Getting It Right:  
Secrets to Writing Better Construction Awards  
June 4, 2015 – 2:00 pm – 3:00 pm ET

PROGRAM SUMMARY

Speakers: Bob Huber and Susan McGreevy

Awards must be written with three audiences in mind: the parties, their advocates, and the courts. They should, therefore, be timely, in the proper form, easily understood and leading to a logical conclusion, and within the scope of the arbitration agreement. If more than just a “bullet” award, an award should also inform the parties of the reasons behind the decision and show that the arbitrator heard and carefully considered the losing party’s arguments. During this webinar, attendees will learn the secrets to writing construction arbitration awards that are clear, complete and convincing. Since protecting your awards from review is such a critical component of award writing, the rules governing their form, scope and timing will be thoroughly examined.

AGENDA

2:00 p.m.  Welcome and Introduction of Speakers  (5 minutes)

2:05 p.m.  Writing Construction Awards  
Discussion of the Rules  
Award Format  
Best Practices  (45 minutes)

2:50 p.m.  Conclusion and Questions  (10 minutes)

3:00 p.m.  Evaluation  (5 minutes)

3:05 p.m.  Adjourn
Bob Huber, today recognized as one of Minnesota’s leading construction attorneys, has devoted his law practice to construction since 1983. Though his experience extends to all types of construction, Bob’s main focus is on claims for changes, differing site conditions, delays, and defective specifications on paving, earthwork, and underground utility projects. He has asserted and defended against many bid protests on low-bid, design-build, and best value procurements.

Bob is an active arbitrator and mediator. He has been appointed to the American Arbitration Association’s National Panel of Construction Arbitrators, Large Complex Case Panel. He is a qualified neutral under Rule 114 of the Minnesota Rules of Court.

Bob frequently speaks before attorneys and trade groups on all aspects of construction law. He is actively involved with the Associated General Contractors of Minnesota, the Minnesota Asphalt Pavement Association and the Minnesota Utility Contractors Association.

REPRESENTATIVE EXPERIENCE

- Represented contractor in bid protest over $60 million best-value procurement of light-rail cars for the Hiawatha Light Rail Line
- Defended consulting engineer sued by owner for cost of removing unanticipated bedrock in excavation for new treatment plant
- Prosecuted owner's claim in lawsuit against design professionals over defects in structural design of parking ramp
- Prosecuted contractor’s claim in arbitration for extra work caused by defects in MnDOT’s Superpave pavement specifications
- Represented amicus petitioner in appeal of protest of award of design-build contract for bridge that replaced the I-35W bridge over Mississippi River that collapsed in 2007
- Represented sewer contractor on appeal of award of extra compensation for undisclosed "corduroying" beneath municipal street
- Represented owner in arbitration against contractor and design professional over design and construction defects in standing-metal-seam roof of college student center
- Defended inspector of new crude-oil pipeline construction after landslide damaged parallel existing pipeline
- Defended residential developer in multiple lawsuits for allegedly defective construction in multi-family housing projects
- Represented slip-lining subcontractor in lawsuit with contractor over termination of subcontract

PRACTICE AREAS

- Construction
- Government Contracts

EDUCATION

- The University of Iowa College of Law, J.D., with honors, 1979
- Carleton College, B.A., 1975

ADMISSIONS

- Minnesota
- Iowa
- Wisconsin
- U.S. Court of Federal Claims
Robert J. Huber

- Represented brewery owner in lawsuit against structural engineer and contractors over structural deficiency in above-ground storage tank
- Defended municipality in lawsuit against contractor's differing site conditions claim over undisclosed underground telephone lines

**OF NOTE**
Bob has tried or arbitrated more than 60 construction-related disputes to verdict or award.

**PUBLICATIONS AND PRESENTATIONS**

*Articles*
- Co-author of *Construction Claims in Minnesota*, Cambridge Institute, 2001
- Co-author of *Minnesota Law for Design Professionals*, Lorman Educational Services, 2003

*Speaking Engagements*
- “Obscure Construction Cases that Every Minnesota Construction Lawyer Should Know,” Construction Law Section, Minnesota State Bar, January 2013 and April 2001
- “What We Have Learned from the I-35W Tragedy,” Mid-Winter Meeting, ABA Forum on Construction Industry, February 2012
- “Renewing the Promise of Arbitration,” Real Estate Webcast Series, Minnesota CLE, March 2011
- “Choosing the Field of Battle: Litigation vs. Arbitration,” Leonard, Street and Deinard Annual Construction Industry Update, December 2010
- “Know the Difference to Make a Difference: Selecting and Arguing the Right Arbitration Statute,” Webinar, Minnesota CLE, June 2010
- “2008 Case Law Update,” MSBA Construction Law Section, January 2009
- “Ethics in Arbitration,” MSBA Construction Law Section, March 2008
- “2008 Case Law Update,” MSBA Construction Law Section, January 2009
- “Ethics in Arbitration,” MSBA Construction Law Section, March 2008
- “Arbitration Clause Drafting,” Arbitration Series, Minnesota CLE, October 2007
- “Hot Topics in Commercial and Construction Arbitration,” MSBA ADR Section, Minnesota State Bar Association, January 2007
- “Arbitration Basics: Your First Arbitration,” 9th Annual ADR Institute, Minnesota State Bar Association, October 2006
Robert J. Huber

