit the scene when a sketch should suffice or other demonstrations when the arbitrator should be allowed to draw their own inferences.

Something is "competent" when, in legal proceedings, it is admissible for purposes of proving relevant facts. Something is incompetent when it has no place in the hearing. Incompetency refers to either the person - to qualify as competent, a witness must have: (1) Understanding of the nature and obligation of the oath or affirmation to tell the truth, (2) Perception (knowledge) of the relevant event, (3) Recollection (memory) of the relevant event, and (4) Ability to communicate with the fact-finders - or the evidence as being of such low quality as to be beneath the proceeding's dignity. Examples would include using the testimony of ex-convicts or people who use jargon (although there is some leeway with allowing a witness to describe things in their own words) or using some shady private investigator to dig up evidence when that person has lost their license or is unethical in their work.

Avoiding Objections

When introducing documentary evidence you can avoid objections by the opposing advocate by first laying the proper foundation for the admission of your evidence. Some usual examples are:

Business Records:

You should ask the following questions in order to establish the foundation for business records to be admitted into evidence and be considered an exception to the Hearsay Rule:

- Are you familiar with Exhibit "A" (business records) for identification?
- Can you identify these documents?
- Were these documents prepared in the ordinary scope of the business of your company?
- Where are these documents stored after they are prepared?
- Where were these documents retrieved from?
- Is it a regular part of your business to keep and maintain records of this type?
- Are these documents of the type that would be kept under your custody or control?

Move the documents into evidence.

Tape Recordings:

You should ask the following questions in order to establish the foundation for tape recordings to be admitted into evidence:

- Have you had the opportunity to hear the voice of Mr. X before?
- How many times have you heard his voice?
- Tell us how you are familiar with Mr. X's voice?
- Have you heard the recording marked as Exhibit "B" for identification?
- Do you recognize the voice?
- To whom does the voice belong?

Move the recording into evidence.

Photographs:

You should ask the following questions in order to establish the foundation for photographs to be admitted into evidence:

- I am showing you what has been marked as Exhibit "C" for identification. Do you recognize what is shown in this photograph?
- Are you familiar with the scene (person, product, etc.) portrayed in this photograph?
- How are you familiar with the scene portrayed in the photograph?
- Does the scene portrayed in the photograph fairly and accurately represent the scene as you remember it on (date in question)?

Move the photograph into evidence.

Authenticating a Letter:

You should ask the following questions in order to establish the foundation for a letter to be admitted into evidence:

- Are you familiar with the signature of Mr. Smith (person who signed letter)?
- How are you familiar with Mr. Smith's signature?
- Show the witness plaintiff's Exhibit "D" for identification.
- Do you recognize the signature at the bottom of this letter?

- Whose signature is it?

Move the letter into evidence.

Diagrams:

You should ask the following questions in order to establish the foundation for diagrams to be admitted into evidence:

- I am showing you what has been marked as Exhibit "E" for identification. Are you familiar with the area located at 16th Street and 12th Avenue in Dade County, Florida?
- How are you familiar with this area?
- Based on your familiarity with the area, can you tell us whether the scene depicted in this diagram fairly and accurately represents the area as you recall it on the date in question?

Move the diagram into evidence.

Additionally, the following methods are provided:

Refreshing Recollection:

To refresh an individual's memory on a particular matter, you should first establish that the witness does not remember something. Then ask the following questions:

- Did you at sometime remember this?
- Did you at anytime prepare a document setting out what happened?
- Would a review of this document assist you in remembering the matters that we are concerned about today?
- I am handing you Exhibit "F" for identification.
- Please review it and tell me if it helps you to remember.
- Does that document refresh your recollection?
- Do you now have an independent recollection of the facts?
- Tell us what happened.

Authenticating Handwriting in a Document:

You should ask the following questions in order to establish the foundation for a handwritten document to be admitted into evidence:

- Are you familiar with the handwriting of Mr. Smith?
- How are you familiar with Mr. Smith's handwriting?
- I show you Plaintiff's Exhibit "G" for identification.
- Do you recognize the handwriting in this document?
- To whom does it belong?

Move exhibit into evidence.

