

# abt1 REPORT

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## *Tips For A Successful Arbitration*

As courts rely more heavily on ADR processes to resolve cases, and business lawyers steer their clients away from jury trials, business trial lawyers increasingly find themselves in various arbitration forums. While presenting a case in a hot, interior conference room may not measure up to the courtroom scenes we imagined in law school, arbitration can offer the trial lawyer some of the best opportunities to hone direct and cross-examination skills. In fact, with the limited amount of discovery often incumbent in the arbitral process, your instincts and skills as a trial lawyer — let alone your stamina — are often put to the test and heightened by a hard-fought arbitration.

This article presents several suggestions to effectively and successfully present an arbitration. Some of these techniques differ from those you would use before a jury.

### Try to Be the Claimant

The party that presents its case first has a distinct advantage. It can present its side in a neat, understandable package, before the opponent has a chance to rebut and present its case. Jurors are reputed to “feel most deeply and retain most vigorously” information they hear and believe first. *Cal. Trial Handbook* (3d ed. 2004 Supplement) § 19.2 at 69. There is no reason to believe that arbitrators react differently.

You should take every opportunity to capture the position of “Claimant.” Think twice before you advise a client to ignore an arbitration clause on the chance that a jury will enter a large compensative or punitive award. In reality, trials in business cases are rare and big verdicts rarer still. More likely, the defendant in your case will immediately file an arbitration demand and successfully

compel arbitration, putting you in the Respondent position — and on the defensive. And then you will have to explain to the arbitrator why you sought to avoid arbitration in the first place.

Alternatively, if you represent the “defendant” and you know a lawsuit is coming, consider a preemptive strike and serve an Arbitration Demand seeking declaratory relief. In this way, you capture the Claimant position and can present your case before your opponent.



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### Set Forth Your Best Facts and Documents in the Demand

Conventional wisdom holds that a Demand For Arbitration and other arbitration pleadings should be brief statement of the claims. I tend to disagree. The *first thing* the arbitrator will read is the Demand For Arbitration and then the Answering Statement and Counterclaims. The initial pleading provides your first opportunity to persuade. Use it. Consider making your Demand or Counterclaim a complete (but still relatively concise) opening statement with the key facts and documents (and perhaps even law) carefully marshaled leading to the conclusion that your client must inevitably prevail. But try to limit yourself to only those key facts for which you possess strong documentary proof — even

where your client swears he can clearly prove something later. You don't want to be in the position of having to retract an important fact on the first day of the hearing.

Also, be ready for the first status conference with the arbitrator, when she will turn to you and say "Counsel, tell me about your case." Give her the 10-minute version of your opening statement illustrated by your five key documents. Take each opportunity to persuade.

#### Jettison Weaker Arguments

By the time a court case reaches the jury, you likely have eliminated those "alternative" positions that you threw into the Complaint or Answer, just in case. An arbitration requires this same honing of theories, but much earlier in the process. Since the arbitrator will first judge your case based on the Demand or Counterclaim, try to eliminate the weaker or even "fall-back" arguments from your first pleading. You may not relish explaining at the Pre-Hearing Conference how two of your five claims have now been dropped. And unlike a jury, which frequently will be unaware of tactical moves during a trial, the arbitrator will know all about your shifts in strategy. Substantial changes in position may cause the arbitrator to question your remaining claims. If you start and remain in the position of strength and equity, your chances of prevailing are enhanced.

#### Limit Discovery and Hearing Testimony

While our business lawyer counterparts advise their clients that arbitration is "cheaper and faster," we trial lawyers know it ain't necessarily so. It can take a very long time before the hearing commences, especially where depositions are allowed or where three arbitrators and two law firms need to agree on scheduling a month long hearing. With no limits upon the evidence presented, the hearing may also take longer than necessary.

At the pre-hearing conference, propose a schedule with realistic limits upon document discovery, depositions, and expert discovery. Equally important, suggest that time limits be imposed on the testimony by each side at the hearing, including direct and cross. If your client is allocated a maximum of 30 hours of testimony, it is amazing how efficient your direct and cross-examinations will become.

In an arbitration we recently conducted, the parties opted to strictly follow the limited AAA discovery rules. We only exchanged documents, took no depositions, and then exchanged expert reports. The

upshot was that a lot of "new" facts came out at the hearing, documents were constantly re-examined for alternative explanations, and theories evolved as the testimony proceeded. If full depositions had been taken, most of these new slants on the facts and documents would have been previously vetted. But at least in our arbitration, it ultimately did not seem that much would have been gained (other than increasing lawyers' fees) by deposing the 15 testifying witnesses. The same basic facts, documents and contentions came through at trial.

The practice point is that a case that depends mostly on documents with the testimony providing the color around the edges (like most business cases) may not require many (or any) depositions prior to the hearing. In fact, the lack of depositions presents real opportunities for effective and surprising cross-examination based on the documents. A skilled trial lawyer will likely come out even or perhaps a bit ahead by effectively using the documents against a witness who hasn't been "prepared" for cross-examination by a previous deposition.

#### Be Candid

Candid and forthright advocacy is perhaps more important in an arbitration than in a court trial. A competent, hard-working arbitrator who has been responsible for a dispute since its inception is unlikely to be swayed by irrelevant facts and overly-emotional appeals. An arbitrator will strive to be dispassionate — to decide the case based on the facts. The arbitrator will look to the attorneys to accurately and fully present the evidence. The arbitrator *will* recognize when "zealous advocacy" becomes stalling, obfuscation or deception. Once any of these labels are pinned on you and/or your client, your chances of prevailing will be substantially diminished. While there may be a place for dramatics in jury trials, avoid it in arbitrations. Normally, your arbitrator has seen courtroom dramatics many times, and is not about to let it influence her opinion.

