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ADR SPOTLIGHT

PREMi PROFESSIONAL RESOLUTION EXPERTS OF MICHIGAN, LLC

An emerging trend to replace direct testimony with written narrative witness statements in commercial arbitration

BY JEROME F. ROCK

A foundational principle of Arbitration is that it based on an agreement between the parties to submit their dispute for a binding decision by a neutral third party. The Federal Arbitration Act and companion state laws provide basic requirements governing arbitration, such as requiring that the arbitration agreement be expressed in writing, while the details of the process are left to the parties. Numerous institutions publish rules governing various aspects of the domestic Commercial Arbitration process, including the American Arbitration Association (AAA), the International Institute for Conflict Preventions and Resolution (CPR) and JAMS. Within these rules, the parties are expected to choose from different procedural options and may further modify the rules to achieve their objectives.

It is often stated that Arbitration is flexible, more efficient, less costly, and faster than conventional litigation. Although specialty Business Courts may focus on efficiently resolving commercial disputes, the characteristics of arbitration including confidentiality of the proceedings, the limitation of appeal rights and the opportunity to customize the process continue to make arbitration the preferred dispute resolution forum for many commercial transactions.

This discussion focuses on one aspect of the domestic commercial arbitration that is gaining acceptance based on the positive and longstanding practice of international arbitration practice.

A distinction has always existed between Domestic and International Arbitration practice. Narrative or Written Witness Statements are routinely used to introduce direct witness testimony in International Arbitration for good reasons. There are often multiple legal systems as well as languages among the parties or neutrals requiring translation, there are greater distances between parties and the tribunal requiring costly and time-consuming travel, and the focus of the arbitration is often on documentary evidence and issues. As a further catalyst to the emerging trend, recent amendments to the International Dispute Resolution Procedures of the International Centre for Dispute Resolution (ICDR), the international division of the American Arbitration Association, clarified and expanded instructions for the use of testimony by Written Witness Statements from "permissive" to "compulsory." The commentary to the revisions suggested "[F]or US practitioners who may be more comfortable and familiar with oral direct witness testimony, the ICDR Rules' support for the use of witness statements is a change of practical note."

Jerome F. Rock

Although the various domestic arbitration rules granted the arbitrator and the parties the flexibility to use Written Witness Statements as evidence; by default, the customary litigation format of direct oral examination of witnesses at the hearing often prevailed.

As part of a continuing effort to improve efficiency and streamline proceedings, the explicit reference to Written Witness Statements is emerging in standard domestic arbitration rules. As an example, the Commercial Arbitration Rules and Mediation Procedures of the American Arbitration Association (effective September 1, 2022) include two separate sections dealing with Preliminary Hearing Procedures. The first of these sections, "P-1 General," provides:

(a) In all but the simplest cases, holding a preliminary hearing as early in the process as possible will help the parties and the arbitrator organize the proceeding in a manner that will *maximize efficiency and economy*, and will provide each party a fair opportunity to present its case.

(b) Care must be taken to *avoid importing procedures from court systems, as such procedures may not be appropriate to the conduct of arbitrations as an alternative form of dispute resolution that is designed to be simpler, less expensive, and more expeditious.* (emphasis provided)

The next section, referred to as "P-2 Checklist" suggests topics that the parties and the Arbitrator should address at the Preliminary Hearing,

(xii) whether, according to a schedule set by the arbitrator, the parties will

(a) identify all witnesses, the subject matter of their anticipated testimonies, *exchange written witness statements, and determine whether written witness statements will replace direct testimony at the hearing.* (emphasis provided)

Arbitrators strive to balance the level of effort necessary to permit each party to effectively present all relevant evidence and testimony supporting their claim or defense, with the plan that counsel often initially suggest that reflects pre-hearing procedure and discovery that mirror their litigation practice, which are often at odds with the objectives of arbitration. The explicit reference in the P-2 Checklist presents the opportunity for a change in basic assumptions by presenting Written Narrative Witness Statements as an option to the standard litigation format, to be addressed in a timely manner, at the Preliminary Hearing. But this opportunity is not without its challenges.