If you are "stuck" in attempting to introduce documentary evidence at arbitration and do not remember how to do it, simply recall the basic steps necessary to establish an evidentiary foundation.

- Show that the witness is familiar with the document that you are attempting to admit into evidence.
- Have the witness authenticate the document.
- Establish that the document is what it purports to be.
- Demonstrate the documents relevance to the case.

After you have accomplished the above steps, chances are that you will have laid the proper foundation for the exhibit to be admitted into evidence. You should then confidently offer it as your next exhibit in the case.

Particular Objections

Particular objections may or may not fit into any of the categories above. To appreciate the full variety, the following alphabetical list is provided.

Ambiguous, Confusing, Misleading, Vague, Unintelligible

Objection Mr. Arbitrator, the question is (confusing) (ambiguous) (vague) (unintelligible) (misleading)

Any of these is the proper objection to a question not posed in a clear and precise manner so that the witness knows with certainty what information is being sought.

Arguing the Case

Objection, Mr. Arbitrator. Counsel is arguing his/her case

Union advocates often do this, and are allowed some leeway. It occurs most often where the advocate states their version of the facts and then goes on to state what conclusions should be drawn from them.

Argumentative

Objection, the question is argumentative

Also known as "badgering" the witness. An argumentative question challenges the witness about an inference from facts in the case.

Example: Assume that the witness testifies on direct examination that the defendant's car was going 80 m.p.h. just before the collision. You want to impeach the witness with a prior inconsistent statement. On cross-examination, it would be permissible to ask, "Isn't it true that you told your neighbor, Mrs. Ashton, at a party last Sunday that the defendant's car was going only 50 m.p.h.?"

The cross examiner may legitimately attempt to force the witness to concede the historical fact of the prior inconsistent statement.

Now assume that the witness admits the statement. It would be impermissibly argumentative to ask, "How can you reconcile that statement with your testimony on direct examination?" The cross-examiner is not seeking any additional facts; rather, the cross-examiner is challenging the witness about an inference from the facts.

Questions such "How can you expect the arbitrator to believe that?" Are similarly argumentative and objectionable. The advocate may argue that during the closing argument, but the advocate must ordinarily restrict questions to those calculated to elicit facts.

"Objection, Mr. Arbitrator. Counsel is being argumentative." Or,
"Objection, Mr. Arbitrator. Counsel is badgering the witness."

Asked and Answered

Objection, the question has already been asked and answered

Union advocates will often try to emphasize a point by repeating the question that elicited a crucial answer. Some limited repetition is allowed, but most arbitrators will sustain an objection if the question has been asked two or three times.

Asking a Question Which Introduces Prejudicial or Inflammatory Evidence

Objection, the question introduces inadmissible prejudicial evidence

Most any line of questioning which would unduly prejudice or inflame the trier of fact is inadmissible. For example, a series of questions which create the impression that the postal customer involved has a long history of prior criminal conduct.

Assumes Facts Not In Evidence

Objection, the question assumes facts not in evidence

This objection is used when the introductory part of a question assumes the truth of a material fact that is in dispute. Questions that assume facts are permitted only under cross-examination, and usually to impeach a witness' credibility.

Best Evidence Rule

Objection, offered exhibit fails to meet the best evidence rule

Applies to writings, such as a last will and testament, which are not the original writings -- that is, the best evidence. Requiring the original document insures that nothing has been altered in any way.

Beyond the Scope

Objection, Mr. Arbitrator, this is beyond the scope of the direct

Permissible questions during cross, redirect, and recross must be related to information gathered during direct examination. Questions during redirect cannot go beyond the scope of cross, and questions during recross cannot go beyond the scope of redirect; and so on.

Calls for Conclusion

Objection, counsel's question call for a conclusion

Conclusions regarding the end result of reasoning flowing from a series of facts are left to the arbitrator. Normally, the witness shouldn't draw conclusions, but rather present facts. However, expert witnesses present conclusions, and lay witnesses are allowed to under certain conditions. For example, the arbitrator might allow the statement that "the car was going too fast" instead of requiring "the car was going very fast".