- “Persons Entitled to and Property Subject to Mechanic's Liens,” A Comprehensive Guide to Mechanic’s Liens in Minnesota, MSBA and Minnesota CLE, January 2005
- “Hiawatha LRT: Litigated Procurement Issues,” Minnesota State Bar Association, Construction Law Section, April 2004
- “Termination: Risky Remedy of Last Resort,” You’re Fired—I Quit: Termination on Construction Projects, MSBA Construction Law Section, June 2003
- “Counsel’s Role in Mediation,” Minnesota State Bar Association, Construction Law Section, May 2002
- “Changes and Differing Site Conditions,” Construction Claims in Minnesota; The Cambridge Institute, Annually, 1987-1999
- “Bad Faith and the General Agreement of Indemnity: Good Faith Obligations Owed by the Surety to its Principal and Other Indemnitors,” Bad Faith Litigation, Minnesota Institute of Legal Education, December 1998
- “Application of Payments to Prior Debts and Their Effect on Mechanic’s Lien and Bond Claims,” Mechanic’s Liens and Payment Bonds, Minnesota Institute of Legal Education, September 1998
- “The Surety’s Post-Claim Options,” Bad Faith Litigation: Surety and Insurance, Minnesota Institute of Legal Education, April 1997
- “Don’t Risk the Reward: Contacting and Hiring an Opposing Party’s Former Employee,” 11th Annual Construction Institute, Minnesota Institute of Legal Education, April 1996
- “Mechanic’s Liens and Payment Bonds,” Minnesota Institute of Legal Education, January 1995
- “Bad Faith Liability of Payment Bond Sureties,” Bad Faith Litigation & the Contract Surety, Minnesota Institute of Legal Education, September 1994
- “Contractual Liability Exclusions,” CGL Policies from A to Z, Minnesota Institute of Legal Education, April 1993
- “Construction Contracts,” Update for City Attorneys, City Attorneys Association of Minnesota, January 1987
Robert J. Huber

PROFESSIONAL AND CIVIC ACTIVITIES

- American Bar Association, Forum on the Construction Industry and Construction Litigation Section
- Minnesota State Bar Association, Construction Law Section, Former chair, 2006-2007
- Wisconsin Bar Association, Construction and Public Contract Law Section
- Hearts & Hammers-Twin Cities, Inc.
  - Board of Directors, 1999-2005
  - Advisory Board, 2006-present

RECOGNITIONS

- Ranked one of America’s Leading Business Lawyers in Minnesota in construction law by Chambers USA: America’s Leading Lawyers for Business. Sources say he “is armed with an ’encyclopedic knowledge of construction law cases and principles.’ He helps client with contentious matters and has particular expertise in working with underground or earthwork subcontractors.”
- Named among The Best Lawyers in America® in the area of construction litigation.
- Selected for inclusion in Super Lawyers®.
Kansas City construction attorney Susan McGreevy's practice consists primarily of advising construction companies, sureties, design professionals, and owners in their day-to-day business ventures. This includes the drafting and negotiation of all types of agreements, resolution of disputes, trying lawsuits and arbitrations, strategic and succession planning, and representing sureties in bond claims and litigation as well as serving as an arbitrator and mediator.

Susan began her career in construction while attending the George Washington University Law School by working for Professors Ralph Nash and John Cibinic, Jr., who were co-chairs of the government contracts program at the law school. Upon graduation, she became a trial attorney at the U.S. Department of Justice, Civil Division, where she represented the United States in construction litigation. In 1977, she went into private practice, continuing her focus on civil litigation and construction-related issues.

**REPRESENTATIVE EXPERIENCE**

- Served as sole arbitrator in a $200,000,000 mixed-use construction dispute
- Served as mediator in loft-conversion project dispute
- Represented general contractor in arbitration over design-build project for replacement of an arena's inflated dome, won seven-figure award
- Represented general contractor in litigation over water infiltration of condominium project, obtained insurance coverage of all damage
- Negotiated construction contracts and handled disputes on behalf of owner of regional performing arts center
- Negotiated contracts for construction and operation of water treatment facilities
- Negotiated contracts for construction of casinos, both water-based and on tribal land
- Assists owners, designers, contractors, insurers and sureties in evaluating facts to determine if a claim exists, and if so, what it may be worth, and how best to resolve it
- Served as arbitrator in disputes arising out of delayed construction of golf course community, and construction of sewer piping systems
- Routinely prepares construction contracts, design agreements, subcontracts, master subcontracts, purchase orders, lien waivers, insurance and bond requirements, bills of sale, and daily report forms for clients
- Presents training sessions for project managers and superintendents on issues such as claim documentation and effective use of daily reports

**PRACTICE AREAS**

- Construction
- Golf Courses, Resorts and Private Clubs
- Government Contracts
- Real Estate
- Government Contracts

**EDUCATION**

- George Washington University, J.D., with honors, 1974
- University of Michigan, B.A., with honors, 1971

**ADMISSIONS**

- Iowa 2007
- Kansas, 1992
- Missouri, 1978
- U.S. District Court for the Western District of Missouri
Susan L. McGreevy

OF NOTE
Susan has written and spoken extensively on virtually all areas of construction law. In 2005, her article, “The Myth of the One-Year Warranty and Other Construction Warranty Issues” was selected by the editors of the American Bar Association's Property and Probate Magazine as the “Best Practical Use” real property article of the year.

