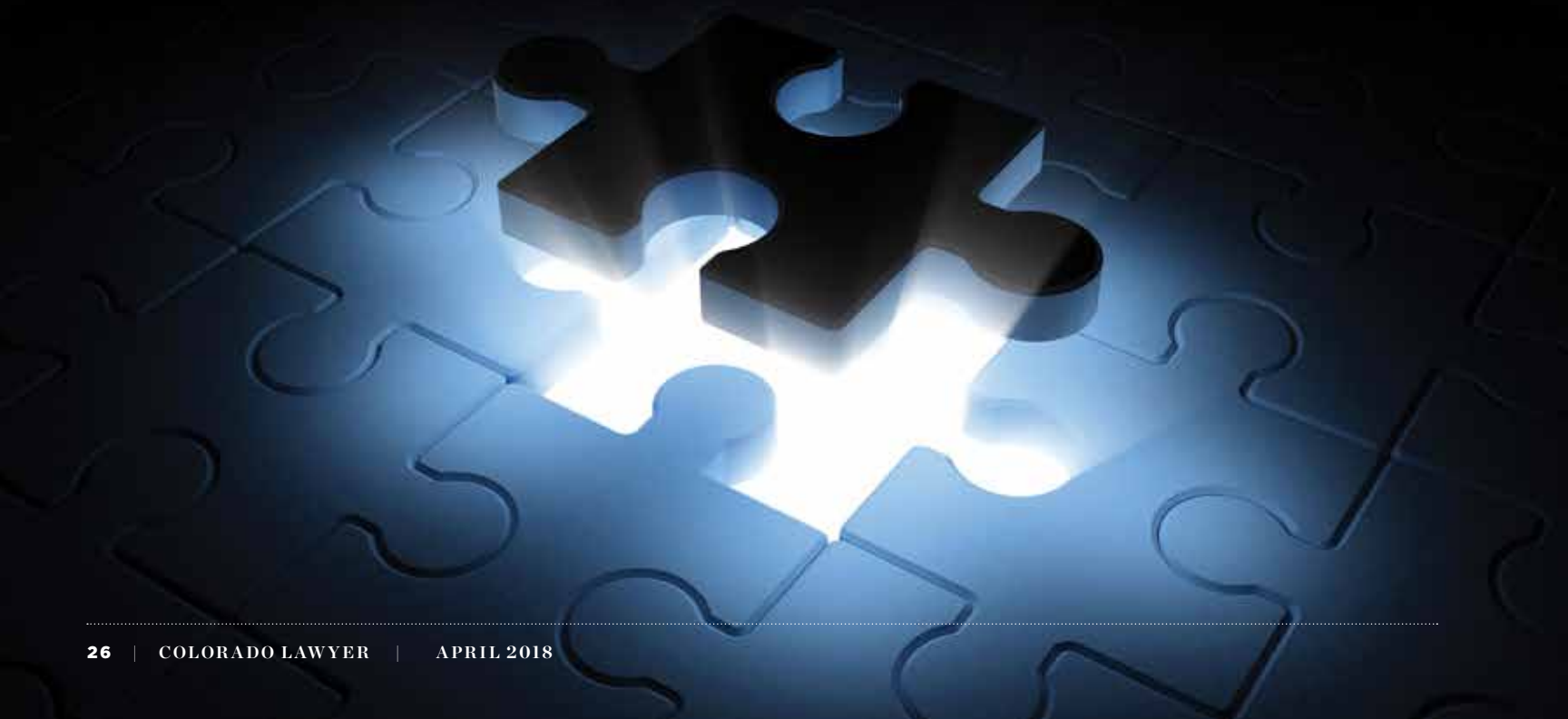
Effective Advocacy in Arbitration

BY JANE MICHAELS



This article explores the benefits of arbitration over litigation and provides practical pointers for trial lawyers who want to sharpen their advocacy skills in arbitration.

Parties to arbitration proceedings frequently comment that they appreciate the arbitration process because it is a faster, more efficient, and less costly way to resolve their business disputes. Unlike litigation, arbitration provides the parties with an opportunity to exercise significant control over the entire proceeding—from the expedited exchange of information to the prompt resolution of discovery disputes, to the determination of customized procedures for the hearing on the merits.

At the outset, the parties can choose arbitrators who have specialized knowledge and expertise in the substantive area of the dispute. As a result, arbitrators can decide prehearing matters quickly. In addition, arbitrators have flexibility in working with the parties to determine the location of the arbitration hearing and the hours during which the hearing will be held. If it is more convenient for counsel and the witnesses, hearings can even be conducted in the evening or during the weekend.

Because discovery is generally limited and the grounds for challenging arbitration awards are narrow, arbitration is far less expensive than most litigation. Every arbitration dispute can be decided in a timely manner—fairly, cost-effectively, and with finality. In addition, arbitration in a private setting has greater potential than litigation to preserve business relationships.

This article is based on the author's 25 years of experience serving as an arbitrator in commercial and intellectual property cases. It is intended to assist trial lawyers in maximizing the benefits of arbitration and optimizing their prospects for effective and successful advocacy in arbitration proceedings.

Why Trial Counsel Should Care about Drafting Arbitration Clauses

Although in-house counsel or outside corporate counsel typically draft arbitration clauses in business contracts, litigators should make an effort to educate their colleagues regarding the importance of concepts to be considered in the drafting process. The language of an arbitration clause becomes critical once a dispute arises.

