

Winning in Arbitration: The 10 Golden Rules

By Hon. Curtis E. von Kann (Ret.)

Even the best advocate can't win an unwinnable case. But for the many cases that could go either way, the quality of advocacy is often the decisive factor. Having conducted arbitrations for 22 years and observed both very good and very bad advocates, I have concluded that those who observe the following rules generally win their cases.

Rule 1: Never Impair Your Credibility with the Arbitrator

In arbitration, relaxed evidentiary rules, less formal proceedings and sophisticated decisions-makers mean that counsel's representations are relied on more heavily by arbitrators than by judges or juries. If your arbitrator believes that you have misstated the holding of a case, or what a witness said on deposition, or the content of a material document, he or she will likely conclude that you don't know your case or you are intentionally seeking to deceive. Either conclusion delivers a body blow to your credibility. Never say anything to an arbitrator unless you are absolutely sure it is correct. If you don't know the answer to a question, don't guess; simply say, "I don't know the answer but will get it for you promptly." Acknowledging that you don't know everything is credibility-enhancing (provided it does not happen frequently), as is acknowledging some of your opponent's (non-critical) contentions.

Rule 2: Neither a Castigator Nor a Whiner Be

Many arbitrators participate in the process because they are sick and tired of lawyers calling one another names, fussing over discovery and screaming that the other side's position is outrageous, dishonest, in bad faith, etc. They have come to arbitration because they want to work with grown-up lawyers who



can zealously advocate for their clients and still deal courteously and cooperatively with opposing counsel. Try very hard to develop a good working relation with that counsel. If the other side starts throwing mud, do not reciprocate. Arbitrators like attorneys who get straight to the merits without berating the other side or whining about how badly they have been treated. Taking the high road in arbitration will put you way ahead of those who don't.

Rule 3: Throw Far-Fetched Claims and Defenses Under the Bus

Another threat to your credibility is the "kitchen sink" arbitration demand or response, which includes numerous claims or defenses that have little chance of succeeding. Experienced arbitrators will recognize these as make-weight distractions that should never have been pleaded. Their inclusion will signal that you haven't yet decided what your client's strongest position is and that you are hoping some scattershot missile will strike some target. Arbitrators do not suffer such diversionary tactics gladly. They want to know right away what the case is

really about and what law and evidence each side relies on to support its position.

Rule 4: Don't Waste Time and Money on Motions

Many inexperienced advocates file the same motions in arbitration as in litigation: motions to dismiss for failure to state a claim, for a more definite statement, to compel discovery, for sanctions, in limine, for summary judgment ("summary disposition" in arbitration), etc. Almost always, this is a huge waste of time and money. Most arbitrators prefer to deal with procedural issues via conference calls rather than having lawyers hurl lengthy missives back and forth. They are also keenly aware that, in arbitration, there is no appellate body to reverse an improperly granted motion and that one of the few grounds for vacating awards, under both the Federal Arbitration Act and most state arbitration statutes, is refusing to hear a party's evidence. You will save your client money and prove your arbitration expertise if you file no motions and get ready for the hearing as quickly as possible.



Rule 5: Keep Your Opening Statement Short but Memorable

If you have laid out your case in a pre-hearing brief, the arbitrator has almost certainly read it and won't appreciate an oral repetition. Even if there were no pre-hearing briefs, keep your opening short, providing an executive summary of your case in chronological order without getting into the weeds. Try to sum up some key points in phraseology the arbitrator will remember. If you have compelling evidence, mention it. If your opponent has some evidence that hurts you but is not fatal, take the sting out by mentioning it and citing other evidence that puts it in the least harmful light. Don't overstate your case (that will come back to haunt you), but outline it in a clear, concise and straightforward way. Don't argue; that comes after the hearing.

Rule 6: Forget the Admissibility of Evidence; Focus on Its Weight Instead

A nearly infallible marker of a neophyte arbitration advocate is seeking to exclude hearsay, or a lay opinion or a business record for which a complete shop-book rule foundation has not been laid. The rules of evidence are hardly ever applied in arbitration (except as to privilege and settlement offers). Thus, nearly all the evidence that any party wishes to present will be received "for what it's worth," so fighting over admissibility is a fool's errand.

However, many advocates fail to appreciate the importance of those quoted four words. Evidence that Joe said X about Y will be received. But why should the arbitrator care? Is there any evidence concerning Joe's honesty; what background, education or experience he had to make his observations reliable; any bias or particular perspective he had on the matter at issue; his memory; or his ability to accurately record what he saw and heard?