Calls for Speculation

Objection, Mr. Arbitrator, calls for speculation

Anything that invites a witness to guess is objectionable. Speculation as to what possibly could have happened is of little probative value. Some leeway is allowed for the witness to use their own words, and greater freedom is allowed with expert witnesses.

Compound Question

Objection, Mr. Arbitrator, compound question

A compound question asks two or more separate questions within the framework of a single question by joining two alternatives with "or" or "and," preventing interrogation of a witness from being as rapid, distinct, or effective for finding the truth as is reasonably possible.

Example 1: (Using "Or") "Did you determine the point of impact (of a collision) from conversations with witnesses, or from physical marks, such as debris in the road?"

Example 2: (Using "And") "Did you determine the point of impact from conversations with witnesses and from physical marks, such as debris in the road?"

"Objection, Mr. Arbitrator, counsel is asking a compound question."

The best response if the objection is sustained on these grounds would be, "Mr. Arbitrator, I will rephrase the question," and then break down the question. Remember, there may be another way to make your point.

Cumulative

Objection, Mr. Arbitrator, this evidence is cumulative

Cumulative evidence repeats evidence already introduced. It is up to the arbitrator's discretion when to stop production of the same evidence by one witness after another or the introduction of similar exhibits if no new information is being offered.

Facts Stated Will Not Be Proven

Objection, Facts stated will not be proven by evidence adduced at hearing

The advocate cannot allude to evidence which, though true, is incapable of being proven at trial because of some test of admissibility.

Hearsay

Objection, the question calls for hearsay

Hearsay is any statement made outside a hearing which is presented at the hearing to prove the truth of the contents of the statement. Statements in the forms of letters, affidavits, declarations, diaries, memos, oral statements, notes, computer files, legal documents, purchase receipts and contracts all constitute hearsay when they are offered to prove that their contents are true. As indicated below, there

are exceptions to the hearsay rule, but it exists because second-hand statements are unreliable and cannot be tested by cross-examination.

If a witness offers an out-of-court statement to prove the truth of the matter asserted in that statement, the statement is hearsay. Because they are very unreliable, these statements ordinarily may not be used to prove the truth the matter asserted. For reasons of necessity, a set of exceptions allows certain types of hearsay to be introduced. Hearsay is a very tricky subject. A few objections which may arise in the case:

Example 1. Joe is being tried for murdering Henry. The witness testifies, "Ellen told me that Joe killed Henry." If offered to prove that Joe killed Henry, this statement is hearsay and probably would not be admitted over an objection.

Example 2. However, if the witness testifies, "I heard Henry yell to Joe to get out of the way," this could be admissible. This is an out-of-court statement, but is not offered to prove the truth of its contents. Instead, it is being introduced to show that Henry had warned Joe by shouting.

"Objection, Mr. Arbitrator. Counsel's question calls for hearsay." Or "Objection, Mr. Arbitrator. This testimony is hearsay. I move that it be stricken from the record."

Certain general categories of hearsay which may arise are recognized to be admissible because of the practical necessity of including the information. Testimony not offered to prove the truth of the matter asserted is, by definition, not hearsay. For example, testimony to show that a statement was said and heard, to show that a declarant could speak in a certain language, or to show the statement's effect on a listener is admissible. Some common exceptions are:

Hearsay exceptions that apply even where the declarant is available

- **Excited utterances**: statements relating to startling events or condition made while the declarant was under the stress of excitement caused by the event or condition. This is the exception that may apply to the 'police officer' scenario listed above. The victim's cries of help were made under the stress of a startling event, and the victim is still under the stress of the event, as is evidenced by the victim's crying and visible shaking. An excited utterance does not have to be made at the same time of the startling event. A statement made minutes, hours or even days after the startling event can be excited utterances, so long as the declarant is still under the stress of the startling event. However, the more time that elapses between a startling event and the

declarant's statement, the more the statements will be looked upon with disfavor.