As an Arbitrator, I have long encouraged the use of Narrative Witness Statements as a method of presenting direct testimony of witnesses under the control of a party. I submit an Agenda to counsel in advance of the Preliminary

(continued on Back Page)

Rosenberg spy case explored in FBA trial practices program Oct. 28

The Federal Bar Association, Eastern District of Michigan Chapter, is teaming up with the American College of Trial Lawyers to retry the infamous Rosenberg spy case. "Anatomy of a Trial: An In Depth Examination of Best Trial Practices" will take place on Friday, October 28, from 8 a.m. to 5:30 p.m. at the Levin U.S. District Courthouse in Detroit.

The event will feature a faculty of distinguished trial lawyers and judges for a mock trial program, the purpose of which is to train younger lawyers on best practices for opening statements, direct and cross examinations, closing arguments, and the ever-important skill of effective, ethical advocacy. Based on the real trial of Ethel and Julius Rosenberg, this training will cover topics including opening statements, direct examination, cross-examination, closing arguments, and a discussion with federal judges on what they want from a trial lawyer.

Included will be:

- Full day of Anatomy of a Trial program with distinguished litigator and trial judge speakers
- Lunch
- Panel discussion with judges on what they want from trial lawyers

Cost is $76 for members and $126 for non-members/guests. To register, visit fbamich.org and click on "events."

'Tips and Tools for a Successful Practice Seminar' presented by SBM

The State Bar of Michigan will present a "Tips and Tools for a Successful Practice Seminar" online Tuesday, October 18, from 9 a.m. to 3 p.m.

The webinar features presentations on how to maintain mutually beneficial client relationships, draft effective fee agreements, analyze ethical issues, and use innovative techniques and technology for effective law office management. The seminar is an opportunity for solo practitioners and new lawyers to obtain ethical guidance and practical information from colleagues who have successfully implemented law office management techniques and utilized economically-priced technology to improve the efficiency of their law practices.

Cost is $50 for lawyers, other legal professionals, law students, and unlicensed graduates. Payment and the completed registration form must be received by 5 p.m. the Friday before the webinar. To register, visit https://www.michbar.org/tipstools.

Materials will be emailed to participants to the email address provided during the registration process one day prior to the webinar.

For additional information, contact the State Bar of Michigan ethics helpline at 877-58-4760 or ethics@michbar.org.

You served us in Mosul.

We serve you in Milford.

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Appellate Defender Annual Fall Training offered online during Oct.

The Michigan State Appellate Defender Office (SADO) and the Michigan Appellate Assigned Counsel System (MAACS) will host their Appellate Defender Annual Fall Training over four days in October online via Zoom.

This training is for defense attorneys/defense attorney team members. Attendees must register for each day separately and can choose to register for whatever days are of interest and attend whatever individual sessions are appropriate. Topics for each day include:

—Day 1: Tuesday, October 11

- MAACS Town Hall
- Racism, Representation & Appellate Advocacy
- Exploring Diverse Epidemiological Methods to Advance Our Clients' Lived-Experiences and Due Process
- Unstacking the Odds: Using re-entry and mitigation to secure favorable resentencing outcomes
- New Youth Decisions & Implications on Sentencing Issues

—Monday, October 17

- Litigating 6.500 Motions: The Keys to Correcting Wrongful Convictions Through Michigan's Post-Conviction Gateway
- Using Experts on Appeal
- Legislative and Court Rule Updates: What Changes You Need to Know
- The Borderline Claims Game (trials and pleas)
- Building Trusting and Durable Attorney Client Relationships

—Day 3: Wednesday, October 19

- Sentencing Law Updates
- 7.208 and Trial Court Practice
- What's on the Legal Horizon? A Preview of this Term in the Michigan Supreme Court
- Practicing Cultural Humility

—Day 4: Monday, October 24

- Writing Persuasive Briefs
- E-Briefing
- Motions to Correct Invalid Sentence
- Motions for Plea Withdrawal
- Plain and Structural Error and *People v Davis*

To register for any of the training days, visit www.sado.org. Attendees will receive a confirmation email with Zoom connection information immediately after registering. Anyone with questions should contact Marilena David at mdavid@sado.org or 313-670-0309.

