Professional Perspective

Five Questions Attorneys Should Answer for a Judge or Arbitrator

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Contributed by Contributed by Janet Lee (Jayli) Miller, JAMS

The difference between lawyers and judges or arbitrators is not skill, intelligence, or knowledge of the law. It's perspective. The adversarial process works because each participant plays a different role, but those disparate roles lead to disparate viewpoints. Before you draft a single word of your brief, consider your audience. If you understand how judges and arbitrators make decisions and then present your arguments accordingly, you are more likely to succeed.

When preparing for litigation or arbitration, lawyers spend considerable time developing the facts of their cases and presenting them in the light most favorable to their clients. Thus, it's not surprising that lawyers often begin briefs with the legal equivalent of an elevator pitch for their clients. But decision-makers consider the facts of a case only after they have a framework for the motion based on certain preliminary questions. The answers to these five questions guide a decision-maker on how to view the facts. Your motion will be more persuasive if you address these issues first and then present only the facts that are relevant to these questions.

1. What do you want me to do?

When a decision-maker reviews a motion, the first question they want answered is: "What is the party asking me to do?" This may seem obvious, but it's surprising how often attorneys fail to describe the relief they seek at the beginning of their briefs. Decision-makers frequently have to skip to the last page of the brief or scan the notice of motion to find out what the moving party wants. Good stories rarely reveal their endings at the beginning, but good briefs do.

The first paragraph of your brief should tell the judge or arbitrator what the result of the motion should be. If you do this, the decision-maker will consider all remaining information provided in the briefs in relation to the relief you seek.

Describe the relief you want specifically. If you request relief that is overly broad, such as seeking the exclusion of an entire category of evidence instead of a specific item of evidence, you are unlikely to prevail. Make sure that the relief requested is something that a judge or arbitrator can provide. If you ask for an order stating that the opposing party must "comply with existing laws," you are unlikely to get it.

Last, use clear and direct language to describe what you want. When attorneys present motions, they expect an order or recommended ruling. It isn't possible to grant relief that is vaguely defined. Ideally, your description of the relief you seek will be so clear, precise, and appropriate that your own words will be copied and pasted into the order issued by the decision-maker.

2. What's the authority that says I can do it?

Lawyers sometimes think that judges and arbitrators can do anything they want. They can't. Even state court judges have jurisdictional limits over certain parties and subject matters. But this question is most pertinent in arbitration proceedings. Arbitrations are creations of contracts, and the contracting parties can design almost any type of arbitration they want. Arbitration provisions determine what the arbitrator can and cannot do, and they frequently limit the agreements, entities, and claims that are subject to arbitration.

If your case arises out of a complicated business transaction implemented via multiple contracts, the arbitrator will want to know whether all the relevant contracts contain arbitration provisions. If your case involves multiple parties, the arbitrator will want you to confirm that all parties are bound by an arbitration provision. If you seek relief that exceeds the obligations of the contract subject to arbitration, the arbitrator will likely ask you why they have jurisdiction to provide you with that relief.

Contracting parties typically allow arbitrators to resolve all disputes "arising out of or related to" the contract. If your contract contains such language, you can assure the arbitrator that they have the authority to resolve any claim related to the contract, including tort or statutory claims. But if your arbitration is governed by a more limited provision—e.g., a provision that directs the arbitrator to resolve all contractual disputes—the arbitrator is unlikely to consider any claims or grant any relief that is not based in contract.

Even when contracting parties agree to arbitrate all disputes related to their contract, the contract may still limit the types of relief available. Arbitration provisions commonly prohibit arbitrators from awarding lost profits, punitive damages, and, on occasion, even consequential damages if the parties agreed upon a liquidated damages clause.

Whether your case is before a judge or an arbitrator, before you ask them to do anything, make sure they have the authority to do it.

3. What's the standard that I should apply to determine whether I should exercise that authority?

The standard is the yardstick by which the decision-maker will determine whether they should grant the relief you seek. It also tells the judge or arbitrator which facts are relevant to the motion and how to evaluate those facts. The standard further indicates whether the decision-maker must consider factors extraneous to the case, such as public policy or equitable issues.