- **Present sense impressions:** A statement expressing the declarant's impression of a condition existing at the time the statement was made, such as "it's hot in here", or "we're going really fast". Unlike an excited utterance, it need not be made in response to a startling event. Instead, it is admissible because it is a condition that the witness would likely have been experiencing at the same time as the declarant, and would instantly be able to corroborate.
- **Declarations of present state of mind:** Much like a present-sense impression describes the outside world, declarant's statement to the effect of "I am angry!" or "I am Abraham Lincoln!" will be admissible to prove that the declarant was indeed angry, or did indeed believe himself to be Abraham Lincoln at that time. Used in cases where the declarant's mental state is at issue. Present-state-of-mind statements are also used as circumstantial evidence of subsequent acts committed by the declarant, like his saying, "I'm going to stop for groceries and get the oil changed in my car on my way home from work."

Another exception is statements made in the course of medical treatment, i.e., statements made by a patient to a medical professional to help in diagnosis and treatment. Any statements contained therein that attribute fault or causation to an individual will generally NOT be admissible under this exception, unless it involves a small child. (The Tender Years Doctrine).

- **the business records exception:** business records created during the ordinary course of business are considered reliable and can usually be brought in under this exception if the proper foundation is laid when the records are introduced into evidence. Depending on which jurisdiction the case is in, either the records custodian or someone with knowledge of the records must lay a foundation for the records, however.
- **Other exceptions, declarant's availability immaterial:** In the United States [Federal Rules of Evidence](#), separate exceptions are made for **public records**, **family records**, and records in **ancient documents** of established authenticity. When regular or public records are kept, the *absence* of such records may also be used as admissible hearsay evidence.

Hearsay exceptions that apply only where the declarant is unavailable

- **dying declarations** and other statements under belief of impending death: often depicted in movies; the police officer asks the person on his deathbed, "Who attacked you?" and the victim replies, "The butler did it". Although, case law has ruled out this exception in criminal law, because the witness should always be cross examined in court.
- **declarations against interest**: Declarations against interest are an exception to the rule on hearsay in which a person's statement may be used, where generally the content of the statement is so prejudicial to the person making it that they would not have made the statement unless they believed the statement was true. A declaration against interest differs from a party admission because here the declarant does not have to be a party to the case, but must have a basis for knowing that the statement is true. Furthermore, evidence of the statement will only be admissible if the declarant is unavailable to testify.
- **prior testimony**: if the testimony was given under oath and the party against whom the testimony is being proffered was present and had the opportunity to cross examine the witness at that time. Often used to enter depositions into the court record at trial.
- **admission of guilt**: if you make a statement, verbal or otherwise, as an admission of guilt of the matter at hand, that statement would not be regarded as hearsay. In other words, self-incriminating statements (confessions) are not hearsay.
- **forfeiture by wrongdoing**: the party against whom the statement is now offered (1) intentionally made the declarant unavailable; (2) with intent to prevent declarant's testimony; (3) by wrongdoing. In plain English, if you get rid of a witness, statements they made can be used against you.

Improper Impeachment

Objection, Mr. Arbitrator, improper impeachment

This is used when attacks on a witness's credibility go beyond the allowable grounds for impeachment. Beyond the usual method of pointing out contradictory evidence, there are generally 5 WAYS TO IMPEACH a witness: (1) bias or prejudice, if paid, stands to gain, a friend

or rival; (2) Poor character, for honesty or veracity; (3) Conviction; (4) Poor memory, if lack ability to observe, remember, or recount; and (5) Prior inconsistent statement, but only if an important fact, such as saying they worked that day, then later saying they had the day off. With expert witnesses, beyond the usual method of attacking credentials, unsubstantiated attempts to overturn the presumption of regularity that imply substitution, contamination, or tampering are improper.

Leading

Objection, the question is leading.

A leading question suggests the answer one expects to hear; "You were at the victim's home that night, weren't you?" The union advocate should not be doing the testifying. Leading questions are permitted under certain circumstances, usually in cross-examination, with expert witnesses, with young, old, or poor recall witnesses, and with any hostile, evasive, or adverse witness.

Misstating the Evidence

Objection, counsel is misstating the evidence offered at hearing

While reasonable inferences may be drawn, it is objectionable if the evidence is misstated or the testimony misquoted.