PUBLICATIONS AND PRESENTATIONS

Articles
- “Big Changes to Missouri Public Prompt Pay Law!” Stinson Leonard Street Insight, May 2014
- Co-Author with Katie Landrum of Stinson Leonard Street, “Factoring Construction Invoices – Proceed with Caution,” Stinson Leonard Street Insight, May 2014
- “You CAN Always Get What You Want (if you know what to ask for): Drafting Additional Insured Requirements for Construction Contracts” American Bar Association, Forum on Construction Industry, Division 7, August 2013
- “He Says He Has Insurance. Does He Really?” Stinson Morrison Hecker LLP Client e-Alert, July 2013
- “Privatization” Chapter in Construction Finance Management Association’s Financial Management and Accounting for the Construction Industry published by Matthew Bender, 2011
- Co-author with Don Kirkpatrick of Stinson Morrison Hecker LLP, “The New BFFs: Construction Lenders and Contractors,” Ingram’s, August 2011
- “If Stimulus Funds Can’t Stimulate the Construction Economy, What Will?” Ingram’s, May 2009

Speaking Engagements
- Speaker at American Institute of CPA’s Construction Industry annual meeting Las Vegas 2014 “Increased Government Audits of Contractors and CPAs role in them” December, 2014
- Guest lecturer to Bloch School of Business, UMKC and Kansas State University Department of Architectural Engineering and Construction Science, 2013-present
- “Playing Games with Numbers,” Stinson Leonard Street client seminar, May 2014
- “Public-Private Partnerships,” presented for Kansas Gas Service Designer’s Workshops, November 2013
Susan L. McGreevy

- “Doing Business in Other States” presented to the Kansas City Chapter of Construction Finance Management Association (CFMA), Kansas City, September 2013
- “Making Smart Decisions in Construction Contracting” presented to Henry Bloch School of Management, University of Missouri at Kansas City Executive MBA program in Real Estate Development, 2012 and 2013
- “The Estimator’s High-Wire Act” presented to the American Society of Professional Estimators, Kansas City, April 2013
- "Managing Subcontractor and Supplier Financial Risks" presented to the CFMA Heart of America Regional Conference Council Bluff, IA, 2012
- "Offers, Acceptances, and Rejections," firm-sponsored seminar, April 2012
- "It's About Time...Extensions," firm-sponsored seminar, March 2012
- "Change Orders," firm-sponsored seminar, February 2012
- "The ABCs of DBEs: Understanding Preference Programs in Procurement," AICPA, December 2010
- "What's Going On in Construction?" BKD, November 2010
- "Managing Subcontractor and Supplier Financial Risks," Associated General Contractors webinar, August 2010
- "Federal Ethics Compliance Requirements" Annual Meeting of the Construction Industry Certified Public Accountants, Chicago, Ill., July 2010
- "Federal Ethics Compliance Programs" Annual Convention of the Construction Finance Management Association, Kailua, Hawaii, June 2010
- "Turbulent Economic Times for General Contractors: Implementing Practices to Ensure Survival During this Difficult Period for Contractors," Associated General Contractors, March 2010
- "Risk Management of Subcontractors" Annual Convention of Associated General Contractors, Orlando, Fla., March 2010
- "How to Keep the Economic Slowdown From Taking You Down," Kansas Gas Service in-house seminar, June 2009
- "Killer Contract Clauses," Mechanical Contractors Association of Iowa, February 2009
- "New Federal Requirements for Business Ethics Compliance," Surety Association of Kansas City, January 2009
- Keynote speaker, annual meetings of National Association of Surety Bond Producers; Kansas Contractors Association; Kansas Consulting Engineers Association; Missouri Concrete Masonry Council and National Association of Women in Construction

PROFESSIONAL AND CIVIC ACTIVITIES

- American Bar Association
  o Forum on the Construction Industry
  o Real Property, Probate and Trust Section
  o Public Contract Section
  o Tort and Insurance Practice (Surety) Section
- The Missouri Bar
  o Construction Law Committee, past Chair
- Kansas City Metropolitan Bar Association
  o Construction Law Committee, past Chair
- American Arbitration Association
  o Panel of Construction Arbitrators
- American Bar Foundation, Fellow
- The Builders’ Association of Kansas City, member of the Board of Directors, 2014-pres.
- Associated General Contractors
Susan L. McGreevy

- Heavy Constructors Association of Greater Kansas City
- Construction Finance Management Association
- Kansas City Surety Association
- Construction Specifiers Institute
- Design-Build Institute of America
- Nelson-Atkins Museum of Art, Kansas City, Missouri, member of the Board of Trustees, 2014-pres.
- Central Exchange Education Foundation, Board Chair
- Win|Win Initiative, Board Member
- Swope Ridge Geriatric Center, Board Member
- Swope Ridge Gardens Senior Housing, Board Member
- Polsky Family Supporting Foundation, Vice Chair

