Innovation Produces Surprising Benefits:
Video Conferencing and
Narrative Witness Statements
in Commercial Arbitration

As an Arbitrator, I have long encouraged the use of Narrative Witness Statements as a vehicle for introducing the direct testimony of witnesses under the control of a party at the Arbitration Hearing. Responding to feedback from counsel, I eventually developed a formal Protocol, essentially an instruction manual, standardizing the process. I even expanded the Protocol to incorporate the use of Video Conferencing for witnesses that were not available at the hearing, but never suggested the entire Hearing would be virtual.

Well before the mandatory Shelter in Place Orders and business closures, some arbitrators were reporting on the ease with which Hearings could be successfully undertaken entirely by video conference, but the practice was far from the norm.[1] Then, because of the necessity to work from home, many judges, arbitrators, mediators, attorneys and clients become proficient using Zoom, largely changing the public's perception and willingness to participate in video conferencing for serious business interactions. Now, as requirements for social distancing and protections for "at risk" individuals continue to limit in-person business meetings, there will be increased interest in conducting arbitration hearings using video conferencing.

I suggest that the use of Narrative Witness Statements can improve the effectiveness of the Video Conference Arbitration Hearing for all stakeholders. But the real innovation will result from the necessity to redesign the process used to create the Narrative Witness Statement in a virtual environment, where attorney, clients and witnesses will be limited in their ability to interact in person, both before, and at the Hearing. The redesigned process can so exceed the standard, that the opportunity to use Narrative Witness Statements may well be the compelling reason to use video conferencing for the entire Hearing.

History of Narrative Witness Statements.

There has always been a distinction between Domestic and International Arbitration practice. Narrative Witness Statements are the routine method for introducing 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 generally 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.

But Narrative Witness Statements are not common in Domestic Commercial Arbitration although there are specific references permitting evidence by written statement under the Arbitration

[1] Martin Weisman (April 2020). Alternative Dispute Resolution in a Virtual World, Center for Conflict Prevention and Resolution

Rules of the American Arbitration Association (AAA), the Center for Conflict Prevention and Resolution (CPR), and JAMS.

Beginning with the amendments of 2013, the Commercial Arbitration Rules of the American Arbitration Association introduced 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)

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

At first my suggestions were met with apprehension. I suggest it reflected a reluctance to change from standard practice, and a lack of understanding of how the process would impact the Hearing. As I provided more of the operational details for Narrative Witness Statements, assured attorneys that cross examination would be available, 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. This is provided to Counsel prior to the Preliminary Hearing, at which time it can then be discussed with the other "Checklist" items, modified as required by the needs of the case, and eventually incorporated into a Preliminary Hearing Order. The Protocol provides guidance to the attorneys on the best practices, suggesting a uniform format to achieve a consistent work product.

I will explain the benefits and discuss some of the challenges to the use of 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.

Attorneys spend a great deal of effort, time and therefore cost in preparing their witnesses for direct examination. Communicating in a Question and Answer format is an extraordinarily difficult process that requires considerable preparation.[2] Individual practices vary, but most attorneys will have detailed notes for their direct examination, and the desired evidence resulting from the witness responses. They spend a great deal of time preparing and rehearsing the witness to testify. This attorney and client interaction was conducted in person, often at the attorney's office. The attorney prepared the witness to listen to the "Question", think about their (proper) response, speak, then stop. Listen to the Question, think, speak, stop, repeat. The attorney actively listened to the initial witness response, then revised the question to elicit a more precise or meaningful answer to the Question. Redo the process again. "Real learning" takes place with this kind of back and forth interaction between the attorney and the witness and builds confidence in the witness to respond as planned under the pressure of an adversary proceeding. But Notwithstanding the level of preparation, the risk remained that the witness becomes nervous, confused, or forgets the desired response to the questioning, leaving a lingering concern that the live presentation will fall short of expectations.

As business practices are forced to adapt to the new normal, we are anxious to innovate, to liberate from convention and hopefully deliver something better, more efficient, more cost effective. It is likely the attorney is already engaged in meeting with client representatives using Zoom, Centrix or Skype. So background interviews with expected witnesses using video conferencing can easily transition to a structured process where there are multiple iterations of drafting and reviewing and finalizing witness testimony.

A best practice suggests that the attorney start with a draft of their expected direct examination "Questions". These Questions form an agenda for a video conference discussion where the witness is instructed to respond to the questions in an unrehearsed, natural manner, which provides the attorney with the facts and details presented by the witness in their own words, as contrasted to the lawyer's interpretation of the facts or events. The attorney then prepares a series of "draft" "Answers" to the "Questions" and submits this suggested 'draft" to the witness for review and accuracy. During this iterative process, the attorney can make sure all key issues are presented, while preserving the "Answers" in the manner, style and content of the witness as if the "Answers" were provided during an "in person" Hearing.