Calendar

M T W Th F S Su

October

3 Oakland Mediation Center (OMC) invites legal professionals to the **Virtual Civil Mediation Training 2022** taking place this October. The 40 hour State Court Administrative Office (SCAO) approved General Civil Mediation Training will be held October 3, 4, 10, 11, 12, 17, 18, 24, 25, and 26 from 1 to 5 p.m. each day online via Zoom. The cost of training is $1,295. For additional information about this training, contact Megan McCoy, director of ADR Services at 248-338-4280, ext. 210, or mmccoy@mediation-omc.org.

5 The Women's Bar Association, Oakland County region of the Women Lawyers Association of Michigan, will conduct it's **October Board Meeting** Wednesday, October 5. The meeting is open to all WBA members. The meeting will start with social time beginning at 5:30 p.m. followed by the meeting at 6 p.m. at Zausmer, 32255 Northwestern Highway #225 in Farmington Hills. To register, visit https://womenlawyers.org and click on "events."

6 The Federal Income Tax Committee to the Taxation Section of the State Bar of Michigan will host a **Happy Hour and Networking** event on Thursday, October 6, from 5 to 7:30 p.m. at Zao Jun New Asian & Sushi, 6608 Telegraph Rd. in Bloomfield Hills. To register for the free event, email Cody Attisha at Cattisha@Kerr-russell.com.

6 The Criminal Defense Association of Michigan will present a webinar on **"Appealing Bail Decisions"** Thursday, October 6, from 11 a.m. to noon via Zoom. Speaking at the webinar will be Phil Mayor who joined the ACLU in 2019. Cost for the webinar is $30. To register for the online program, visit https://cdam.wildapricot.org.

7 Attorneys from the **Oakland County Bar Association** and **Lakeshore Legal Aid** will assist applicants with the expungement process during a free virtual event on Friday, October 7, from 1 to 5 p.m. Lakeshore Legal Aid is currently striving to host one expungement clinic a month. Information on upcoming clinics can be found by following Lakeshore Legal Aid on Facebook @LakeshoreLegalAid.org and Twitter @MICH_legalaid and/or via MichiganLegalHelp.org events calendar: https://michiganlegalhelp.org/legal-clinics-and-events.

9 The 43rd annual **Race Judicata** presented by the Oakland County Bar Association will take place on Sunday, October 9, at Birmingham Covington School, 1525 Covington Road in Birmingham. The 5k run and walk starts at 9 a.m. and family/friends/leashed dogs and strollers are all welcome. On-site registration available starting at 8:15 a.m. Registration fee includes a custom race medallion, refreshments, snacks and awards (runners only). Registration fees are $30 for 5k run and $20 for 5k walk. To register, visit www.ocba.org and click on "events."

11 Western Michigan University Cooley Law School will continue its Community Conversations virtual event series with **"Lawyers Interrupted: Getting Better, Together"** featuring Mandi Clay, Three Thirteen Law founder, on Tuesday, October 11, beginning at noon. To register for "Lawyers Interrupted: Getting Better, Together," visit https://info.cooley.edu/community-conversations.

13 The Michigan Association for Justice will sponsor its **"No-Fault Institute XIX—Hacking Our Way Through the Jungle of Issues"** on Thursday and Friday, October 13-14, at the Four Points by Sheraton Novi, 27000 S. Krevich Dr. in Novi. Thursday, October 13, will be "PIP Day" and Friday, October 14, will focus on "Negligence." Cost for MAJ members is $550, MAJ members 3 years or less of practice pay $360, MAJ sustaining members pay $300, MAJ paralegal and student members pay $330, and non-members pay $800. Judges can attend for free. To register, visit www.michiganjustice.org or call 517-321-3073.