RECOGNITIONS

- Recognized as a 2011 Dean of the Trial Bar by the Kansas City Metropolitan Bar Association
- Named amongst the “Best of the Bar” by the *Kansas City Business Journal*, honored nine times, most recently 2013
- Listed in the current edition of *Best Lawyers in America* in the area of Construction Law and has been since 2003
- Recognized as a Rainmaker by *Ingram’s Magazine*, 2009
- Elected as a Fellow of the American Foundation by The Missouri Bar Association (an honor reserved for no more than half of 1 percent of the state’s attorneys), 2007
- Among the first group of 25 women to be chosen as *Women Who Mean Business* in 2000
The Art of Communicating Arbitral Judgments:

Write Ya' Heart Out!

And Follow the Basic Rules of Arbitration and Clear Writing

Arbitrators do three things. They hear cases, make decisions and write them up. Even though they spend more time writing opinions than doing any other part of their job, the literature of arbitration rarely addresses opinion writing. This article provides a set of practical, down-to-earth recommendations on writing better opinions. It examines the audience for the award, provides an alternative to the time-honored structure of the arbitration award, pinpoints a number of stylistic defects, and offers solutions to many conceptual issues and writing problems.
Arbitrators are selected for their judgment and their ability to communicate that judgment. While many books and articles discuss aspects of arbitral judgment, very few address the way that arbitrators communicate those judgments. A recently published bibliography of labor arbitration, for example, contained annotations of 1,336 books, monographs, journal articles and proceedings.

Only seven entries addressed decision writing, and the standard bibles such as Elkind and Elkind's or Bornstein, Gosline, and Greenbaum's do not examine the topic at all.

Richard Mittenthal says that arbitration opinions make “dreadful reading,” and he wonders whether the parties actually read most of the opinions given to them. Benjamin Aaron says that the landscape of most arbitral awards is bleak. Many of the awards he read indicated that the writers lacked not only a sense of form, but also a knowledge of the fundamental principles of grammar and syntax. In the wilderness of arbitral rhetoric, one encounters a host of solciusia, misplaced modifiers, dangling participles, and outright misuse of words.

We too have been disappointed in many of the awards that parties have given us to support their cases. Some have been laden with editorial, grammatical or stylistic defects that not only are annoying, but also detract from the arbitrator’s reasoning. As a result, we have prepared some practical, down-to-earth approaches to better award writing. We’ll examine the award’s audience and its structure, the writing, and some do’s, don’ts and pitfalls. We’ll close with the results of a published survey and a recent one of our own on what advocates liked and did not like in arbitration awards.

Defining the Audience

Everyone wants a clearly written, easily understood analysis that leads to a logical conclusion. While many contend that the writing should be addressed to the advocates, we believe that the arbitration award has at least three audiences, each with different needs. One is the advocates; a second, their clients; and the third, external review agencies such as the courts. The needs of each audience should be a beacon to the arbitrators when they choose words, phrases and sentence construction.

A. The Advocates

The arbitrator should think first about the losing advocates and their clients, because they are going to examine the award more carefully and more critically. The winning advocates cannot be ignored, but their perceptions of the logic and the writing may be influenced by their victory. Faulty logic, dense writing and clumsy phrases can nevertheless seem the essence of grace and scholarship to the winners.

Losing advocates have lost in two ways: Not only have they lost the case, but their clients may question their judgment in picking the arbitrator. Therefore, losing advocates need awards that they can explain to their clients and that vindicate their judgment. They rely on a fully explained, clearly written analysis to show the client why the case was lost and why the arbitrator’s decision, no matter how disappointing, had some justification. The arbitration award should convey this kind of message: “I listened carefully to your argument and I considered it fairly. But I read a particular contract clause or practice differently from you. That reading led me to decide against your position.”

B. Their Clients

The clients pose a special communication problem. The arbitrator and the advocate share some common ground: They know the rules, read the same books and use the same expressions. The client rarely participates in this sharing. The arbitrator who keeps the client in mind will avoid esoteric language and unnecessarily complicated sentences filled with subordinate clauses. This approach is basic in all award writing and will be discussed further, but it can be emphasized here. The document is easier to read if major points are highlighted and ideas are expressed in simplified,

The arbitration award has at least three audiences, each with different needs. One is the advocates; a second, their clients; and the third, external review agencies such as the courts.
The arbitrator who keeps the client in mind will avoid esoteric language and unnecessarily complicated sentences filled with subordinate clauses.

yet precise writing. The long word or the little-known word should be used if necessary to convey a meaning with precision. But if a shorter, more commonly understood word does the job, that word should be used.

