

The *New Normal* for Arbitrators & Hearing Officers



10th Annual New Mexico ADR
Symposium
Alternative Dispute Resolution Bureau
Our 20/20 VISION of ADR in New Mexico

by

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2020: Global pandemic *crisis*

“Only a crisis---actual or perceived---produces *real change*.
When that crisis occurs, the actions that are taken depend on
the *ideas that are lying around*”---Milton Friedman (1982)



Traditional approaches to *Dispute resolution*

Coercive

- Strike
- Work stoppage
- Lockout
- Intimidation
- Aggression
- War

Peacemaking

- Communication
- Negotiation
- Mediation
- Conciliation
- Fact Finding (Hearing officer)
- Arbitration

Both *Fact finders* and *arbitrators*:

- Third party to disputants
 - Selected by parties
- Neutrals with no interest in outcome
 - Lacking conflicts of interest
- Conduct *evidentiary hearings*
 - Make *findings of fact*
 - Draw *conclusions* from facts

Arbitration & fact finding *hearings*

Venues

- Commercial
 - Labor
- Employment
- International

Issues

- CBA rights
- Just cause
- Interests
- Representation

Hearing officers are Fact finders

- Investigative fact finding
 - Professional *investigator*
 - Occasional ad hoc investigator
- Evidentiary *Hearing Officer*
 - Hearing officer for Personnel Board, Civil Service



