Obtaining better arbitration results

A brief guide to your opening statement, questioning, use of exhibits and do's and don'ts of argument in arbitration

By Joe Ramsey

As the binding arbitrator in a substantial number and variety of civil cases, I have observed that counsel who get consistently better results are those who approach the hearing with the same focus that good trial lawyers bring to trials. Here are some basic reminders which should help get better arbitration results.

The big picture

Trial counsel should always start by envisioning the entire case. No matter how complex or simple the issues presented, counsel need to know where they are going and then develop the best way to get there. As Yogi Berra once famously pronounced: "If you don't know where you're going, you're going to end up somewhere else!" So your starting point should be preparing the best argument the facts and law will allow you to make. Then chart a course to prove what needs to be proved to make that argument properly and persuasively.

Arbitration brief

The pre-hearing brief offers the first opportunity to present your case. It should be thorough but concise, well-organized, forceful, entirely supportable by evidence which will certainly be admitted, and it should be on time. Cutting corners with substance or being late surrenders a major advantage to the opposition. The arbitrator will be fair, but he is also human. He will be impressed with a good and timely brief and unimpressed with a sloppy eleventh-hour brief.

Opening statement

The opening statement offers the second opportunity to present your case. Counsel should always plan to give an effective, forceful, persuasive opening statement. You should *not* assume that it is a waste of time or somehow duplicative of a good pre-hearing brief to follow with an oral presentation of the case. The reasons are fundamental and obvious: You are presenting your case for a second time; you are presenting it orally instead of in writing and will therefore persuade through a different medium; you are reducing to zero the possibility that the most conscientious arbitrator has not had a chance to focus on the pre-hearing brief; and, when you are making your points orally, you have an opportunity to sense whether the arbitrator understands and appreciates the points being made.

As for substance, some controlled repetition is not only permissible but recommended. In the opening statement, it is okay to say things differently up to three times: Tell the arbitrator in abbreviated form what you intend to say; say it forcefully and in more detail; and then summarize succinctly what you just said.

Evidence

The following suggestions apply regardless of the type of civil dispute involved and assume that the evidence will include testimony from lay and expert witnesses as well as documentary and demonstrative evidence.

Persuasive testimony

Any meaningful treatment of the multiple peculiar intricacies of direct and cross-examination of the different categories of witnesses we confront as trial counsel is beyond the scope of this article. The recommendations I make here about how to present more effective oral testimony apply regardless of whether the witness is a lay percipient witness, a lay witness with expertise, or a retained expert. They also apply to both direct and cross examination.

Tips on questioning

• You should *exercise the control you have over witnesses.* Counsel have a right to require all witnesses to be responsive. Lay witnesses especially often tend to listen carelessly and not confine their answers to proper questions. With such witnesses, it should save time and please the arbitrator if you move to strike non-responsive testimony. If a non-responsive witness persists, ask the arbitrator to instruct the witness to confine answers to questions asked.

• Expert witnesses should also be confined to questions asked. Experts often become advocates and improperly argue the case. As a recent example of over-reaching in a personal injury case, the defense accident reconstruction expert had been given voluminous documents including multiple statements of the plaintiff. In addition to perfectly appropriate testimony about his reconstruction, he volunteered his perception that there were inconsistencies among the plaintiff's statements and actually commented that plaintiff lacked credibility. Another recent example of over-reaching occurred in a

business dispute in which an accounting expert volunteered his opinion of what the contract between the parties obligated them to do. Objections were sustained limiting the experts not only to questions asked but also to the subject matter of their expertise.

• Your *questions to every witness should be well-organized* so that the order in which the subject matter is proved makes sense. Most percipient witness testimony is best presented chronologically. Many percipient witnesses' and most expert witnesses' testimony is often presented by covering key subjects within the overall scope of his testimony. You should present logically organized examinations of witnesses both because it is easier for you to present and easier for the arbitrator to hear, understand and remember your points. The questioner who bounces around from partial point to partial point is difficult to follow and generally not persuasive.

• You should *have a reason for every question asked*. It is a waste of time and energy and distracts from the points you should be making to ask unnecessary questions which do not call for information you need to prove. I *usually* hear many questions which do *not* add to any relevant point being made by a particular witness. I believe one major reason for such questions is that we become used to taking depositions where the object includes thoroughly exploring every subject matter which has any reasonable chance of leading to admissible evidence. But by the time of the hearing, you should know exactly what you need from each witness and limit your questions strictly to those needs.

• The important corollary to having a reason for every question is to *never ask an unnecessary question.* Even with a *friendly* lay or a retained expert witness, do not ask a question you have not prepared with the witness. A throw away question to an *adverse* witness is recklessly worse and should always be avoided.

• Your *questions should be concise and clear.* Shorter questions are easier to understand and more difficult for an adverse witness to dodge. A common cross-examination mistake even by experienced trial counsel is making the statement you want the witness to adopt and then tagging the phrase *"isn't* that true?" Such a tag line makes the question and answer unintelligible. A "yes" answer means "Yes, it is not true." A "no" answer means "No, it is not true." In both cases there is confusion about what is true. The cure is simply to change the tag line to "is that true?" With that tag, the yes or no answer makes sense.