C. Reviewing Agencies The third audience consists of potential reviewing agencies, usually the courts or government bodies. Poorly crafted awards invite the losing party to contest the outcome in the courts. According to Abrams and Nolan, three conditions should be met to keep an award out of the courts. First, at a bare minimum, the award must be impervious to legal attack. This means that it demonstrably "draws its essence" from the collective-bargaining agreement and the result is consistent with public policy. Second, the opinion must be clear, orderly, reasoned and complete. If the court cannot derive any meaning from the arbitrator's run-on sentences, or if the commission cannot follow the logic, the chance of review probably increases. And third, while it is too much to hope that the arbitrator's arguments will convince the losers that they were wrong, it is not too much to hope to convince them that they have had their day in court. To do this, the arbitrator must show consideration to all of the loser's arguments, fully answer all issues, and write in a comprehensible, forceful and persuasive manner.

Formatting the Award

A. Introduction Arbitration awards typically begin with administrative detail. This may include how the case reached the arbitrator, where and when the hearing was held, who represented each party, whether transcripts or briefs were filed, and when the hearing was closed. Arbitrators vary about including more than these minimum essentials. Some prefer to complete the record with the names of all the witnesses who appeared for each party, although advocates rarely ask for particular details to be included.

B. Background and Issue The arbitrator next lays out the background, the issue to be decided, the remedy requested and the contract clauses that are most significant to the decision. We build our model of award writing around an ancient formula: Tell them where they're going, get them there, and tell them where they've been. This section should give the parties a clear idea of your destination and your route. The background should include enough facts to show an understanding of the parties' operations and the grievant's occupation and length of service. It should indicate how the case arose and the decision that is grieved. The issue should be defined with precision, which usually means defined narrowly.

It is not: The issue is whether or not the employer can deny holiday pay for all absences the day before a holiday.

It is: Did the employer violate the agreement when Annie Laurie was denied holiday pay for Labor Day in September 1996?

The first definition is too broad; it invites policy decisions beyond the case at hand. The concept of the employer's right to deny holiday pay may underlie the grievance, but in almost every case the arbitrator is called upon to deal with a specific application of such concepts. To build upon another ancient idea, the definition of the issue should answer questions about who, what, when, where, and sometimes, how and why.

If the parties can define a remedy without undue fuss, that's the best course. But sometimes neither the arbitrator nor the parties have the foggiest notion of the difficulties and problems that may be encountered in prescribing a remedy. In these cases it is better to leave the remedy in terms such as, "The Union asks that the grievant be made whole in compensation and seniority." But if a remedy can be stated with precision, that's what should be used. In the situation illustrated above, the remedy sought might be one day's pay at straight time for Labor Day, 1996.

C. The Contract The parties often refer the arbitrator to every contract clause or rule that might conceivably bear upon the grievance. In these days of computer scanners, where any typed material can be inserted into an award electronically, arbitrators are surely tempted to give the parties back everything they offered. Unfortunately, the net result is distracting. By including material that the arbitrator will later ignore, the listing of clauses does not tell the parties where the award is headed. We recommend that this section of the arbitration award quote the essential portions of those contract clauses, employer work rules, laws or regulations that affect the decision and remedy. Some may be paraphrased. For example, in a case where an employee has been terminated for assault:

Article xyz... This article lists a number of offenses for which employees may be barred from work. One such offense is assaulting a supervisor.

Or, in dealing with standard management-rights and arbitral-powers clauses:

Article V provides management with broad powers relating to the direction of the work
force and scheduling production except as limited by the terms of this Agreement. Article VII prohibits the arbitrator from adding to, subtracting from or modifying the terms of the Agreement.

**A Choice of Design**

There is a traditional method of constructing arbitration awards. Once the introduction and background are completed, the award goes on to present the positions of each party sequentially, discuss those positions and conclude with the decision. While many arbitrators are comfortable with that approach, we find merit in the alternative of combining the presentation of the parties’ positions with the discussion. This approach has two advantages: it eliminates the repetition of each position as it is discussed, so nothing of the danger of listing positions that are never discussed, and it also assists the arbitrator in analyzing the parties’ arguments in a logical sequence of substantive topics.

We outline the two major formats in Exhibit I. We tie the examples into a hypothetical case where an employer assigned overtime to employees, regardless of seniority, because of an emergency, and the parties’ arguments centered on contract language, past practice and the claim of an emergency. The traditional format, on the left, goes through the positions of the parties and then the arbitrator’s discussion and award. Under the alternative format, there is no separate section on the positions of the parties. The discussion may begin with an overall framework statement and may include the arbitrator’s decision. Then the substantive aspects are considered under topical headings. The position of each party is incorporated in the discussion of each aspect, followed by the arbitrator’s evaluation on that topic. See Exhibit I.

One other kind of format can be noted. Some arbitrators entering the field from a practice of law follow the design of legal opinions. They list findings of fact by number before the discussion and end with a list of conclusions by number. However, this approach is used less often in labor-management arbitration.

**The Discussion Section**

Whatever format is chosen, this section should begin with a brief paragraph stating the most important aspects of the case. Consider Roger Abrams’ introductory paragraph in the discussion section of a job-combination problem:

“This is a tale of two jobs—the Senior Toolroom Keeper and a Senior Storeroom Keeper. The Company sought to make them one, and eventually under the terms of the Agreement they will be combined. In the interim, however, the parties are fighting about who must perform duties previously performed exclusively by the Senior Toolroom Keeper.”