13 As part of its Annual Health Care Webinar Series, Dickinson Wright PLLC will present **"How Will Telehealth Evolve as the Pandemic (Hopefully) Draws to a Close?"** on Thursday, October 13, from 1 to 2 p.m. Speaking at the webinar will be Dickinson Wright Member/Partner Kimberly Ruppel. To register for the webinar, visit www.dickinson-wright.com and click on "Insights."

13 The Michigan Defense Trial Counsel will hosts its **Meet the Judges** event on Thursday, October 13, from 6 to 8 p.m. at the Detroit Golf Club, 17911 Hamilton Road in Detroit. The event is free to all judicial attendees, $85 for members (member rates apply to staff of MDTC members), and $135 for non-members which includes membership fee. To register or for additional information, visit www.eventbrite.com and search for "MDTC."

13 The Criminal Defense Association of Michigan will present the webinar **"Show and Tell - Demonstrative Aids Throughout Trial"** on Thursday, October 13, from 11 a.m. to noon via Zoom. Speaking at the webinar will be CDAM Past President Karl P. Numinen. Cost for the webinar is $30. To register for the online program, visit https://cdam.wildapricot.org.

13 The Oakland County Bar Association will present an **"Update on the State of Juvenile Law"** as an online webinar on Thursday, October 13, from 11:30 a.m. to 1 p.m. via Zoom. This program will offer a review of developments in juvenile law, including new legislation, court rules, and case law from the past year. Credit has been approved with the Oakland County Bar Association for 1.5 Criminal credit and 1.5 Juvenile credit. Cost for the webinar is $12 for OCBA members pre-registration and $25 for non-members pre-registration. Oakland County MIDC court appointed attorneys can attend for free. To register for this webinar, visit www.ocba.org and click on "events."

15 The **Michigan Association of Professional Court Reporters** (MAPCR) is hosting a fundraiser comedy night, 6 to 9 p.m., Saturday, Octtober 15, at Block Brewing Company, 1140 S. Michigan, in Howell, featuring stand-up comedian Billy Ray Bauer. Tickets are limited and can be purchased at https://mapcr.org/event-4879728. Each ticket includes dinner, dessert, and one drink ticket per guest. A cash bar will also be available.

17 Wayne State University Law School, the American Society of Law, Medicine & Ethics, and Harvard Law School will co-sponsor the **"Journal of Law, Medicine & Ethics Transgender Health Equity and the Law Symposium"** on Monday, October 17, from 9 a.m. to 5 p.m. at the WSU Spencer M. Partrich Auditorium, 471 West Palmer in Detroit. There is no charge to attend this event, however, seats are limited and registration is required. For additional information, contact Heather Walter-McCabe at hwaltermccabe@wayne.edu.

18 The National Diversity Council and Michigan Diversity Council will present the inaugural **Michigan Legal Diversity Summit** on Tuesday, October 18, from 7:30 a.m. to 12:30 p.m. at the MSU Management Education Center, 811 W. Square Lake Road in Troy. To learn more or to register, visit http://michigandiversitycouncil.org/events/2022-michigan-legal-diversity-summit.

20 The Oakland County Bar Association will present **"Luncheon Limine—Family Court"** online Thursday, October 20, from noon to 1 p.m. via Zoom. October's lunch will focus on the family court with Oakland County Circuit Court Judge Kameshia D. Gant, Family Division. This event is free for OCBA member and $10 for non-members. Space is limited. To register and receive the Zoom details, visit www.ocba.org and click on "events."

24 Members of Wayne State University Law School's Black Law Alumni Council (BLAC) executive committee and broader membership are invited to join for a happy hour with Wayne Law Dean Richard Bierschbach. The **BLAC Happy Hour with the Dean** will take place Monday, October 24, from 5 to 6:30 p.m. at the Wayne law Faculty Lounge (room 3341). Registration for the free event is requested. To register, visit https://bit.ly/3xMmprk.