A decision-maker may have to apply both a procedural standard and a substantive standard. If you file a demurrer (a motion to dismiss at the pleading stage) in California, the decision-maker will determine whether the plaintiff has failed to "state facts sufficient to constitute a cause of action," because that is the procedural standard for prevailing on a demurrer. If you file a summary adjudication motion, however, the decision-maker must apply the procedural standard ("no triable issue of material fact") to the substantive standard (the "elements") for the issue on the motion, whether it is a claim, affirmative defense or category of damages.

Thus, you must argue the procedural standard for the motion in relation to the substantive standard for the claim you are attacking or defending. If you are defending or attacking a breach of contract on summary judgment, for example, you must explain why there is or is not a triable issue of material fact as to any one of the four elements of a breach of contract claim: contract, breach, causation, and damages.

If the standard is relatively easy to meet, you've got the wind at your back. If the standard is stringent, you must work harder to succeed. Experienced judges and arbitrators usually already know the standards for most motions, but you should set forth the standard regardless, because it signals that you know the standard and have presented the facts that are relevant to the standard.

4. Who has the burden?

There may be no greater tool to a decision-maker than the burden of proof.

The "burden of proof" is a party's duty to produce evidence proving its claim. Under motions in civil practice, the moving party wins if it supports the motion with "a preponderance of the evidence." Under certain motions, however, the moving party must present "clear and convincing evidence." The "burden of production" is your obligation either to produce evidence or to demonstrate a lack of evidence. The "burden of persuasion" is your obligation to convince the decision-maker to interpret the facts in your favor.

Roughly 80% of motions filed in a case clearly weigh in one direction or the other. For the remaining 20%, the decision-maker's tool of last resort is the burden of proof. Experienced attorneys know that they can defeat a motion by either presenting facts in opposition or by arguing that the moving party failed to meet their burden.

Occasionally, when the party that carries the burden lacks evidence, their attorney will attempt to flip the burden of proof onto the opposing party, arguing that the defending party failed to present evidence in support of denying the motion. If you are defending against the motion, do not let this argument pass without correction. Remind the decision-maker which party carries the burden and that if they fail to meet it, your side wins.

For most motions, the moving party carries both the burden of production and the burden of persuasion, but under certain motions, the burdens shift back and forth. In California, the moving party on a summary judgment motion has the burden of producing evidence showing that no triable issue of material fact exists. If the moving party satisfies that requirement, the burden of production shifts, and the party opposing the motion must produce evidence that a triable issue of material fact does exist. If the opposing party meets its burden of production, the burden shifts back to the moving party for rebuttal.

If you file or oppose a summary judgment motion, you must understand what burden you carry and when. If you are the moving party and the decision-maker tentatively rules that you failed to meet your burden of production in the moving papers, you won't win at oral argument by attacking the evidence presented in the opposition. If your summary judgment motion is based upon a lack of evidence supporting a claim or affirmative defense, you may need to remind the decision-maker that you are not required to prove a negative, i.e., you do not have to present evidence of a lack of evidence.

The burden of production also shifts under other types of motions, such as anti-SLAPP (strategic lawsuit against public participation) and class certification. To ensure that you have provided the decision-maker with the relevant evidence at the right time, make sure that you understand how the various burdens operate in your motion.

5. Which facts are relevant to the decision?

After you tell the decision-maker what you want, why the decision-maker has the authority to give you what you want, how the decision-maker should determine whether to give it to you, and how the burden of proof operates, you should then present the facts of your case. If you have covered the first four questions, your decision-maker will be primed to view the facts of your case through the correct prism.

Additionally, you won't squander your page limit by discussing case facts that are interesting but ultimately irrelevant to your success on the motion. Judges and arbitrators are focused on making the right decision on the specific motion before them. They want to focus on the facts relevant to the motion, and they do not pay much attention (if any) to additional case facts presented in the briefs.

Some attorneys discuss irrelevant facts in motion practice to get their version of the case before the decision-maker as early as possible. That doesn't work. Experienced judges and arbitrators have witnessed hundreds of cases morph and transform from the pleading stage to the final disposition, and they are trained to avoid forming any preconceptions about a case until the record is closed.

Conclusion

The decision of whether to bring a motion rests squarely with the advocates, in consultation with their clients. Judges and arbitrators know that lawyers occasionally bring motions for tactical reasons or to advance other interests in the case. But if you have filed a motion because you want to win it, consider the questions raised in this article and draft briefs that will be more likely to persuade the decision-maker.