ADR

Winning With Arbitrators

By Robert D. "Bo" Links

One true thing about litigation is that it breeds winners and losers. Witnesses testify, evidence is presented, arguments are made. The dust settles, if only for a moment, and then a judgment issues,

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an appeal is taken, and a final decision ends the process. In the end, one party prevails. Litigation very rarely ends in a tie.

As an advocate and arbitrator who has watched this process for over 30 years — the last 20 as an arbitrator — I have seen just about everything. I've seen star experts, great cross, compelling argument. What I don't see all that often are judges or arbitrators taking the time to explain the things that motivate them in their decision making. Now that I have heard over a hundred cases and tried or arbitrated about the same number, I thought it would be a healthy exercise to set down some thoughts in the hope that maybe someone out there, particularly young lawyers, would see a path to better advocacy — a path that wins cases and achieves the desired result for a paying client.

I am particularly intrigued about the decision-making process in arbitration. It is no small subject, as the courts have long embraced arbitration as a viable alternative to the courtroom and many parties routinely write arbitration clauses into their contracts.

In a very critical sense, advocacy in arbitration is more challenging and far riskier than in the courtroom, for in arbitration there is no appeal. You get only one shot to convince an arbitrator of the merit of your position. You should make the most of it.

When a case is presented to an arbitrator, what happens? What key factors tip the decisional scales one way or the other? I like to think of them, with apologies to legendary golfer Ben Hogan, as The Five Fundamentals.

Simplicity

Arbitrators tend to focus on simple arguments. In a contract case, what does the contract provide? Did a party live up to his obligation? In an injury case, who's fault is it? How badly is the claimant hurt?

Like anyone, I am a curious fellow. I love to learn about new things. How a car works, how a chemical reacts, how a computer program functions. But when I'm an arbitrator, I am constantly amazed at how I am motivated by the simplest things. For me, it's almost never the details that move me to a decision. I know that sounds counterintuitive, but it is absolutely true. Details are a bit like glue. They may buttress a point and may hold an argument together, but in and of themselves, they don't win the case. The big picture wins the case.

Construction cases are a perfect example. If a party builds a house that leaks, I focus on the fact of the leak, rather than the details of how and why the water penetrates the facade.

Keeping things simple leads to a related time-honored truism: build on a theme. If an advocate has a theme, every piece of evidence, every bit of testimony, every question asked on direct or cross ties to that theme.

I can recall vividly an investment case I arbitrated where the claimant's advocate had a simple theme: the investment was inappropriate for the client. The claimant was an elderly man on a fixed income. At every turn, the claimant's attorney presented material to show that the broker did not evaluate the investment with this particular investor in mind. All of the published reports recommending the investment counseled against this type of investor. The claimant himself testified that he was looking for security, not risk. When the broker testified, he was grilled on his duty to his client, to wit, making sure that the shoe fit when recommending investments.

The entire presentation never wavered from the theme that the broker failed in his duty to recommend an appropriate investment.

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There was considerable technical testimony about standards, ratings, and risk, but what motivated me as an arbitrator was the specter of an elderly claimant on a fixed income, who had almost his entire portfolio on the line and who was counseled to invest in junk bonds that were, in fact, junk. I don't think I need to explain how that case turned out.

Brevity

Although arbitration is not a jury trial, even educated arbitrators have a limit to their attention span. An advocate, like a house guest, should never overstay a welcome. When asked to make an opening statement, keep it to the point. Although some cases take longer than others to introduce, almost all can be summarized in a tight package. The simpler it is put, the more effective it is.

The advantage of a brief approach is that it sticks to the ribs. The decision maker gets a deep impression of the case's core, rather than a diffused view that covers everything but focuses on nothing.

Suppose you are asked to present a contract claim. What was the promise? How was it breached? And what are the damages? Beginning, middle, end. It's as simple as that.

An offshoot of this principle is another very helpful advocacy hint: always be ready to explain the case in 15 seconds. No kidding. Sound bites are very effective. Knowing that, be prepared to state the core of the case quickly, confidently, and clearly. Doing so accomplishes at least three things. First, it tells the decision maker that you know the case. Second, it communicates your side of the case in a way the decision maker can easily hear and, remember. Third, everyone — particularly an arbitrator — appreciates brevity and when you are brief, the decision maker will also appreciate you.

Assume a construction case involving a brand-new residence that cost $1 million. The house leaks and the new owner is suing the contractor for damages. "Counsel, what is this case all about?" You respond, "My client paid a million dollars for a brand new house that leaks like an old rowboat. This is a claim against the contractor for damages so we can repair the house and get what we paid for — a new home that doesn't leak." You are off and running. The arbitrator will easily grasp what you are after. No one wants to live in a leaky house.

Here's another example: "This is a wrongful termination whistleblower case. I represent Jane Smith, who was fired by Acme Corporation after she reported to the authorities that the company was dumping toxic waste. A company does not have the right to fire someone for reporting pollution to the government agencies empowered to police it." You can go on to explain the details, but you've already hooked the decision maker with the central point of your case. The arbitrator will have no trouble following your presentation with this type of road map.

Even if you can't boil your case down to 15 seconds, the mere effort to do so will make your presentation clearer, tighter and more powerful.

Know Your Arbitrator

While there may be no appeal in arbitration, there is one distinct advantage over traditional litigation: You get to pick the judge. Your client's arbitration clause may have a great bearing on arbitrator selection, for it may prescribe particular qualities (i.e., the arbitrator shall be a lawyer with 10 years experience in secured real estate transactions). In other cases, you may simply have a list of proposed arbitrators from an ADR provider, such as JAMS or the American Arbitration Association.

Do your best to get detailed resumes or profiles so you can have some idea of an arbitrator's background. If you are using a full-time neutral, get an idea of what type of cases he or she has handled, and what the results were. If you are using an arbitrator who is also a practicing lawyer, learn what you can about his or her practice. "Googling" an arbitrator will yield many a nugget that can be decisive in arbitrator selection.

The best thing you can do is to talk to other lawyers about potential arbitrators. If you have never appeared in front of an arbitrator, get advice from attorneys who have. Get as many opinions as you can conveniently get, and then make an informed selection. It may be the most important selection you make in the case.

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