Hearing officer conducts *evidentiary hearing*

Evidence admitted through exhibits

Sworn **testimony** given by witnesses

Opening/closing **arguments** by advocates

Direct & cross **examination** by advocates

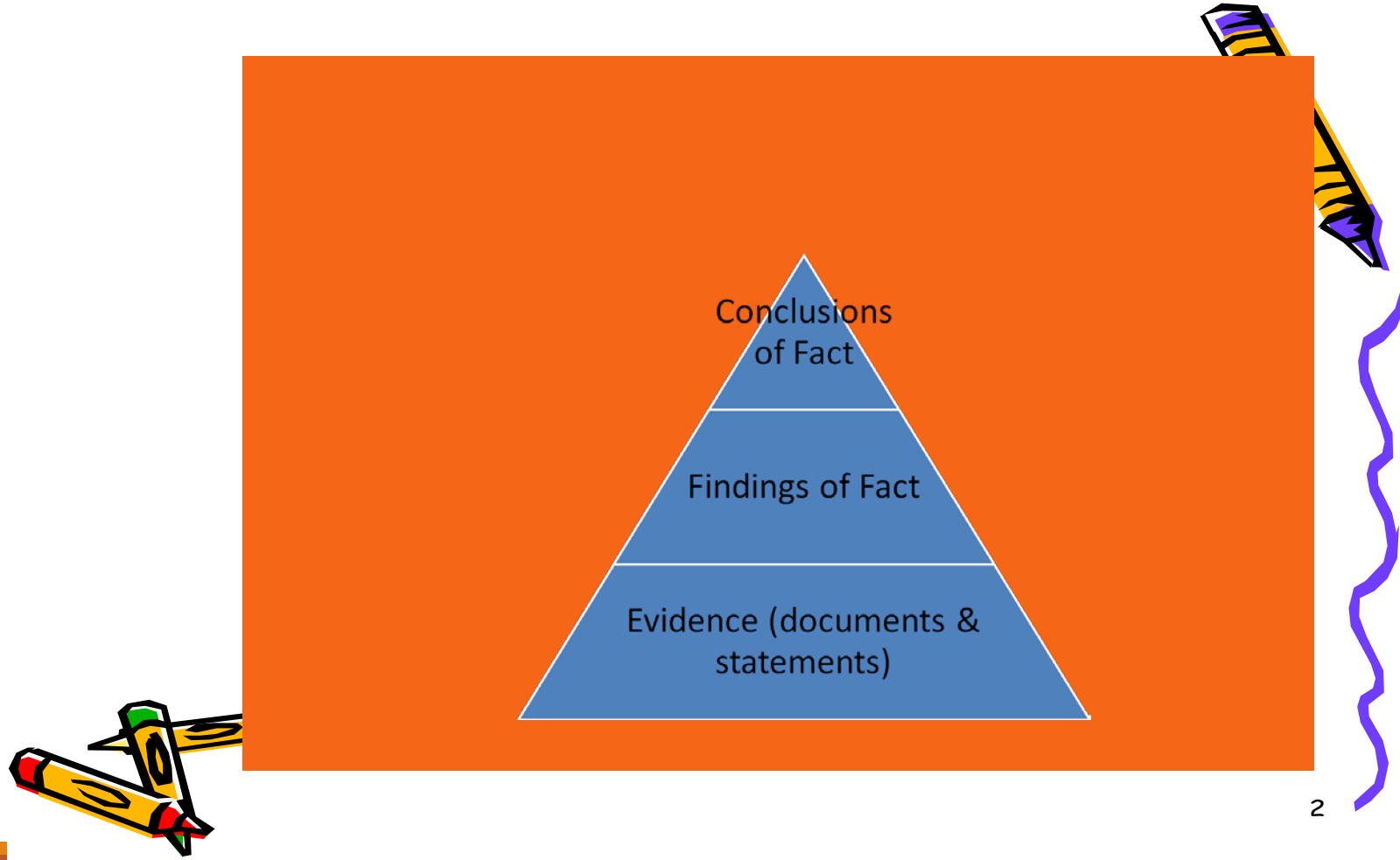


Arbitrators & Labor Arbitration

- Final & binding
- CBA compulsory
- Joint selection
- Evidentiary hearing & *award*



Building blocks for facts & conclusions





Traditional hearings (**in-person**)

Complex scheduling arrangements

- Two days travel time
- Airfare, Car rental, motel, ground travel
- Expensive: **\$3,000** for Tulsa hearing