Most "slam-dunk" or "dog" cases settle. To win the arbitration of the closer cases, don't run away from bad facts or create issues where they do not exist. You only have to win the case, not every argument, document or examination. Present the case accurately, fully and logically. When your opponent strays from this advice, chances are that your client's position will appear stronger.

#### Pitch Your Case to the Arbitrators

This is an obvious, but critical suggestion. In a single arbitrator case, there is only one person you need to convince. Focus and present your case so that it will

appeal to your arbitrator. Find out if she is a strict constructionist who is likely to enforce the terms of a written contract and the Evidence Code, or is more likely to resolve the case on the “equities.” In shaping each argument and examination, think and re-think how your theme is likely to be received by the arbitrator.

In cases with three arbitrators, it is usually possible to determine which arbitrator will have the swing vote. Where one lawyer or judge is appointed along with two non-lawyer industry experts, you can be almost sure that the lawyer will find at least one other vote for her position. Where there are three judges or lawyers, examine the relationship between the three to determine who is likely to be the leader and who is likely to agree with whom. Once you determine which arbitrator is most likely to sway her fellow arbitrators, pitch your presentation right at her.

#### Benefit From the Relaxed Evidence Rules, But Fight Blatant Hearsay

The less stringent rules of evidence normally applied in arbitration (*see, e.g.*, AAA Commercial Arbitration Rules (Complex Matters), R-31) — especially the lack of strict prohibition on hearsay — will provide your witnesses with greater latitude in their testimony. Your first witness can lay the foundation for the entire case, going beyond areas where he has strictly personal knowledge to the introduction of subjects that will be dealt with more expansively by other witnesses. Let the first witness become a mirror of your opening statement. Later witnesses can tie up the foundation and go into the necessary details.

As for objections to your opponent’s evidence, you normally will not prevail in an objection to admissibility of a party’s own records. While they may be hearsay, they probably qualify as business records with foundation easily established by a custodian of records. The arbitrator likely will not require the non-controversial testimony of document custodians. But make sure the records were truly made in the ordinary course of business. If the record was made to support the litigation or to “summarize” events for counsel, it probably should not be allowed in, especially where the author is unavailable to testify.

#### Constantly Re-Think Your Strategy

In any trial, anytime, you must always be prepared to re-evaluate your case plan and even your next document. The relative importance of key facts, documents and even theories changes constantly in trial, especially in fast-moving arbitrations. Prior to the

hearing, you cannot fully predict how your case will go into evidence and which witnesses will ultimately be most credible, important or even necessary. The person that you viewed as a key expert prior to the commencement of the hearing may become unnecessary by the middle of the case.


Every night, every witness, re-think your overall case strategy and don’t be afraid to change course. What has the arbitrator said or conveyed through rulings on objections or other comments? Is “reinforcement” evidence on a subject necessary, or ill advised? Has your opponent made a new attack on a different front? For example, if opposing counsel obtained damaging cross from one of your main witnesses, think about not calling another witness whose testimony would be cumulative. If you choose to call that additional witness without being able to neutralize the points your opponent already made, you’re just handing your opponent the opportunity to re-bloody your side with the same cross.

The ability to restructure strategy mid-trial/hearing is a primary factor in making a great trial lawyer. Constantly re-evaluate your case and go with your best judgment (after obtaining your client’s agreement!) as to how best to present the remainder of your case. And when your gut says it’s time to stop, rest.

#### Provide An Out

It’s always difficult for counsel to plan for losing the verdict. While we all imagine winning every verdict, it doesn’t happen. Often, an arbitrator will want to find a middle ground between the parties’ positions. Although not always comfortable, one of our jobs is to provide evidence and argument for the arbitrator to “split the baby” in a way that is acceptable to the client — or at least not too painful.

The most obvious way for a Respondent to paint a middle path is effective cross-examination both on liability and damages. But you often need to expressly argue not only for no liability but alternatively for reductions in the Claimants’ damages. One effective method is to incorporate Claimants’ damages in a spreadsheet and then, step-by-step, modify the calculations based on comparative fault, lack of causation and other factors you have established through your cross or other evidence. During closing argument, provide the arbitrator with hard copies of the spreadsheets demonstrating each of these reductions. She will then have those modified damage calculations when she writes the Award and may be searching for a principled compromise. And if the Award should come in against your client, but still in an amount less than or about the



same as you offered in settlement, you can chalk up another win.

### Leave the Arbitrator with a Road-Map for the Award

I recommend holding an oral closing argument immediately following the close of the arbitration testimony, rather than extensive and prolonged post-hearing briefing. We have found post-arbitration briefing to be expensive and time-consuming; it does not appear to add much, if anything, to a cogent oral closing argument made after an evening of preparation.

For closing argument, put together a binder of the most important documents organized by the topics or themes of your argument. Highlight the key passages, and then have copies for the arbitrator and counsel. The binder will become the outline of your argument, freeing you from any notes. More importantly, the arbitrator will be able to take the binder with her. When, several weeks later, it comes time to write her Award, the arbitrator will be able to reference your binder — highlighted with the passages or damage analysis that support your case. In this way, your closing argument will be close at hand whenever she writes her Award.

Whether or not your arbitration concludes with closing arguments or extended briefing, offer to present proposed findings of fact and conclusions of law. They normally should be brief (five to ten pages), highlighting the key facts and law. The proposed findings and conclusions serve a purpose similar to bare-bones jury instructions providing the framework and path for the arbitrator's Award.

### Conclusion

Your best presentation in an arbitration hearing may significantly differ from the same case presented in a jury trial. It may not be necessary to take depositions; instead, consider relying on the surprise of “cold” cross-examination based on the documents. Then keep your eye on the arbitrator, and pitch your case to a position with which she will agree.

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