27 The Professional Development Committee of the Oakland County Bar Association will present **"Mastering the UCCJEA: Getting Child Custody Issues Right When a Parent Moves Out-of-State"** as an online master class on Thursday, October 27, from 5:30 to 7 p.m. via Zoom. This presentation will discuss the ins and outs of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101-722.1406. Cost for the program is $25 for OCBA Professional Development Committee members; $35 for OCBA members; $25 for OCBA new lawyers, paralegals, students; and $45 for non-members. To register, visit www.ocba.org and click on "events."

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COMMENTARY

Lawyer-client privilege comes at very high cost

BY BERL FALBAUM

Is there anyone—anyone—out there who would accept and endorse the following:

A policy that lets innocent people rot in prison for decades or even be executed when lawyers representing the guilty parties refuse to speak out because they don't want to violate lawyer-client privilege.

Nay, you say. That's impossible. No one would defend such an unconscionable, inhuman, perverse, circumstance.

Well, there is a sector of our society that endorses such a policy and does so proudly. The legal community. Yes, the very legal community that is dedicated to pursuing truth and justice. Why? Because it is defined in its legal code of ethics. You read that correctly. This is protected under legal ethics.

Permit me to explain.

With this column, I complete a futile five-year campaign to have that "ethical" code changed. It ended for me after a decision recently by the Michigan Supreme Court. But first some background.

I wrote a book, ("Justice Failed: How 'Legal Ethics' Kept Me in Prison for 26 Years," Counterpoint Press, 2017), on Alton Logan, a black man in Chicago, who served 26 years under those exact circumstances.

Logan was wrongly convicted—in two trials nine years apart—of fatally shooting a McDonald's security guard, a murder committed by another man, Andrew "Gino" Wilson, who later was arrested and convicted in the fatal shootings of two other police officers.

Four lawyers knew from the very beginning that Logan was innocent because Wilson confessed to them that he committed the murder. What did the lawyers do?

They felt compelled to keep silent because the legal ethical code forbids lawyers from revealing any information which might harm their client. They wrote an affidavit stating that Logan was innocent, signed it, had it notarized and locked in a strong box which one of the lawyers kept under his bed for 26 years.

Logan was "lucky" because he was exonerated after Wilson died in prison. He had given his lawyers permission to speak out after his death.

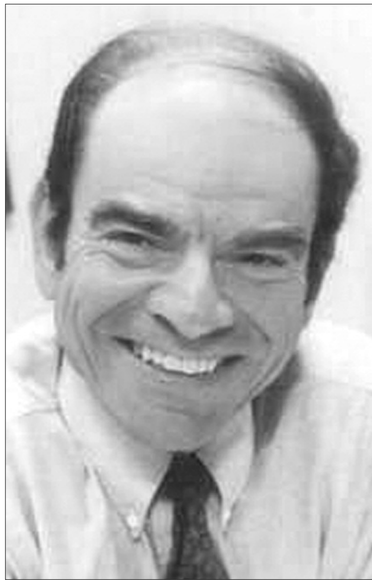
Indeed, during my research, I discovered that another man, Lee Wayne Hunt, was in the Maury Correctional Institution in Raleigh, N.C. under the same circumstances. When the lawyer, who represented the real murderer who died, went to court and testified that Hunt was innocent, Cumberland County Superior Judge Jack A. Thompson, would not accept the testimony, stating that the attorney violated lawyer-client confidentiality.

If that were not enough, Thompson reported the attorney to the state bar for an ethics violation. The bar took no action on the complaint. (I tried to interview Thompson; he did not return my messages). Hunt died in prison after having served 30 years for a crime he did not commit.

I could not believe the story on Logan when I saw it on "60 Minutes." It is impossible to accept that lawyers would let an innocent person rot in prison knowing—the key word is "knowing"—that he/she is innocent. Indeed, Logan faced the possibility of the death penalty; the jury voted 10-2 to put him to death—two votes saved him.

Since the book's publication, I launched a one-man campaign to try and have the ethics code changed. (Others have tried as well through the years). I believe it would not be difficult to amend the code and still protect privileged information received from clients while setting the innocent free.

In the book, Logan and I offer several proposals which would do just that. As a matter of fact, three of the four lawyers who kept silent, whom I interviewed, also gave us recommendations on how to change the code.