The Narrative Witness Statement Protocol supports the process with detailed instructions and procedural ground rules that mimic the typical direct examination format. First and foremost, 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 Protocol instructs both sides to prepare the Narrative Witness statement using the same ground rules typical for direct examination;

[2] Daniel I. Small (2014) Preparing a Witness for Arbitration, American Arbitration Association, Handbook on Commercial Arbitration, 2nd Edition, Chapter 30,.

first question, then witness answer; avoid privilege, establish the foundation, avoid speculation, hearsay, and be cautious about straying into unsupported opinion and argument.

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 ready to be submitted as direct evidence at the Hearing. You can readily see how these steps can be completed "virtually". This thorough preparation also relieves much of the anxiety of the witness, as they are under less stress and more confident when they respond to cross-examination. In the event the attorney desires to also present their witness for full or partial direct examination at the Hearing, the witness' direct examination will match the Narrative Witness Statement reinforcing the credibility of the witness. Following the instructions of the Protocol, the time and effort spent preparing Narrative Witness Statements can be consistent with pre-hearing preparation for witnesses under conventional practice, but with more reliable results.

Cross Examination by the Adverse Party.

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. The well-prepared cross examination is expected to be thoughtful and focused.

Every attorney shares the memory of a client sitting next to them in a Hearing or courtroom while they are cross-examining a witness. The client's scribbled message delivered with urgency to the top of your notepad suggesting, or sometimes demanding your immediate action. In the heat of the moment, the response varies. But consider how that client's insight and perspective could have been channeled productively into your preparation for that cross examination. The client has an opportunity to make contributions that are satisfying to them, and likely beneficial to your relationship. Having the time available to plan and collaborate on that cross examination should be a message conveyed to clients as a distinct advantage uniquely available in the framework of the Narrative Witness Statement.

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.

The adverse party always has the right to cross-examine witnesses. If cross examination is requested, the witness must attend the Hearing ("in person" or by video conference), or the Witness Statement will be excluded from the record. Depending on the complexity of the case, the testimony of some minor or secondary witnesses prepared and submitted as Narrative Witness Statements, may be agreed upon, without the need for cross examination or attendance of that witness at the Hearing, thereby submitting evidence of foundation for the record, further reducing the cost of the proceedings.

Arbitrator's Perspective.

There are a number of advantages for Arbitrators when Narrative Witness Statements are used in the proceeding.

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 Staged Discovery, where a judge permits the discovery of the least costly or most cost-effective process first, and depending on the results or benefits produced, expands the scope of discovery permitting more intensive discovery methods. The analogy to 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. Clearly, any reduction to pre-hearing discovery efforts 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 Narrative Witness Statements are used by the Arbitrator to prepare for the Hearing. The Arbitrator is familiar with the testimony in advance, can prepare their own questions, and anticipate the topics of cross examination. The Arbitrator's note taking is largely 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. [3] As a response, 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. Although this concession may counterbalance some of the time savings at the Hearing achieved by using the Narrative Witness Statement in lieu of full direct examination, it's a small concession to assure the parties the full opportunity to present all relevant evidence at the Hearing.

As Arbitrator, I encourage ongoing settlement discussions, and anticipate the parties will engage in formal mediation at some stage of the proceedings. Although difficult to document, it is my experience when acting as a mediator, the availability of Narrative Witness Statements increases the likelihood of settlement prior to the Hearing. The Narrative Witness Statements eliminate much of the uncertainty or confusion of expected testimony and forces the parties to adjust their bargaining and settlement positions accordingly. As always, a settlement agreed to by the parties spares the Arbitrator from the risk of making

[3]John Wilkinson (2014). Streamlining Arbitration of the Complex Case, American Arbitration Association Handbook on Commercial Arbitration, 2nd Edition. Chapter 6. also, Richard Mittenthal (1978). The Search for Truth – Credibility- A Will-o'the Wisp, 31st Annual Meeting of National Association of Arbitrators,

a suboptimal Award. Upon request, the Arbitrator can always issue an Award upon Settlement as suggested under R-48 of the AAA Commercial Arbitration Rules.

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

Conclusion.

The Protocol provides the educational background and the procedural guidelines that satisfy much of the initial hesitation to use Narrative Witness Statements in Domestic Commercial Arbitration proceedings.

The Narrative Witness Statement incorporates the same effort involved with ordinary preparation of witness testimony, but because it becomes a written work product, it is carefully reviewed for accuracy and completeness thereby reducing the risk the live presentation will fall short of expectations. The process is less stressful to the witness, improves the quality of the cross-examination, and prepares the Arbitrator with the perspective to better manage the Hearing. All of this permits everyone to be better prepared for the Hearing, which itself creates efficiencies and cost savings in the process.

The Narrative Witness Statement Protocol is available on the author's website, www.JeromeRockLaw.com.

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