Narrative Called For

Objection, the advocate's question calls for a narrative

A narrative question is one that is too general and calls for the witness in essence to "tell a story" or make a broad-based and unspecific response. The objection is used when there is danger of a witness running away with their story, or to start pouring out their testimony. There are times when a narrative is appropriate, and better than question and answer, but in this case, the objection is to prevent inadmissible evidence from pouring out before you have a chance to object.

Non-Responsive Answer

Objection, Mr. Arbitrator, non-responsive

Used when an answer does not directly answer the question. And if the answer goes beyond the question, the excess is objectionable.

Opinion By An Unqualified Witness

Objection, the advocate's question calls for an improper opinion. Or, objection, the witness hasn't been sufficiently qualified as an expert. Or, objection, insufficient foundation

Opinion testimony is proper only in the area of expertise or specialized knowledge that an expert witness is qualified in. Lay witnesses may give opinions only when their perception is helpful to the arbitrator; e.g., time, distance, speed, sobriety.

Personal Attacks On Management's Advocate Or Witness

Objection, counsel is personally attacking (me) (witness)

This is usually reserved for cases when an advocate acts like a bully. It is proper to attack testimony or credibility, but personal attacks, in an effort to vent or inflame emotions, should not be permitted.

Personal Opinions By Counsel

Objection, the union advocate is giving his/her personal opinion

Any statement based on the union advocate's personal belief that something is or is not true is strictly forbidden. Advocates comments should be restricted to the credibility of a witness, the weight of the evidence, and arguments about the evidence, not if anything is true or false. This objection is also used when an advocate expresses their personal opinion about the integrity of opposing counsel, the grievant, or any witness. Attacks on credibility should never become personal.

Prejudicial Or Inflammatory Remarks

Objection, the advocate's argument is solely designed to prejudice the arbitrator

Improper arguments include anything devised to appeal to the arbitrator's sympathy, passions, or prejudice. For example, while it is improper for you to say that the arbitrator has a moral obligation to protect the work place from the grievant or to imply that the grievant might strike back personally against the arbitrator, it is equally objectionable for the union advocate to remind the arbitrator of the grievant's family responsibilities, his/her sobbing young children, or bright future.

Relevance

Objection, the question calls for an irrelevant answer.

Something is irrelevant if it does not serve, by any natural pattern of inference, to establish an issue of fact.

Witness Examination

The arbitrator controls the questioning of witnesses so as to make the presentation of evidence effective, to avoid wasting time, and to protect witnesses from harassment or undue embarrassment. The questioning of witnesses during hearing generally takes place as follows:

Direct Examination. Advocates call and question their own witnesses.

Form of Questions. As a general rule, witnesses may not be asked leading questions by the direct examiner (the advocate who calls them testify). A leading question is one that suggests the answer you want, and often requires a "yes" or "no." Direct questions generally should be phrased to evoke a set of facts from the witness.

Personal Knowledge. Direct examination covers all facts relevant to the case of which the witness has personal knowledge. A witness can only testify about an event if they were there when it occurred and they directly observed it. When a witness makes inferences from what they actually did observe that substantively alters the facts of the case or affects the outcome of the trial, advocates may properly object to this

type of testimony because the witness has no personal knowledge of the inferred fact.

Refreshing Recollection. If a witness is unable to recall a statement made in a prior statement, the advocate may use that portion of the statement to help the witness remember. The examiner has the witness review his/her statement to "refresh" his/her memory. It is not necessary to enter the statement into evidence for this purpose.

Redirect Examination. The direct examiner should plan for redirect in case the credibility or reputation for truthfulness of the witness is attacked on cross examination. If, during cross examination, the witness is damaged by statements made to the opposing advocate then the direct examiner may ask questions that "save" or "rehabilitate" the witness's truth-telling image in the eyes of the arbitrator. Note: Redirect examination is limited to issues raised by the opponent advocate on cross examination.

Cross Examination. Cross examination follows the opposing advocate's direct examination of his/her witness. Advocates conduct cross examination to explore the weaknesses in the opponent's case, test the witness's credibility, and establish some of the facts of their own case when possible. Do not ask a question for which you do not already know the answer. Do not confuse cross-examination with discovery – you are not seeking to uncover new information during cross examination.