Berl Falbaum

Here is just one: Lawyers representing the guilty party would appear "in chambers" before one judge or a panel of judges or a grand jury and lay out the facts that their client for which an innocent person is serving time committed the respective crime. This testimony would remain secret and could not be used against their client. The judges or grand jury would rule accordingly and the innocent would be set free.

These kinds of "deals" are made routinely in the law. Immunity is offered to many guilty parties, and grand jury and in chambers sessions are secret proceedings.

If this suggestion or others need tweaking, let the tweaking begin. It is not difficult to find a solution!

During the last four years, I contacted the American Bar Association, state bar associations, and numerous legal organizations, all to no avail. I tried to launch a petition campaign. That failed also.

The State Bar of Michigan, which I contacted in 2017, apparently thought I had a point and established a committee to study the issue. I was interviewed but since then, every time I checked, I was told the committee was still working on it. If it hasn't died in the State Bar offices, I am confident it is in a very deep coma.

Then I learned that I could appeal directly to the Michigan Supreme Court which, after public comment, could change the ethics code.

I filed a petition with the Supreme Court more than a year ago. Two weeks ago, I received a reply from Sarah Roth, Michigan Supreme Court administrative counsel. The relevant part of her email stated:

"After a robust discussion, the Court has decided not to publish the proposal for comment at this time."

Translated that means, the Court decided, robustly no less, to do nothing. Judges with, arguably, the best legal minds sitting on Michigan's "supreme" court who are committed to the highest standards of justice, have no problem with letting the innocent rot in jail or be executed.

Thus, it is fair to conclude that Michigan's justices find nothing offensive about these two cases, and are prepared to accept that others might languish innocently in prison or may be put to death.

If you think the ethics code that I described above cannot get any uglier consider: The most outrageous provision holds that lawyers may break their silence if their clients did not pay outstanding legal fees. In other words, a lawyer's fees are more sacrosanct than human life.

So, I have a question for the justices: If you or your loved ones were rotting in prison or facing execution—in other words, you were in Logan's and Hunt's shoes—and had the power to change the ethics code, would you do so or support and endorse the silence of those who could set you free?

No need to reply. Everyone reading this column knows the answer.

Berl Falbaum is a veteran journalist and author of 12 books.

ADR SPOTLIGHT

PREMi

PROFESSIONAL RESOLUTION EXPERTS OF MICHIGAN, LLC

An emerging trend to replace direct testimony with written narrative witness statements in commercial arbitration

(Continued from page 3)

Hearing, which includes those topics presented in the P-2 Checklist under the AAA Arbitration Rules, as well as my suggestion to consider use of Narrative Witness Statements as a way of improving the efficiency and cost effectiveness of the process. This advance notice prepares Counsel to address the topic thoughtfully at the Preliminary Hearing.

Initially, my suggestions to adopt Written Witness Statements were met with apprehension. This resistance reflected a reluctance to deviate from standard practice, and a lack of understanding how the process of using the Written Witness Statements could positively impact the Hearing.

Understandably, there were more questions, and often no place to get answers to these important concerns:

• Which witnesses will be subject to the Written Witness Statement procedure?

• Will it take more time, or cost more to provide Written Witness Statements?

• Will the format be Q and A, or more like Affidavits?

• Are leading questions permitted, or will strict rules limit narrative testimony?

• When are the Written Witness Statements Exchanged?

• Can the Witness Statements be amended or supplemented? On what conditions?

• Will depositions be eliminated/permitted?

• If the witness is not present at the Hearing for cross-examination, will the Written Witness Statement be excluded?

• Can the witness still testify on direct examination at the Hearing so the arbitrators can assess the character and credibility of the witness?

As I provided more of the rationale, logistics and details for Written Narrative Witness Statements, explained the Question-and-Answer format, affirmed opportunity for cross examination, and emphasized the significant efficiencies and cost savings, that initial reservation shifted to acceptance, and in many instances, enthusiasm.

