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Beyond the Courtroom: Overlooked Strategies for Litigators to Excel in Arbitration

By Ronald Ravikoff
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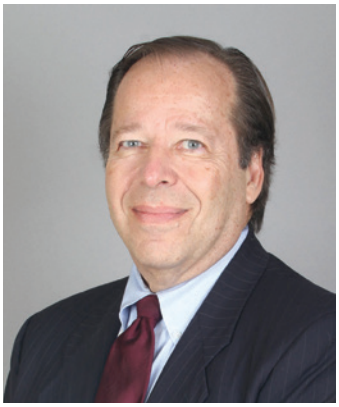
Litigators often complain about the "problems" with arbitration without realizing many of these so-called problems can be resolved by abandoning the litigation mindset. Here are some points to consider:

Prepare for the Preliminary Conference

The first critical event in the arbitration will be the preliminary scheduling conference with the arbitrator. This, more than likely, will occur by telephone. Prepare for it! Much of how the arbitration will proceed will be set in stone at this point. Will you need discovery? What kind of discovery will be allowed and how much? Will dispositive motions be permitted? What type of award are you seeking? When are the deadlines? Do you want a court reporter present? Will the hearing be bifurcated? What rules and law will apply? When and where will the hearing take place? How many days will be necessary? The arbitrator will usually block out the requested days, and if you exceed that, it may be weeks or even months before you can resume the hearing. Best practices suggest asking the arbitrator for a list of topics and having discussions with opposing counsel prior to the conference.



Consult With Opposing Counsel Often

Confer with opposing counsel often. The arbitrator will appreciate it, and it will greatly reduce time and costs for your client. For example, talk to opposing counsel and set up a schedule for the calling of witnesses before the hearing and how they will testify—whether it's in person, by telephone or via videoconference. Waiting until the hearing may result in some witnesses being unavailable, which may lead to an adjournment. Consult with opposing counsel on the length of time anticipated for the arbitration, and strive to accommodate scheduling concerns before the hearing starts. If you think you will need more time for the hearing, select backup dates with opposing counsel and the arbitrator before the hearing.

Consult with opposing counsel on the voluntary exchange of documents and what discovery may be needed.

Read the Rules, Read the Rules, Read the Rules!

As a litigator, you have immersed yourself in the Federal or State Rules of Civil Procedure, yet lawyers are regularly engaging in an arbitration without having thoroughly read the rules (e.g., JAMS, AAA, AHLA rules) or reviewing the controlling arbitration clause. You can bet your arbitrator has read them and will hold you to them!

Rules and procedures (such as those relating to jurisdiction, arbitrability and discovery) differ depending on the tribunal for your case. For example, a commercial dispute may not have the same rules as a consumer dispute.

Modify the Arbitration Clause to Make your Arbitrations Efficient

Most attorneys do not realize that the parties can agree to modify the arbitration clause and the rules to make them fit the needs of the case. Arbitration clauses are usually boilerplate and have provisions that may or may not be appropriate for the case at hand. The parties are free, by agreement, to modify it. Similarly, arbitrators will usually allow a modification of the applicable rules if the parties request it.

The more a lawyer tries to make arbitration into something it is not—a trial—the less likely it is to be efficient, economical or final.

Boilerplate arbitration clauses often call for application of the Federal Rules of Civil Procedure or Rules of Evidence. If so, why are you in arbitration? The parties have all of the burdens of a litigation with none of the benefits or controls.

If you can, agree with opposing counsel to eliminate such a provision and rely on the arbitration rules.

Forget Discovery as You Know It

Arbitration rules generally provide for very limited discovery—perhaps a voluntary exchange of documents and one deposition. Unlike a trial, the facts are not fully fleshed out until the hearing. If more discovery is needed, work that out with opposing counsel—the arbitrator will almost always accept what the parties agree on.

A smart arbitration guideline is to tailor your discovery to the size and complexity of the case. If you have received all discovery and it is deficient, document your effort to resolve the dispute. File a motion to compel only if all efforts to resolve it have failed.

Maintain Your Credibility

The arbitrator is not a jury. They have likely read all the submissions and case law and are experienced.

If your arbitrator believes you have misstated a case or a witness' testimony or the contents of a document, they will likely conclude that you either do not know your case or are intentionally seeking to deceive.

Another threat to your credibility is the "kitchen sink" arbitration demand or a response that includes numerous claims or defenses that have little chance of succeeding. Experienced arbitrators recognize these as make-weights that never should have been pleaded. They want to know right away what the case is about and what law and evidence support your position.

A tight, short case goes a long way.

Do Not Waste Time and Money on Motions

Many inexperienced advocates file the same motions in arbitration as in litigation. This is usually a huge waste of time and client money. Arbitrators are keenly aware that, in arbitration, there is usually no appellate body to reverse an erroneous grant of a motion for summary disposition and that one of the few grounds for vacating an award is refusing to hear a party's evidence. Skip motions and get ready for the hearing as quickly as possible.

Opening Statement

If you have laid out your case in a pre-hearing brief, the arbitrator has almost certainly read it and will not appreciate an oral repetition. You should always request to file a pre-hearing brief. It is the best way to familiarize the arbitrator with the issues to be decided. If there were no pre-hearing briefs, keep your opening short, providing a brief summary of your case without getting into the weeds. Sum up key points in terms the arbitrator will remember. Mention your most compelling evidence and address your opponent's best evidence.

Forget the Admissibility of Evidence

Because the rules of evidence hardly ever apply in arbitration, nearly all evidence that any party wishes to present will be received "for what it's worth." Fighting over admissibility is usually unproductive. Any document whose authenticity is not disputed will usually be received.

Give the Arbitrator Post-Hearing Briefs With the Backup to Help Support Your Desired Award

By the time of closing arguments, most arbitrators are dealing with information overload.

Poor advocates compound the problem by dumping everything on the arbitrator without organization. Instead, put this information in a closing argument binder that contains everything the arbitrator will need to write the award you want. It can accompany a pre-closing brief.

Your arbitrator will greatly appreciate having this at their fingertips when writing the award. A well-prepared, well-organized binder isn't just helpful—it's a game changer to make sure your key points stand out in a crowded field of information.

***Ronald Ravikoff, Esq.**, is a mediator, arbitrator and hearing officer with JAMS in Miami. He handles complex commercial matters with a particular emphasis on matters involving healthcare, parallel civil and criminal proceedings including False Claims Act matters, Foreign Corrupt Practices Act matters, antitrust and trade regulation, class actions, financial institution litigation, securities litigation and regulatory proceedings, and trade secrets matters.*