Tips for Arbitration

By David Kotzian

In this era of the disappearing jury trial and the proliferation of arbitration clauses in employment, corporate, and consumer contracts, it's important for litigators to be skilled in effective arbitration advocacy. The goal in arbitration is simple: to persuade the decision-maker to rule in your favor.

I'm often surprised at how attorneys fail to focus on that goal and instead do what they feel most comfortable doing. I have sat as an arbitrator in cases where the attorneys conduct the examinations as if they were all-day discovery depositions, and my notes of key testimony are less than a half-page after four hours. I have asked questions of witnesses that I believe are important to help me understand the testimony and decide the case, and have had attorneys object and tell me what I'm asking for is irrelevant. I have had attorneys insist on documenting evidence that I have told them is irrelevant, when there is no court reporter taking down a record. I sometimes feel like I spend much of the hearing refereeing spats and battles of wills between attorneys that distract me from focusing on the evidence. But I understand that things often look much different depending on the seat in which one sits. So here are some thoughts and tips on how things look from the arbitrator seat.

Pre-hearing proceedings

Arbitrations in some areas of law, such as the individual employment rights cases that I typically arbitrate, have extensive pre-hearing discovery, discovery motions, and dispositive motions. Much of that is necessary when arbitration is expected to serve in place of litigation. It's especially important when arbitration is imposed unwillingly on employees or other participants who have signed pre-dispute arbitration agreements in employee handbooks or other form agreements. In those situations, the access to documents, witnesses, and expertise heavily favors the corporation that drafted the agreement, and it's critical that the claimant be allowed an opportunity to conduct discovery that is necessary to prove his or her case. I welcome the parties bringing substantive disputes to me for resolution before the hearing. If the claimant clearly does not have enough evidence to meet the requirements of a legal claim, it's better for both sides to have that ruling before the substantial time, effort, and cost of a full evidentiary hearing. If there is sufficient evidence, pre-hearing motions can help make the evidentiary hearing more efficient and assure that the parties are afforded a full and fair opportunity to present their case.

However, just because you can get the attention of an arbitrator by email or by requesting a telephone conference instead of having to file a motion and sit through motion call does not mean you should abuse that convenience. Attorneys should not incur the time and expense of using the arbitrator to resolve issues they should be able to deal with themselves. I recall one case where I would routinely receive a faxed motion to compel and for sanctions at 5 p.m. on the 28th day after each discovery request was served. In other cases, I have had to make a ruling because the parties couldn't agree on whose office to use for depositions. If you do these things, you are greatly increasing your client's bill for arbitrator fees and losing your credibility with the arbitrator. Don't go to the arbitrator for relief until you have exhausted every opportunity to work things out with your opponent. When you do go to the arbitrator, pick your best arguments so you will be viewed as the voice of reason in the dispute.

Be credible and don't exaggerate

Your credibility as an advocate is an important factor in your chances of ultimately convincing an arbitrator to rule in your client's favor. I'm not talking about a general

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reputation for being credible, although that always helps in the practice of law. I'm talking about the credibility you build through the arguments you make and the positions you take throughout the arbitration process.

For example, if in your arguments you are well-prepared and correctly cite the appropriate authority in support of your positions, you gain credibility. Arbitrators are typically familiar with caselaw in the area in which they specialize, and arguments that mischaracterize the law stick out like a sore thumb. When it comes to an issue that is a close call, the arbitrator is more likely to side with the party that has consistently proven to be accurate.

For the same reason, avoid exaggeration. The urban legend that an attorney should throw every conceivable claim, defense, or argument against the wall to see what will stick in hopes that the arbitrator will "split the baby" does not work. Throw-away claims and defenses are just that: things that should be thrown away and not presented. I have especially seen this in attorney fee petitions, where adding up the numbers shows lawyers billing more than 24 hours in a day or spending 8 hours writing a motion that I received as a one-page fax. Instead of going through each entry to try to guess the correct time spent, I'm far more likely to look for a way to give these arguments the response they deserve: nothing.

Focus on substance and be efficient at the hearing

Unlike some jurors, arbitrators generally pay attention and are legal or subject-matter experts or both. Therefore, excessive repetition that might be useful for a jury trial is not necessary in arbitration. However, everyone's mind wanders from time to time, including an arbitrator's. So don't bury your key points in a long, rambling argument or in lengthy questioning that puts everyone to sleep.

Arbitrators generally are more interested in getting to the truth than in technical procedural battles. As an arbitrator, I'm going to eventually hear everything that is pertinent to the dispute. Get to the point and tell the arbitrator what evidence you have that supports your case.

Arbitration, especially in the employment cases I typically hear, is often criticized for its costliness, and with good reason. In addition to clients having to take time from their schedules to attend arbitration, there are costs for the time spent by the arbitrator, attorneys, and court reporter. Don't waste it. Taking three days to arbitrate something that should take one day is three times the cost. As an arbitrator, I do everything I can to move things along, but I have an obligation to give both sides an opportunity to present everything relevant to the dispute. If someone goes on for too long, it's difficult for the arbitrator to cut him or her off without the risk of excluding relevant evidence. The attorneys who have prepared the case know the facts far better than the arbitrator and are in a better position to self-regulate so the hearing is efficient.

Don't read things excessively

In a trial, it's sometimes very dramatic and effective to have a witness read something out loud; in arbitration, use that technique sparingly. Nothing is more frustrating than having a witness struggle or speed through reading a whole paragraph while the other parties sit there with the same document and can easily read it themselves. It also drives court reporters crazy.

It's perfectly acceptable in arbitrations to simply refer parties to the appropriate document and ask them to read it themselves. One exception, though, is when something is brief; it may be easier to read a sentence or a few words out loud.