• There seems to be a tendency to reprove points or entire subjects with repetitive witnesses. Unless there is a specific need to show that many witnesses perceived the point or subject substantially the same, counsel should always *resist asking the same questions of multiple different witnesses.*

• Finally, *avoid needless repetition and know when to stop.* In many of the arbitrations before me, counsel tend to keep asking additional rounds of questions, often just to re-emphasize points already made, almost as though fulfilling a need to have the last word. The scope of the previous direct or cross-examination is largely ignored. You should plan to complete your own examination and to object if the other side tries to follow up with questions beyond the scope of your examination. The arbitrator should sustain most of such objections. This repetitive questioning might also be an unintended consequence of what we too often routinely do in depositions.

Effective use of exhibits

Entire seminars focus on how best to handle documentary and demonstrative evidence, and no effort is made here to explore the intricacies involved in most effectively presenting either of these important categories of evidence. These suggestions cover only the most basic, fundamental considerations which apply to presenting both these types of evidence.

For this article, "documentary" evidence refers simply to any printed or hand-written words and/or numbers. The writings themselves are usually offered into evidence and commonly include such documents as letters, reports, itemized bills, accounting analyses, transcriptions of testimony from depositions or other proceedings, and the like. In complex business matters, summaries of statistical or other data are commonly offered into evidence.

"Demonstrative" evidence illustrates or "demonstrates" a point or concept. One common example is photographic evidence. Another common example is a graph or chart showing the relationship between different interacting factors such as time and speed in a vehicular accident or income and expense over time in a business evaluation. With the continuing development of computer technology, effective demonstrative evidence is limited only by the imagination of innovative counsel.

Sometimes "documentary" and "demonstrative" evidence combine in a single exhibit. PowerPoint™ presentations usually include both transcripts of testimony or quotations from writings along with graphs and charts in business litigation and photographs and even reconstructions in vehicular accidents.

Whether you decide to present documentary or demonstrative evidence or a combination of both, *such evidence should be prepared and presented so that it is easily visible and understood.* I frequently see well-conceived but poorly crafted exhibits prepared by or for experienced trial counsel which include written material too small to read! I also frequently see demonstrative *exhibits which may be inadvertently misleading, require too much explanation, or contain too much information* for effective persuasion. One common example of inadvertent misleading occurs with overhead photographs, maps, or sites relevant to the litigation. Such exhibits should *always* be presented with traditional geographic orientation so that north is always essentially up. An example of a

similar failing is trying to depict too much in one exhibit. A recent example involved trying to illustrate the complexity of an intersection not just of two perpendicular streets but of two additional oblique streets. By the time enough explanatory labels were added, the words were too small to read and the information too complicated to comprehend easily.

Photographic evidence is important in many types of civil litigation, including as common examples, a wide variety of real estate, construction defect and personal injury disputes. *With photographic evidence,* my first recommendation is to *be selective* and not inundate the arbitrator with repetitive or otherwise unnecessary photographs. *Organize the selected photographs rationally,* which will make it easier for the arbitrator to understand and absorb the points you want to make.

Finally, *select an effective form for presenting key evidence.* As one example, in any kind of civil litigation, if the opposition has made a clear and unqualified admission on a key point, why not print a blow-up of the admission in permanent form and leave it on an easel visible to the arbitrator? As another example, so long as the data are demonstrated fairly, a graph or chart illustrating a clearly favorable point should be presented in permanent form for relatively constant exposure to the arbitrator. It is often effective to project evidence onto a screen, but the downside is that, once shown, it does not remain permanently before the arbitrator.

Argument

The arbitrator *should* encourage counsel to present argument in whatever form they feel would be most effective. Sometimes an arbitrator will decide he does not want any argument at all or that he would prefer that any argument be presented either in writing or orally. Assuming that the arbitrator leaves to counsel the decisions whether to argue at all, and, if so, whether to submit written or oral argument, your decision as trial counsel will depend on each particular case. Here are some thoughts for your consideration on decisions whether and how to best argue your case.

Preliminarily, *there may be circumstances in which counsel will elect to submit the matter to the arbitrator for determination without written or oral argument.* However, waiving argument altogether is almost never advisable. In my experience, the primary reason for waiving argument arises if the arbitrator has clearly rejected your request for argument of any kind, a circumstance which should almost never arise, because the arbitrator should let you present your case as you see fit. Other than the rejection of argument by the arbitrator, if the case is short and simple, you may feel entirely confident that there is no need to argue it. But such cases are rare. Almost every time a matter goes to hearing, there are serious differences in perception on major issues, and argument is an extremely important final tool.

In almost every case, counsel should therefore plan on written and/or oral argument to convince the arbitrator to find for their clients. The question whether to present written or oral argument, or perhaps some combination of both, can only be determined on a case-by-case basis. *There are some circumstances in which written argument is more effective*. Written argument will provide the arbitrator with key legal and factual matter in permanent form in his file. *There are other circumstances in which oral argument is more effective than written argument.* As is true with oral opening statements, oral argument allows counsel to sense whether the arbitrator understands and appreciates the points counsel makes. Oral argument allows counsel to persuade in many ways he cannot accomplish in writing. He can pause to allow a point to sink in; he can repeat key points for emphasis; and he can moderate tone and volume.

Counsel may design an overall *argument that is part oral and part written.* Your case may present an opportunity to combine both these forms of argument and get the best from each. There is no reason counsel should hesitate to request oral argument supplemented by written argument on certain issues.

Finally, although many believe most cases are won or lost long before argument, my experience is that argument is one of the most if not the single most important element of your entire case. If counsel is given a choice between written or oral argument, in most cases, I would recommend oral argument for the reasons stated above.

I hope everyone from neophyte to grizzled veteran has taken a point or two from these suggestions and will get consistently better arbitration results.


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