Similarly, a purported business record whose authenticity is not disputed will be received but given little weight unless the proponent demonstrates that the person who made the entry had sufficient knowledge and incentive to make it reliable, that the recording was close in time to the event and that the business' document maintenance practices provide reasonable assurance that the entry has not been tampered with.

In short, get in the evidence contest that matters in arbitration. It's not about admissibility; it's about weight.

Rule 7: Do Not Ask Leading Questions During Direct Examinations

Arbitrators are unmoved by direct examinations that consist of your witness agreeing to your account of events. Conducting a direct examination without leading questions is hard work. It requires careful planning on your part, thorough preparation of your witness and several dry runs. But if your witness is able to tell a coherent story, clearly and concisely, in his or her own words, that direct examination will have a much greater impact on the arbitrator than any leading you could do.

Rule 8: In Cross-Examination: Less Is More

Ineffective advocates believe that they must address on cross-examination everything an opposing witness said. This is a big mistake. It gives the witness the opportunity to repeat the many parts of direct testimony that you cannot disprove merely by questioning him or her. A far more effective cross-examination is one in which you inquire about a few statements made on direct and force the witness to acknowledge that the statement was incorrect or, better yet, untrue. Usually, that is best done by confronting the witness with a clearly inconsistent

statement he or she made in a deposition or document. Your first question should be about testimony on which you have the strongest impeachment. Once you have secured from the witness four or five admissions of error, say, "I have no further questions for this witness," and sit down.

Rule 9: In Briefs: No Bull, No Miscitations, No Typos

All your briefs should be brief, clear and cogent. Make your arguments flow persuasively from the relevant facts and law. Do not overstate your case, harangue the other side or engage in rhetorical flourishes. Scrupulously check and double-check all evidence and legal citations to assure that they are exactly correct. And proof your briefs carefully; typos, misspellings and similar errors connote sloppy work and signal that you were unwilling to take the time required to provide the arbitrator with a first-class product he or she could rely on.

Rule 10: Give the Arbitrator the Tools Needed to Write the Award You Want

By the time of closing arguments, most arbitrators are reeling from information overload.

Poor advocates compound the problem by spewing forth rapidly (because they are rushing to squeeze into their allotted time every point that has occurred to them) detailed factual accounts, dates, names, damages calculations, primary and alternative legal theories, testimony quotes, exhibits numbers, case citations, etc., which the arbitrator is trying frantically to write down.

Good advocates plan their closing arguments carefully; hand the arbitrator at the outset a closing argument notebook (which contains all the materials the arbitrator will need to write the award they

want); summarize those materials in a relaxed, unrushed manner; and then invite the arbitrator to ask any questions he or she may have. Materials that should always be included in every such notebook include the following:

1. A chronology of key events (with supporting record citations for each)
2. A glossary of technical terms in the case
3. Slides from any PowerPoint presentation used during closing arguments
4. A demonstrative exhibit showing how damages were calculated
5. The exact wording of any declaratory relief sought
6. A list of the legal authorities chiefly relied on (with copies of each, if not too lengthy)
7. A list of the key exhibits (with copies of each, if not too lengthy)

8. A list of the key pages (not too many) for the arbitrator to read (if there is a transcript)

Submitting these materials in writing will eliminate the need for the advocate to orally communicate all of this detailed information. And arbitrators will greatly appreciate having these tools to award-writing at their fingertips when they undertake that task.

Other items that might, in appropriate cases, be included in the notebook are:

1. Copies of pleadings, with important language highlighted
2. Copies of stipulations
3. In a case where many witnesses testified, a one-page witness summary of the most important things the witness said (with supporting transcript citations)

4. In a case with many pre-hearing orders, copies of important orders with key language highlighted

A copy of the notebook should be given to opposing counsel at least 24 hours before closing argument so he or she cannot complain about being “sandbagged.”

If you aren’t already employing these golden rules in your arbitrations, try doing so and watch your win-loss record improve! ●



Hon. Curtis E. von Kann (Ret.) is a JAMS neutral in Washington, DC. In his 45 years as a trial lawyer, judge, arbitrator and mediator, he has handled numerous cases involving engineering and construction matters in North and South America, Europe and Asia. He can be reached at cvonkann@jamsadr.com.