In those three sentences, Abrams set the stage for everything that followed. Such a paragraph is a crisp, clear starting point for the body of the discussion. In proceeding with the discussion, arbitrators take one of two approaches. One has been called the “detective story” approach. The arbitrators develop pieces of their reasoning as positions are discussed. Although they know the parties will read the last page first, they withhold their conclusion until the end. This approach probably works best under the Traditional Format. Under the Alternative Format, the arbitrator would more often state the conclusion early and then explain the path to that conclusion.

The discussion is the most important part of the award, whether it is set off in a section by itself under a traditional format, or included with the parties’ statements of position. The parties hire arbitrators for their judgment, and here is where they are supposed to shine. The discussion should avoid excessive repetition of the parties’ arguments, which is made easier in the Alternative Format. It should be longer than the recital of facts that came earlier and should focus on the key points raised in the testimony and the arguments. There should also be a wrap-up section where the arbitrator indicates which facts, arguments and explanations were most persuasive. Arbitrators who have told the parties that they have taken evidence for “what it is worth” should explain exactly what it was worth. Finally, the arbitrator should

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**EXHIBIT I: TWO FORMATTING ALTERNATIVES**

<table>
<thead>
<tr>
<th>A. Traditional Format</th>
<th>B. Alternative Format</th>
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<tbody>
<tr>
<td><strong>The Position of the Union</strong></td>
<td><strong>Contract Language</strong></td>
</tr>
<tr>
<td>Argument 1: Contract Language</td>
<td>Union and Co. Arguments</td>
</tr>
<tr>
<td>Argument 2: Past Practice</td>
<td>Arbitrator’s Discussion</td>
</tr>
<tr>
<td>Argument 3: Emergency</td>
<td>Past Practice</td>
</tr>
<tr>
<td><strong>The Position of the Company</strong></td>
<td>Union and Co. Arguments</td>
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<td>Argument 1: Contract Language</td>
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<td>On Argument 1</td>
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<tr>
<td>On Argument 2</td>
<td>Arbitrator’s Discussion</td>
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<tr>
<td>On Argument 3</td>
<td>Arbitrator’s Discussion</td>
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<tr>
<td><strong>Arbitrator’s Conclusions</strong></td>
<td>Arbitrator’s Conclusions</td>
</tr>
</tbody>
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“Speech which fails to convey a plain meaning will fail to do the job that speech has to do...clearness is secured by using the words that are current and ordinary.”
write the conclusion in positive, definite terms, even if it is a close decision. The detriment in providing excruciating detail on the difficulty in making the decision is that the arbitrator is likely to communicate a message saying that the case turned on some relatively inconsequential factor or was the result of a coin flipped in the air."

The Statement of the Award
The award to the parties is to be unambiguous and definite. It is designed to provide the parties with a clear understanding of the decision and instructions for implementation. It typically indicates whether the contract was violated and whether the grievance was denied or sustained. In some cases where back pay is awarded, for example, “back pay, less the usual offsets” is sufficient. In other cases, particularly when the arbitrator is on an ad hoc appointment and is a stranger to the parties, more may be needed. The award might have to consider interim earnings, unemployment compensation, workers compensation, seniority and even imputed overtime. Arbitrators may be guided by the parties, but they should not return part of the case to the parties for further negotiation. And although there are different views on this issue, the arbitrator should be reluctant to retain jurisdiction unless requested by the parties or in the instance of an unusually complex award."

Attention to the wishes of the parties and to the standards of effective writing is not only desirable for arbitrators, it is expected under the Code of Professional Responsibility for Arbitrators of Labor–Management Disputes.

Some Ideas on Writing
Having examined the structure of the arbitration award, we turn to style." These are fundamental rules that we believe should govern writing arbitration awards.

A. Write in a way that comes naturally. How many people take on a different character as soon as they pick up their pen or boot up their computer? The short, powerful Anglo-Saxon words that mark everyday speech tend to become longer, more Latinized, when we write. Use becomes articulate, anger becomes hostility and worsen becomes exacerbate. Except in the hands of a master, rich, ornate prose works against the communication intended by the award.
The first draft of an award should be written in the words and phrases that the arbitrator uses in everyday speech. Arbitrators who cannot express their thoughts in their normal language may not have thought the issue through. Perhaps the language is a guise for muddy logic or incomplete thinking. In the second draft, longer words and more formal structures may be brought in if they add precision, clarity, tone or color.

B. Write with nouns and verbs. Adjectives and adverbs cannot carry your thought. They may add shades of meaning and lend grace to a sentence, but the noun or the verb invariably expresses the fundamental thought. If the descriptive word does not add strength or clarity to the thought, it should be cut. Qualifiers such as rather, very, certainly and surely should be pruned wherever possible. They are “the leeches that infest the pond of prose, sucking the blood of words.”

C. Do not construct new words, and spell the ones that you use in the standard way. The word “impact” is a case in point. Impact has always been a very good noun, but its usage as a verb is often incorrect and could prove to be an annoyance, simply because the award may be read by someone who wants words used in their traditional sense. Words should also be spelled in the orthodox way, because any other form is distracting—for example, “through” rather than “thru,” “though” instead of “tho.” Once one of the authors had to review a book in which the author consistently used the alternative spelling of “Shakespeare” for Shakespeare. As I read the word, I was first distracted and later irritated. I wonder if these feelings influenced my negative review of the book.