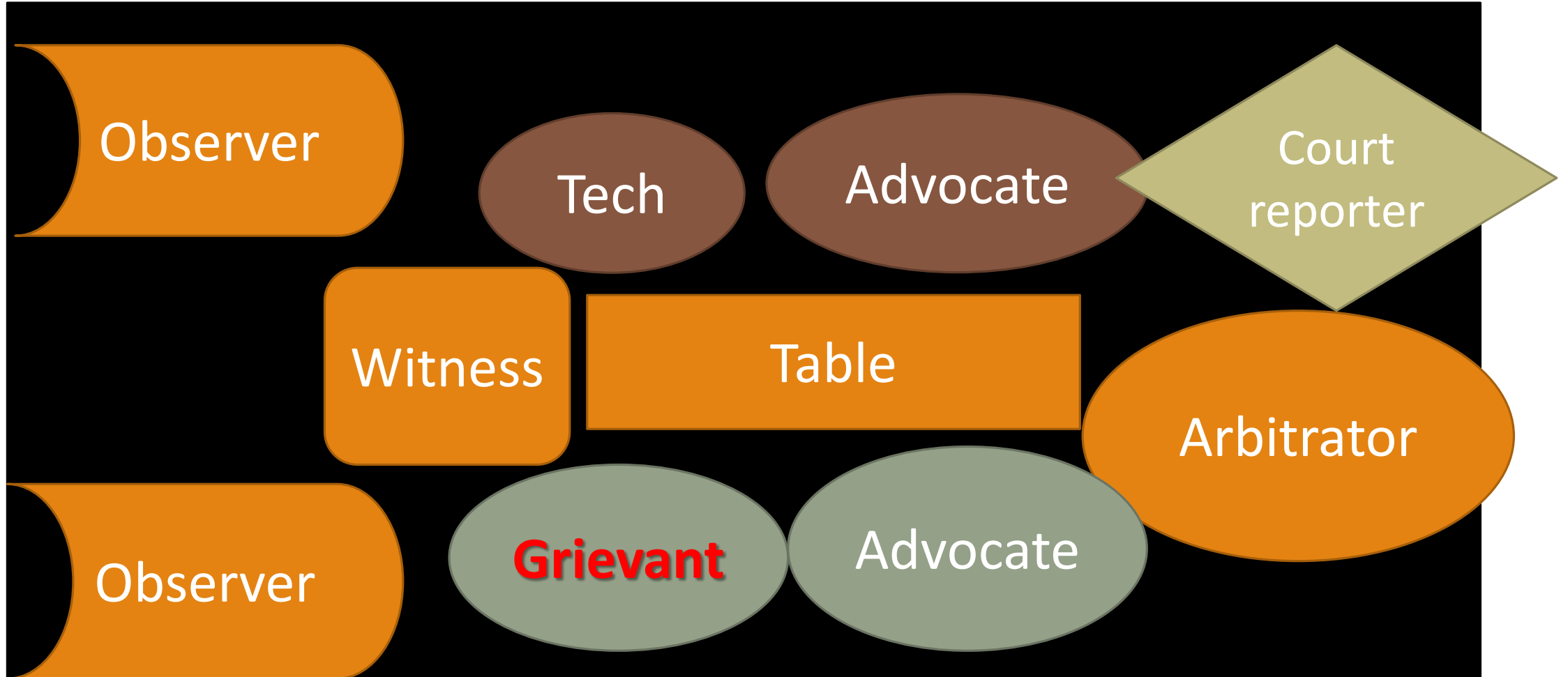


Traditional hearings (**in-person**)

- Ability to converse & testify in person
 - Observe *body language*
 - Assess *credibility*
- Sense emotion & feelings



Traditional hearing *seating arrangement*



Coronavirus in-person hearing

Advocate

witness

Table

Arbitrator

Advocate



CDC & NM hearing *requirements:*

- Provide **6'+ distance** between participants & appropriate ventilation
 - **No more than 10 participants** allowed (1) arbitrator (2) management advocate (3) union advocate (4) court reporter (5) grievant, (6) witness
- Other witnesses sequestered room with sufficient space for 6' social distancing, until called to testify
 - Participant **temperature taken** upon entering hearing room
 - Participants **sign in** with contact information, name, email, telephone number, and hearing role
- Physical contact between participants limited & not expected
 - Masks, plastic gloves, disinfectant wipes, hand sanitizer available

CDC & NM hearing *requirements:*

- Participants certify they have **no relevant symptoms** nor had exposure to anyone with COVID-19 within last 2 weeks
- ***Masks worn*** at all times, except when speaking, by other participants outside hearing room & may not pass within 6'
 - ***Exhibits*** marked & submitted electronically in advance
 - No food, other than bottled water permitted in hearing room
- Individual microphones provided to enable clear hearing of those speaking (due to distance and use of masks)
- Hearing room door knobs, witness chair & table(s) wiped down with

CDC & NM hearing *requirements:*

- Witness with health concerns may testify by videoconference so participants can view testimony
- **Appropriate breaks** taken as determined by the Arbitrator
 - Lunch taken outside hearing room
- Participants complete ***Relevant Symptoms Questionnaire***



Relevant symptoms questionnaire

- 1) Do you have **severe symptoms**?, i.e., shortness of breath, chest pain, confusion, loss of consciousness: yes, no
- 2) Experiencing **less severe symptoms**?: cough, diarrhea, headache, loss of taste/smell, shortness of breath, no symptoms
- 3) Do you have a **fever**? temperature above 100.4 °F, older than 60 & temp above 99.6 °F, I feel feverish, I don't know, no fever
- 4) All **travels** done within last 14 days: Intern'l, Domestic, None
- 5) Knowingly contacted persons **testing positive** for COVID-19? yes, no
- 6) Spent time in healthcare facility, nursing home, jail, or childcare facility in last 14 days? yes, no

Option: *Video conferencing*



Zoom.com

Skype

WebEx

RingCentral

Micro Soft Teams

GoToMeeting

Example: Two-day *videoconferencing* in Truth or Consequences

- ❑ Russin Court Reporters in Las Cruces as **host**
 - ❑ **Hearing Officer** in Albuquerque
 - ❑ **City attorney** in **Santa Fe**
- ❑ **Grievant, attorney, witnesses** in **TorC**



Advantages of videoconferencing in arbitration & fact finding

Reduced *health threat*

Less *legal risk* for parties

Decreased travel & per diem *expenses*

Expeditious use of *time* & resources



Opposition to videoconferencing in arbitration

“The City’s position is that in-person hearings are essential to *ensure due process*, the right to confront witnesses, the ability to *judge witness credibility* and *body language* which cannot be seen on video, and the necessity to control the environment of the witnesses and have all witnesses testifying in the same environment.” (Holcomb 2020).

to judge witness **credibility**

Credible person...is **trustworthy** & entitled to be **believed**:

- 1) reputation for *truthfulness*
- 2) intelligence
- 3) knowledge of circumstances
- 4) no conflict of interest

Role of *body language* in credibility?