Objections: Pick your battles

When it comes to making objections, pick your battles carefully, especially when it comes to objections as to form or relevancy.

With respect to relevancy objections, there is no jury to keep something from and a limited opportunity for appeal. Why take 10 minutes arguing about the relevancy of evidence when in the course of the arguments the arbitrator has to be told what the evidence is anyway? Rather than keeping something irrelevant away from the decision-maker, the arguments about relevancy put extra emphasis on that testimony. As the arbitrator, there are times I'm not sure what is relevant until I've heard most of the evidence because, unlike the attorneys, I have not prepared the case and worked on it for countless hours before the hearing. On occasion, I hear evidence that I initially think is irrelevant only to have the connection that shows its importance arise later. Therefore, I'm reluctant to uphold objections based on relevancy.

In addition, under Michigan's Uniform Arbitration Act, MCL 691.1703(1)(c), and the Federal Arbitration Act, 9 USC 10(a)(3), one of the grounds for vacating an arbitration award is when the arbitrator fails to hear all evidence that is material to the dispute. Who wants to win an arbitration only to have it later reversed? Therefore, I must err on the side of inclusiveness in ruling on relevancy objections unless presentation of the irrelevant information is going to waste a lot of time.

Sometimes, attorneys are absolutely livid with me for allowing testimony on a point where relevancy is doubtful. What they don't understand is that allowing the testimony is

for their benefit. In my mind, they may be winning the case, and I'm making sure that the opposing party has every chance to present their proofs. If an arbitration award is challenged, the prevailing party is better off if the arbitrator allowed arguably irrelevant testimony and rejected it on the merits instead of blocking the opposing party's evidence based on relevancy. The parties can argue about the relevance of evidence in their closing briefs, and should trust the arbitrator to sort out what is persuasive in his or her final award. The one possible exception is when pursuit of an irrelevant topic would waste a significant amount of hearing time. For example, an attorney should object to a complete mini-hearing about the experience of another employee if it's not relevant to the claimant's case.

Even though the rules of evidence don't need to be strictly applied in an arbitration, it's proper and good advocacy to make objections that strategically point out the legal deficiency of certain evidence. For example, an objection to testimony about an alleged discriminatory comment made by an employee who played no part in the decision to terminate the claimant's employment would be appropriate. Even if the arbitrator allows the testimony, the objection has served a purpose by alerting the arbitrator to the fact that it may not be significant.

It's also important to make objections on things that are truly none of the arbitrator's business, such as settlement negotiations or privileged information. Arbitrators don't simply let everything in for what it's worth, especially when the underlying arbitration agreement requires application of the rules of evidence.

Objections as to form also should be limited. If it becomes too much of a distraction or too blatant, you can object to leading questions. However, don't get overly aggressive about it. As an arbitrator, I don't think that leading questions on direct examination are effective. I can tell when it's the attorney who is testifying.

Be professional and avoid bickering

In both trials and arbitrations, attorneys should avoid unnecessary bickering between themselves. Jurors and arbitrators don't like it, and it distracts from the arguments you are trying to make. I once was successful in obtaining a verdict for my client in a highly contested and publicized case that included many interesting and important legal and factual issues. After the successful verdict, I spoke to the jury to see what key arguments and evidence had convinced them to rule in my client's favor. Their only comment was how nice they thought it was for me to allow the defense attorney to use my blow-up chart in closing argument after she had objected to its use in mine. Your conduct in an arbitration should not determine the substantive outcome, but why push your luck?

Exhibits

In arbitrations, I typically order the parties to get together and produce a single exhibit book. I know that attorneys are doing a thousand things to prepare for arbitration and putting together a joint book isn't easy. It's sometimes especially difficult to reach agreement in advance on exhibits. But it's distracting (and environmentally wasteful) to have two separate books that substantially overlap. I prefer to have joint stipulated exhibits marked as J1–J#, followed by C1–C# as the claimant's disputed exhibits, and R1–R# as the respondent's disputed exhibits.

Closing arguments and briefs

If the parties have previously provided extensive briefs as dispositive motion pleadings or in pre-hearing briefs, the arbitrator may already have a pretty good idea of how all the evidence fits together. In those instances, oral closing arguments may be sufficient. However, if there has been no prior briefing or the prior briefs have not fully detailed the evidence, closing argument briefs are crucial. They are your best—and perhaps only—chance to demonstrate to the arbitrator how the evidence proves your client's claims or defenses.

Don't assume that just because the arbitrator has heard all the evidence that he or she understands how all the pieces fit. The parties and their attorneys have been living and breathing the case for an extended time before the arbitration hearing, whereas the arbitrator is having all the pieces thrown at him or her simultaneously during the evidentiary hearing. Further, during an evidentiary hearing, presentation of witnesses and exhibits may scatter or obscure the most significant points.

Some cases are easier to decide than others, and the arbitrator may have a clear idea of which way he or she is going to rule before the closing briefs. However, in many cases I don't know which way I'm going to rule until after I review the briefs. Take advantage of this opportunity to clearly and concisely marshal your arguments. Don't waste time or the arbitrator's attention span with lengthy recitations of every background fact or a treatise on the law. To me, the most helpful closing argument briefs state the elements and legal standards of proof for each claim and describe the testimony and exhibits that support or counter the claim.

Conclusion

Arbitrations have important consequences for the participants. The results are generally binding with even less opportunity for review than a jury trial. The first and foremost consideration in every arbitration hearing is persuading the arbitrator to rule in your client's favor, and the above suggestions should help attorneys focus on the best methods for achieving that goal. ■

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