D. Be definite but do not overstate. Writing styles differ in terms of directness. The so-called “style of the powerful” consists of direct assertions, little equivocation, few hesitations and brevity. At the other extreme is the “style of the powerless,” marked by hedge words (“giving due weight”), meaningless fillers (“in support of its burden”) and terms of personal reference (“it grieves me deeply” and “after giving the matter a great deal of thought”). The effect of these stylistic features is reduced assertiveness and a lower level of trust. Studies of jury behavior have shown that those jurors who were exposed to the more powerful styles judged the content to be more credible.” However, while the writing style should be definite, the arbitrator should protect against overstatement. When you overstate, you put the reader on guard, making everything else in the document suspect.

E. Be careful in using hypotheticals to illustrate points, and watch the innoxious aside, the “big picture” and the conjectures. Examples may often clarify an award, and references to the big picture may create a context, but the further the award
strays from the issues, the more likely it treads upon dangerous ground. As awards are broadened, it becomes more likely that arbitrators will be perceived as exceeding their authority. The further we stray into the byways of the relationship, the more likely we move into territory we do not understand, possibly creating some unintended common law.

F. Avoid fancy, particularly foreign words. What do the grievant, the supervisor, the human resources officer or the business agent think when confronted with *res judicata, collateral estoppel, functus officio, a fortiori, gravamen, quantum, indicia, sua sponte or conditio sine qua non?* If the purpose of the award is communication, should we not eliminate such words or at least provide a translation? “Speech which fails to convey a plain meaning will fail to do the job that speech has to do...clearness is secured by using the words that are current and ordinary.” When choosing between the formal and the informal, the regular and the offbeat, the arbitrator should err on the side of established usage. There is simply a better chance of writing a good award if the creativity is addressed to the problem rather than the language.

G. For some of the worst expressions used in arbitration awards,” See Exhibit II.

H. On verbs, sentences, and paragraphs...Three of the common teachings in treatises on effective writing are to avoid using the passive voice, long sentences and long paragraphs. Our view on verbs is that the active voice (e.g., “I presume”) is usually clearer and less cumbersome than the passive voice (e.g., “it is presumed”) and should be used where it expresses the thought better. We also think that each paragraph should contain one unit of thought. A different thought warrants a new paragraph.

With regard to sentences, a long sentence filled with subordinate clauses is ordinarily hard to understand. The mind absorbs information in chunks of text. Bigger chunks are difficult to understand and impede communications. But we also think that variety adds spice to the arbitration award. “One can ingest just so many pages filled with simple declarative sentences unvaried by an occasional venturesome independent clause or a single felicitous phrase, before giving up...” The award does not have to be fine literature, but it will read better with some passive verbs and a mixture of short and long sentences that average somewhere between 15 and 25 words. Consider this hopeless sentence from a published arbitration award:

“The Union claims that the Grievant was unaware that he had taken any unearned vacation or that the unearned vacation he had taken would be offset against vacation he earned on subsequent anniversary dates, that

the Grievant had no way of knowing of this procedure, and that in the absence of contractual authority, the Grievant cannot be penalized for his use of unearned vacation.”

When a sentence becomes a tangled web of commas and clauses, as is the case above, the best recourse is to begin anew, dispersing your ideas into two or more shorter sentences.

I. Some technical details...Typographical errors are insidious, but we must do our best to eliminate them. At a minimum, those arbitrators writing with a computer should employ their spell-check routine. This will catch a number of errors, but will not catch the error when the misspelling is a word in itself (e.g., “affect” and “effect”; “their” and “there”). Some find that reading the award aloud helps to catch these errors (and possibly writing problems and flaws in the logic as well).

To add some variety to the award, refer to Exhibit III for some verbs to express assertions:

One of the most troublesome editorial pitfalls concerns the his/her syndrome. The time is long past when the masculine pronoun was general enough to cover both sexes. Substituting the feminine pronoun does not solve the problem. Nor does the s/he aberration because it distracts the
eye and the mind. Some basic alternatives are:77

1. Stick to the plural. Instead of saying “Each employee must punch his/her time card,” say, “All employees must punch their time cards.”

2. Use nouns instead of pronouns. Instead of “If an employee is late, his/her arrival time is noted,” say, “If an employee is late, the arrival time is noted.”

3. Reword the sentence. Instead of “When a bargaining-unit member files a grievance, he/she must notify the Union,” say, “A bargaining-unit member who files a grievance must notify the Union.”

4. Substitute “one.” Instead of “He/she must be exact,” say, “One must be exact.”

What Do the Parties Want?

A 1983 survey of parties’ pet peeves regarding decision-writing reported on many substantive concerns, such as a resort to a line of argument the parties had not introduced, ignoring arguments introduced by the parties, relying on clauses that one or both parties felt were unjustified, and providing gratuitous advice. Stylistically the critics found, as we have, that the parties deplore Latin phrases, overly long quotes from the contract and statements of position, and criticism of one of the parties or an advocate.9

Our informal survey of advocates yielded similar results. One management advocate set the tone for many of the respondents in saying: “When we pick you, we vouch to our clients for you, and we want you to make us proud, even when we lose. We want a fair shot at winning, an intelligent decision that we can explain to our clients, and one that is clearly written.” More specifically, some advocates added:

- Set forth the reasons.
- Be sensitive to the ongoing relationship.
- Do not play God.
- Think through the remedy. The remedy in a discharge case should address such issues as seniority, benefits and health care (from a union advocate).