- **Credibility Assessment** (deception detection) scientific criminal investigation/prosecution, national security screening & TSA screening
- **Danger of anchoring bias/first impressions**



Theories of *detecting deception*

Susan Adams contends these behaviors often indicate person is *lying or deceiving*:

- Demeanor or voice radically changes
 - Avoids saying “I”
 - Has an answer for everything
 - Fidgets and fusses for no reason
 - *Proclaims her honesty* repeatedly



Theories of *detecting deception*

Spy the Lie, ex CIA agents: supposedly obvious **indicators of liar**:

1. Pausing or delaying when asked “uncomfortable question
2. ***Verbal/body disconnect***, i.e., shaking head “yes” instead of “no,” or rolling eyes
3. Hiding the mouth or eyes when lying
4. Throat-clearing, swallowing before answering probing question
5. Biting, licking lips, pulling on lips or ears when giving response
6. **Grooming gestures**, sweating profusely or drinking water excessively

Body language in *arbitration* & *fact finding*: *Minimal role*

- ❖ Unilateral decision imposed by arbitrator
- ❖ Formal *evidentiary hearing* to determine findings of fact
 - ❖ Often post-hearing briefs 30+ days later
- ❖ Final arbitrator award *60+ days following hearing*

ARBITRATION
HEARING



Body language in *mediation*: *Enhanced role*

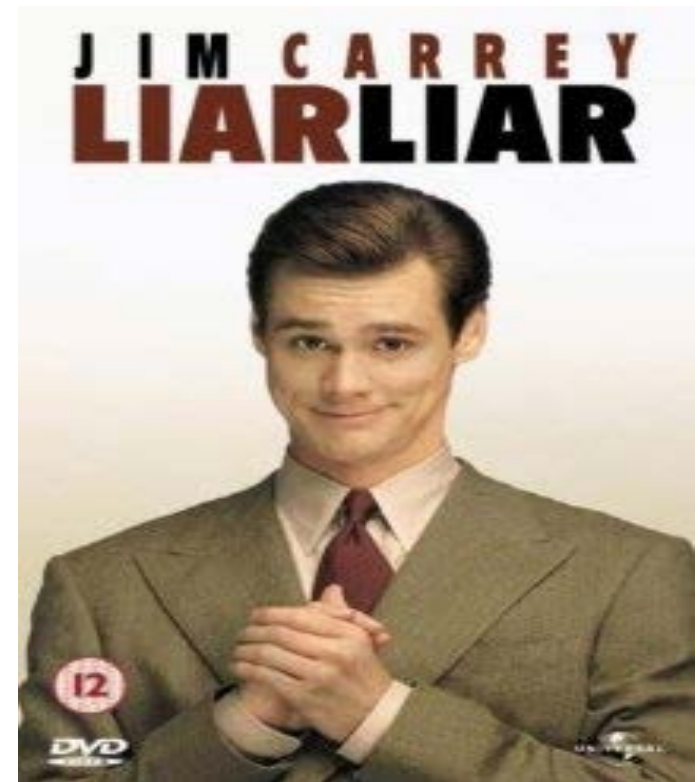
- ✓ *Win-win* mutual settlement
- ✓ Mediator facilitates parties' agreement
- ✓ Listening for expressed *feelings*
- ✓ Immediate results



How do you know if someone is *lying*, either by omission or commission?

Rate from 1 (low) to 5 (high)

- Intuition (“gut” instincts)_____
- **Heart** (feelings)_____
- Observing closely_____
- **Listening** intently_____
- Reputation_____



Video conferencing in arbitration & fact finding *is* the “*New Normal*”

- Engage a third party, i.e., as **host**/co-host
- Do **not mix** video conference & in-person witnesses
 - **Record** hearing & archive
- Use heightened **security**: passwords and codes
 - Do trial run in advance
- Prepare for **glitches** and phone backup
 - **Zoom Pro** plan (\$12.50 per mo)