ADR

Arbitrators Want Fundamentals

By Robert D. "Bo" Links

In Monday's paper, I explained the importance of presenting a simple pitch in arbitrations and of making informed choices of arbitrators. In this article, I explore several other fundamental components of effective advocacy that are crucial to winning arbitration cases

Second of Two Parts

Seek Preliminary Hearing

One of the best ways to meet your arbitrator is to ask for a preliminary hearing. At that hearing, which will be used to set deadlines, hearing dates and disclosure rules, you will have an excellent opportunity to gauge the arbitrator's temperament and learn about his or her idiosyncrasies. A preliminary hearing is also a great way to expose a case.

What do I mean by "expose"? I can explain it best by relating how I conduct a preliminary hearing. The first thing I do is explain how I plan to run the proceedings. I make it clear there will be no trial by ambush. I require each side to disclose supporting documents well in advance of the hearing and to provide witness lists and short summaries of anticipated testimony so we all have an idea what we will be listening to. If there are experts, I try to have the parties exchange reports, too. Although in some cases I may be prevented by the rules from mandating discovery, I do let the parties know that, if we get to a hearing and something new comes up, a party may well be granted a continuance to deal with it. The best way to avoid continuances, I explain, is by laying the cards on the table. If the proof is sound, pre-hearing exposure to an opponent will not cause decay.

I also make it clear that I like to allow the advocates to try their cases. One of my favorite lines is that "you can say anything you would like to say." Then I add, "Just make sure you can prove it." In short, stick to the facts, don't exaggerate, and if you want to call the other side the devil in interstate commerce, it is perfectly permissible, provided you can prove it. "When the sun sets on this case," I have been known to say, "you want me to reflect and know that you proved what you said you would prove."

I don't say this to scare attorneys (who don't scare easily, anyway). I say it because this is serious business, and I take it seriously.

Moreover, I spend a lot of time making sure the lawyers know that we're going to treat one another with respect and decorum. No one needs to raise his or her voice or interrupt opposing counsel. I know that they have a dispute and that it is not uncommon for opposing counsel get into personality conflicts. I ask counsel to check those conflicts at the door. I will not be a schoolyard referee. I will simply hear them out and decide who has the best proof.

Arbitrators are not like parts manufactured by an assembly line. They are not all the same. You have to know your arbitrator, and you must select your arbitrator with care.

Know Your Case

A good advocate knows his or her case. You need to know all the facts, and you need to know, line by line, what every document says, means and implies. Thus, you must have interviewed (or deposed) every key witness and have read (and re-read) every key document. There should be no surprises at the hearing. Even though many arbitration cases are tried without discovery, a good lawyer investigates the case and learns as much as he or she can. Most arbitrators allow you to see documents ahead of time, and many also require a pre-hearing disclosure of witnesses. This is yet another reason to request a preliminary hearing: It is a chance to forge agreement on sensible ground rules.

I tell the parties to show every key document to the other side before we get into the hearing room. "If your case is so good," I have been known to say, "it will withstand pre-hearing disclosure of important documents."

The same goes for witnesses. There should not be a problem in disclosing witness lists and brief testimony summaries. What's wrong with letting everyone have a road map before the hearing?

I routinely require briefs at least 10 days before a hearing. And the brief comes at the end of the process, after we've disclosed documents and witness lists.

Take Bad With Good

A vital part of your job is knowing the bad as well as the good. If negative information is in the hands of your opponent, beat him or her to the punch by disclosing it first. One thing you can count on at an arbitration is that your adversary will trash your client and your case at every opportunity. So, if negative information is out there, talk about it before your opponent. Give it the best spin you can. By doing so, you can steal the thunder and dull the blade of your opponent's sword.

I believe that the more exposure a case gets, the healthier it is. A good case doesn't wilt when exposed to light and air. If anything, a good case thrives on those nutrients.

Talk Money

Many attorneys, especially the young ones, are reticent about discussing damages. It's almost like talking about a dark family secret. Damages are a vital part of every case. From a client's perspective, they are what matters the most. When the case is over and an award issues, the client focuses much more on the number than on the name of the party liable.

Be upfront and specific about damages. After all, you want the arbitrator to award your client something, right? Well, exactly how much do you want, counsel? Lay the claim on the table at the outset, then build the case around the number you seek.

I am flabbergasted at how rarely this occurs. I want the parties to educate me about their case. What are the issues I will be asked to decide? And, if it's a damage claim (as almost every case is), how much do you want me to award and why?

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If counsel do not address damages, I always ask about them at a preliminary hearing. If an advocate can't tell me the answer, it tells me something is wrong with the case. "How much?" is a question that must be answered specifically and forcefully. Doing so conveys a belief in the underlying case, and it tells the arbitrator that you have come to him or her for a purpose.

Of course, there are exceptions. Some damage claims may not be fleshed out fully at the time of the preliminary hearing. That is a fair point and a good reason to hedge your bets. But if that is the case, tell the arbitrator, and let the arbitrator know when you expect to address this most vital issue.

Keep Your Cool

How many times have you sat there and watched an opponent skewer your expert? Or your client?

The worst thing you can ever do is lose your cool. Don't fidget. Don't sigh. Don't shake your head. All that does is tell the arbitrator the other side got to you. The best thing you can do is keep your head down and react as if nothing is happening.

When it's your turn to respond, ask rehabilitative questions. When the time is right, make the right argument that responds to the thrust and parry of your opponent. You might be pleasantly surprised. In some cases, the testimony you think is devastating to your case makes no impression on the decision maker. But it will make an impression on the decision maker if it makes an impression on you.

Keeping cool is the trait of an experienced advocate. The great communicators learn to speak when it is their turn. They garner respect, and once they've earned it, they do not surrender it.

Hit the Bull's Eye

These points are simple, but they need repetition. I play a lot of golf, and every decent golfer knows there are simple fundamentals that must be learned, practiced, re-learned and practiced some more.

For advocates, there are a few overarching objectives. You want the arbitrator to trust you. You want the arbitrator to look to you for help in deciding the case. You want the arbitrator to say, when the case is over, "there goes a good lawyer."

If you keep the essential arguments short and sweet, speak clearly when asking for an award, build your case around a constant theme and conduct yourself with decorum and dignity, nothing will stop you from being successful.

If you follow the fundamentals I've laid out, you will be a more effective advocate, and the arbitrators (and judges) before whom you appear will respect you. Not only will they understand your case, but they will embrace your perspective and make the decision you want them to make. A good advocate can't ask for more than that.

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