Proofread carefully and make sure that the document looks professional.

Do not be overly creative in your reasoning and your award.

Avoid wit and humor.

Don’t rehash the facts and the arguments for 20 pages and then give a two-page analysis (particularly when charging for four days of study).

Show some human concern, particularly in a discharge case, but don’t tell us how it grieves the arbitrator to...

Don’t tell us how wonderful the losing advocate was or how difficult the decision.

Finally, most of the advocates asked for courtesy. Even if the arbitrator did not believe the grievant, simply state that “questions of credibility were resolved in the employer’s favor.” Likewise, the arbitrator may point out that a supervisor’s actions were improper, but it is cruel to focus attention on the person rather than the act. And the arbitrator may find a brief difficult to follow, but it makes no sense to highlight that for the parties’ attention.

Definite, Certain and Concise

Attention to the wishes of the parties and to the standards of effective writing is not only desirable for arbitrators, it is expected under the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes. The Code states a basic principle: “The award should be definite, certain, and as concise as possible.” The succinct explanation that follows could serve as a summary of this article:

When an opinion is required, factors to be considered by an arbitrator include: desirability of brevity, consistent with the nature of the case and any expressed desires of the parties; need to use a style and form that is understandable to responsible representatives of the parties, to the grievant and supervisors, and to others in the collective bargaining relationship; necessity of meeting the significant issues; forthrightness to an extent not harmful to the relationship of the parties; and avoidance of gratuitous advice or discourse not essential to disposition of the issues.10

In this article we have tried to help arbitrators write awards that their audiences can understand and might, perhaps, enjoy reading. Clarity is critical, particularly in this litigious age where words that “seem perfectly intelligible to the arbitrator as they are carefully framed in an award become, under the critical and inspired scrutiny of an ex-
Arbitration awards are not supposed to be great literature. However, a good opinion “answers the question put—all of them and no others. It allows its lesson for the future to come from the result, not its pontification.” It does not lecture; it does not offer gratuitous advice; it does not denigrate or embarrass. None of us may ever come up with such a wonderful phrase as Thomas Paine did when he wrote: “These are the times that try men’s souls.” But we can communicate our thoughts clearly and, we hope, with a certain grace. The overall charge was probably stated best by Cervantes, in his introduction to Don Quixote: “See to it, rather, that your style flows along smoothly, pleasantly, and sonorously, and that your words are the proper ones, meaningful and well placed, expressive of your intention in setting them down and of what you wish to say, without any intricacy or obscurity.”

ENDNOTES
6 Throughout this article the terms “arbitration award” and “award” are used to represent the entire document and not just the decision at the end.
9 Id., at 314-316.
11 Georgia Power Company and International Brotherhood of Electrical Workers, Local 84, 93-1 Arb (CCH) 4301 4311 (1993) (Abrams, Arb.).
13 Supra, note 4 at 99-91.
16 Id., at 73.
18 Id., at 40, quoting Aristotle.
20 Id., at 38.
21 Supra, note 5 at 518.
23 Supra, note 7 at 28-29.
24 NAA, AAA, FMCS, Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, Section 6 (C)(1).
25 Supra, note 14 at 222.
26 Supra, note 4 at 75-76.

What’s New in Employment Arbitration?

(Continued from page 7)

sideration for the employee’s agreement to arbitrate, as the arbitration provision was not mutual, and the mere fact of continued employment did not constitute consideration where there was no showing that the employer conditioned continued employment on acceptance of the arbitration policy. The concurring opinion urged that the broad disclaimer in the employee handbook also precluded enforcement of the arbitration provision set forth in the handbook. It further expressed a disdain for the “acknowledgment form” technique, noting that a “knowing and voluntary waiver would require, at the least, a single and explicit contractual document.” Finally, the Ninth Circuit also refused to enforce an arbitration provision set forth in an employee handbook, even though the employee had signed an acknowledgment form that stated he had read and understood the handbook. The court concluded that the acknowledgment form was insufficient because: (1) it did not explicitly mention either the arbitration requirement or that the employee was waiving a right to a judicial forum; (2) it did not state that the employee agreed to that policy; and (3) it did not expressly notify the employee that acceptance of the policy was a condition of continued employment, and that by choosing to continue his employment, the employee was agreeing to the mandatory-arbitration policy. Employers that have issued policies inconsistent with these recent standards may want to revise those policies to address the issues raised by these recent cases.

ENDNOTES
5 Martin v. Dana Corp., 114 F.3d 421 (3rd Cir. 1997), reh’g en banc granted and opinion vacated (3rd Cir. July 1, 1997).
8 Id. at 4-5.
9 Supra, note 8, at 6 (Caudby, J., concurring).
11 Id. at 4-5.
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