Eventually, I summarized these instructions, incorporating many of the suggestions of Counsel, and now issue them as a Protocol. These instructions are provided to Counsel prior to the Preliminary Hearing, at which time narrative witness statements can be discussed with other "Checklist" items, modified as required by the needs of the case, and eventually incorporated into a Preliminary Hearing Order.

The Protocol is then a step-by-step instruction manual for the attorneys to prepare the Written Witness Statements resulting in standard format for all witnesses under the control of each party. The detail provided in the Protocol removed the uncertainty associated with a nonstandard approach and gave the attorneys the confidence each side would operate under the same rules. The complete Protocol is available as a download at the author's website https://www.JeromeRockLaw.com and may be used without restriction.

The following section describes some of the benefits and challenges of using Narrative Witness Statements as a vehicle for introducing direct witness testimony as evidence at the Arbitration Hearing, as well as the new challenges and opportunities made available with Video Conferencing.

Direct Witness Testimony

First, the Narrative Witness Statement should be the testimony of the Witness, and not the legal argument of the attorney. The attorney can assist, review, and focus the witness to describe the facts. The Narrative Witness Statement Protocol supports the process with detailed instructions and procedural ground rules that mimic the typical direct examination format where leading questions are permitted; first question, then witness answer.

The Narrative Witness Statement becomes a written work product that is carefully reviewed for accuracy and completeness by both the attorney and the witness, affirmed under oath by the witness and prepared to be submitted as direct evidence at the Hearing. This thorough preparation also relieves much of the anxiety of the witness. Their direct testimony is flawless, and they are under less stress and more confident when they respond to cross-examination.

Counsel may be concerned that the use of Narrative Witness Statement limits the Arbitrator's opportunity to gauge the many dimensions of witness credibility, since the Arbitrator will only observe the witness under the pressure of cross examination. To address this concern, the Protocol permits the lawyer to put their witness through as little or as much of the full direct examination in front of the Arbitrator as they feel necessary, using the Narrative Witness Statement as the outline.

Timing for the exchange of Written Narrative Witness Statements is important. Attorneys usually expect to present their witness testimony at the Hearing and changing this schedule requires some explanation. When the exchange of the Written Witness Statements is set early in the discovery process, both parties' benefit. The claimant focuses the issues which can eliminate the need for the respondent to delve into tangential topics to avoid surprise testimony at the Hearing. The testimony of Respondent's witnesses is also narrowed and focused.

Further, if a party has the complete direct examination of a witness available as a Written Statement, the need for a pre-hearing deposition of that witness may be obviated or, at least, reduced.. Decreasing the number of depositions saves time and costs..

Finally, every case filed as a demand for arbitration will go through a mediation phase where the parties will attempt to resolve the dispute voluntarily. The Arbitrator should be aware of the opportunity to assist the parties in preparation for this exercise. Written Narrative Witness Statements, when exchanged early, can provide a strong factual foundation for effective mediation. The Narrative Witness Statements eliminate much of the uncertainty or confusion of expected testimony and force the parties to adjust their bargaining and settlement positions, accordingly, increasing the likelihood that the parties will resolve the case on their own terms.

Following the instructions of the Protocol, the time and effort spent preparing Narrative Witness Statements should be consistent with pre-hearing preparation for witnesses under conventional practice, but with tangible benefits.

Cross Examination by the Adverse Party

The first reaction to the suggestion of Written Witness Statements focused on whether the right to cross examine the witness would somehow be diminished. The Narrative Witness Statements are always subject to cross examination at the request of the adverse party. The opportunity to prepare for cross examination of direct fact witnesses well in advance of the Hearing is obviously a distinct advantage to counsel; well-prepared cross examination is expected to be thoughtful and focused.

When prepared and exchanged early, Narrative or Written Witness Statements can lessen the need for deposition of the witness or at the least reduce the scope and duration of the deposition. The cross-examining party has detailed advanced notice of the witness' direct testimony and need not rely on a deposition to prepare for effective cross examination.