Form of Questions. An advocate should ask leading questions when cross examining the opponent's witnesses. A leading question allows the advocate to control the witnesses' answers to some degree. Questions tending to evoke a narrative answer that usually begin with "how," "why," or "explain," should be avoided.

Scope of Examination. While the scope of cross-examination should be limited to those matters covered during the direct-examination, arbitrators generally do not strictly follow such limitation. In arbitration the "scope" of cross examination (i.e., the subject of questions asked) often expands to subjects other than those brought out under direct examination. It generally covers matters affecting the credibility of the witness, and additional, otherwise admissible, matters that were not covered on direct examination.

Impeachment. On cross examination, the advocate may want to attack the credibility of a witness to show the arbitrator that the witness should not be believed. A witness's credibility may be impeached by showing evidence of the witness's conduct, past convictions, and prior inconsistent statements.

Prior Conduct: "Isn't it true that you misrepresented your academic credentials when you applied for your present job?"

Past Conviction: "Isn't it true that you've been convicted of stealing jewelry from a department store?"

Prior Inconsistent Statement:

"Did you state on direct that the light was yellow?"

"Is this your affidavit/declaration/written statement?"

"Did you swear to the affidavit/declaration/written statement or attest to its truthfulness?"

"Does it say in paragraph 2, line 3 of the affidavit/declaration/written statement that the light was red."

If the witness does not admit to a prior inconsistent statement, the witness may be impeached. When the prior statement was signed and sworn/attested by the witness, the advocate should introduce the statement and ask the witness:

- 1) "Is this your statement?"
- 2) "Did you make it at a time much closer to the events in question?"
- 3) "Did it contain all you could then remember?"

Recross Examination. Recross follows redirect examination, but is limited to the issues raised on redirect and should avoid repetition.

Summary. The union advocate will use objections to prevent potentially damaging evidence from being presented to the arbitrator. Your job as an advocate is to ensure that all such evidence you wish to introduce is received into evidence. Postal arbitrators do not strictly follow the rules of evidence, but being familiar with those rules will be advantageous to you in having evidence accepted.

To help themselves become familiar with the rules of evidence some advocates utilize check lists to be sure they do not omit an essential part of the foundation. A check list can also help you create a good impression as an advocate who knows what they are doing. A check list can also indicate to the arbitrator that you are both careful and competent.

Remember; when you are commenting on the union advocate's objection *argue to the arbitrator not with the arbitrator*. Arguing with the arbitrator will force them to take the other side, and if that happens you will probably lose the argument.

Keep in mind that arbitrators generally want to admit the evidence into the record to get “the full picture.” If the arbitrator admits it “for what it’s worth” – ask the arbitrator to tell you the worth they assign to that evidence so that you know how to proceed with your presentation. Is it worth so much that you must spend considerable time in rebuttal or so little that it may be safely ignored?

Finally, if an objection to your proffered exhibit has been sustained stop and take a good look at that evidence. Depending on the circumstances, a document that is inadmissible for one reason may be admissible for another reason. For example – a document inadmissible as a business record could be admissible as an admission; a declaration against interest; a prior inconsistent statement; past recollection recorded; or even used to refresh a witness’ recollection. Through your case preparation you should be able to identify potential admissibility problems and the solutions to those problems.

Each advocate is entitled to object when it believes the other advocate is seeking to introduce improper evidence or argument at the arbitration hearing. Such objections, when based upon some plausible grounds, can serve a useful function even if overruled, for the arbitrator will have been cautioned to examine the challenged evidence or argument more closely before giving it weight. Advocates are also entitled to object to evidence considered irrelevant, for the record should not be burdened with a mass of material having little or no bearing on the case.

Objections that have no plausible basis and that are repetitious should be avoided, as was advised by Arbitrator Clarence M. Updegraff:

“Do not make captious, whimsical or unnecessary objections to testimony or arguments of the other party. Such interruptions are likely to waste time and confuse issues. The arbitrator, no doubt, will realize without having the matter expressly mentioned more than once, when he is hearing weak testimony such as hearsay and immaterial statements.”

(Elkouri & Elkouri, “How Arbitration Works”, Sixth Edition 2003, page 317.)