With effective planning for cross examination, the adverse party should also be prepared for Rebuttal testimony, if necessary, which can be arranged and presented in a timely manner without the need to delay or adjourn the Hearing.

Arbitrator's Perspective

Narrative Witness Statements provide several advantages to the Arbitrator.

The Preliminary Hearing deals with the wide-ranging discovery needs of the parties, while the Arbitrator is challenged to maintain a fair, but efficient and economical process. Attorneys are familiar with the concept of Proportionality and Staged Discovery, with discovery of the least costly or most cost-effective process first, and depending on the results or benefits produced, expand the scope of discovery permitting more intensive discovery methods. The analogy to Proportionality and Staged Discovery then applies to the Narrative Witness Statement as the first step of this discovery journey.

When Narrative Witness Statements for expected fact witnesses are prepared early and exchanged with this strategy in mind, the adverse party can assess the written testimony as that first level fact finding tool, anticipate the effectiveness of their cross examination at the Hearing and either accept the Narrative Witness Statement as prospective evidence, or demonstrate to the Arbitrator their need for the formal deposition of the witness ("in person" or by video conference) in order to properly prepare for cross examination of that witness.

The Preliminary Hearing Order can then be used to phase the schedules for the exchange of Narrative Witness Statements as the Arbitrator monitors the progress, adjusting schedules as needed to accommodate the newly requested deposition of witnesses. Any reduction to pre-hearing discovery effort reduces the cost of the Arbitration.

Since the Narrative Witness Statements are exchanged in advance of the Hearing, the Arbitrator develops a perspective of the entire case and the interplay of expected testimony and the documentary Exhibits. Since the Arbitrator is better informed, they can more effectively manage Pre-Hearing issues without the need for extensive conferences or formal briefing from the parties.

The Arbitrator also uses the Narrative Witness Statements to prepare for the Hearing. The Arbitrator becomes familiar with the testimony in advance, can prepare their own questions, and anticipate the topics of cross examination. The Arbitrator's note taking is limited to annotating the Narrative Witness Statements. The Arbitrator is not distracted and can concentrate on the witness and managing the Hearing.

There may be a concern that the use of Narrative Witness Statement limits the Arbitrator's opportunity to gauge the many dimensions of witness credibility, since the Arbitrator will only observe the witness under the pressure of cross examination. As a response to this concern, the Protocol permits the lawyer to put their witness through a brief direct examination in front of the Arbitrator consistent with the Narrative Witness Statement.

The use of Written Narrative Witness Statements directly reduces the number of hours or days of Hearing that would otherwise be required to introduce the direct testimony of witnesses under the conventional format. This means the parties will have the benefit of cost savings due to fewer Hearing days, which in complex cases can amount to tens of thousands of dollars for each Hearing day.

Finally, when it comes to preparing the Award, there is a reassuring level of confidence that all the testimony is readily available for review. The Arbitrator's contemporaneous reactions to the testimony and cross-examination are preserved as annotations to the Written Narrative Witness Statements. This is often more useful than a post-hearing transcript.

Conclusion

Arbitrators assume a critical leadership role in changing the paradigm from routinely importing procedures from the court systems to introducing those process techniques that are designed to make arbitration a preferred form of dispute resolution that can be simpler, less expensive, and more expeditious. Written Narrative Witness Statements are a critical component that addresses each of these stated benefits of the arbitration process. Educating participants about the advantages of Written Narrative Witness Statements in advance and incorporating this discussion as integral part of the Preliminary Hearing will be a major step in achieving these objectives.

Jerome F. Rock is an arbitrator and mediator focusing on business, technology and construction industry disputes. He serves on the Commercial, Construction and Large Complex Case Panels for the American Arbitration Association and the ICDR for both arbitration and mediation. He has degrees in Mechanical and Civil Engineering, practiced as a construction and technology lawyer and served as executive of a high-tech engineering company. He is a member of the Professional Resolution Experts of Michigan (www.PREMiADR.org), an invitation only organization of experienced ADR professionals. His approach to ADR, case studies and references are available at his website, www.JeromeRockLaw.com.

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COMMENTARY PAGE

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