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An arbitration clause must clearly define the scope of arbitrable claims. Important considerations about the scope include:

- Will *any* dispute relating in any manner to the subject matter of the contract be arbitrable?
- Do the parties want to include, or exclude, disputes regarding claims that are not necessarily connected to a cause of action for breach of contract, such as antitrust claims, patent infringement claims, or certain tort claims?
- What law will govern the procedural and substantive issues in dispute?
- In what city will the arbitration take place?
- Will the dispute be decided by one arbitrator or a panel of three arbitrators?
- What qualifications do the parties want the arbitrator or arbitration panel to have?
- Do the parties want specific administrative rules to apply, such as the Commercial Rules of the American Arbitration Association (AAA), the rules of the International Chamber of Commerce (ICC), or those of another administrative body?
- Before arbitration, will formal mediation or an informal dispute resolution process be required?
- Will there be any limitations on discovery in the arbitration?
- If there is a dispute regarding whether a claim is arbitrable, who will determine arbitrability?[1]
- Will there be any limits on available remedies? For example, do the parties agree that no punitive damages may be awarded or that the arbitrator may not impose injunctive relief?

- How will attorney fees and arbitration expenses be handled; will costs be divided equally between the parties or will the non-prevailing party pay all attorney fees and expenses incurred?
- Do the parties want to include a statement that all documents, testimony, and proceedings in the arbitration will be treated as confidential?
- How will the arbitrator's award be enforced?[2]

All of the foregoing issues must be considered when drafting a meaningful arbitration provision in a business contract. In my experience, most litigators get involved well after the fact, sometimes years after the governing arbitration clause has been written by others and without any input from trial lawyers who will actually handle the arbitration proceedings. This can compromise the efficacy of the arbitration proceedings. Advocates in arbitrations should get involved in counseling clients and their corporate colleagues regarding best practices in drafting arbitration clauses.

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Make a Positive First Impression

A well-presented demand for arbitration or a carefully substantiated response to a demand for arbitration provides the arbitrator with a positive first impression. When claims and defenses are clearly described, the arbitrator is better prepared to assist the parties from the outset of a case. Advocates do a disservice to clients when a demand for arbitration is nothing more than a cryptic reference to breach of the operative contract, without any meaningful supporting factual information or specific legal claims. Likewise, clients are disserved if the response to the demand for arbitration is nothing more than a litany of denials.

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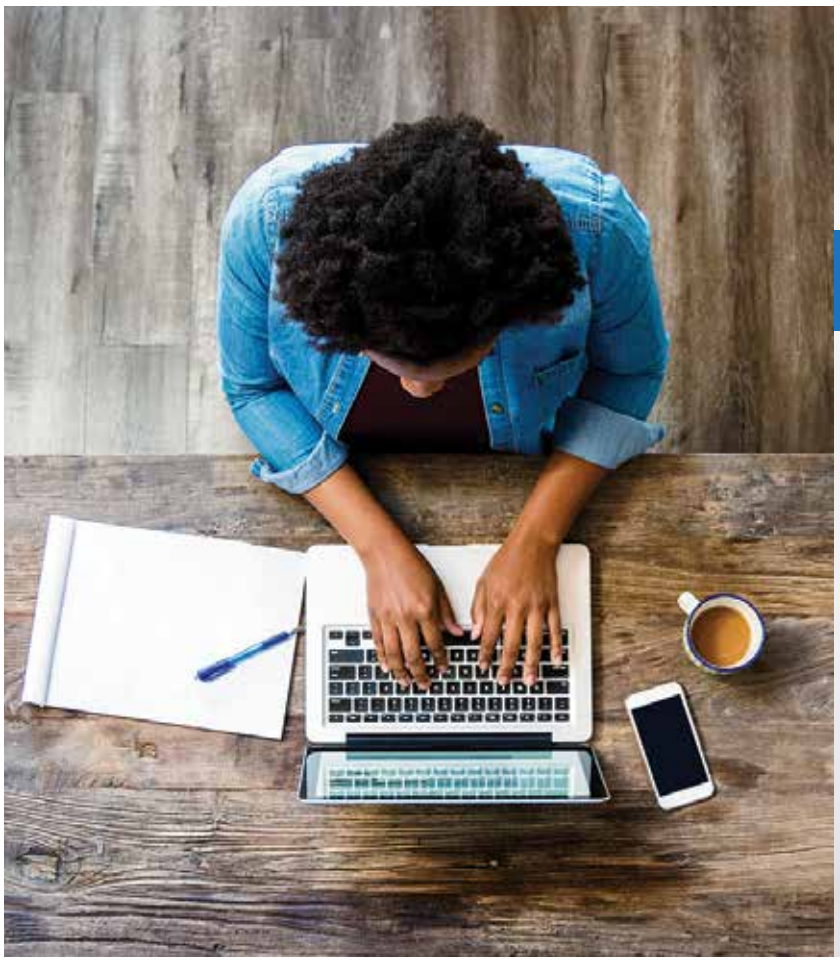

to do its job properly. In addition, clients better understand the scope of the factual and legal issues in dispute when the initial submission is clear and substantive. Counsel representing the claimant should quantify the basis for and extent of damages being sought and explain clearly any nonmonetary relief requested, including the need for a preliminary injunction. Counsel for the respondent should raise promptly any jurisdictional or procedural deficiencies, such as a non-arbitrable claim or a statute of limitations bar. At the earliest stage of the proceeding, take advantage of the opportunity to make a positive first impression and to begin the critical process of persuasion.

Be Proactive in Preparing for the Preliminary Hearing

Counsels' first encounter with the arbitration tribunal occurs at the preliminary hearing, which is often held telephonically. Preparing promptly for the preliminary hearing can make a significant difference in the development of the case. Start by reaching out to opposing counsel before the preliminary hearing and then, to the extent feasible, cooperate in outlining the hearing parameters. The arbitration clause will presumably state the governing law and venue of the arbitration. But counsel can agree on many other aspects of the prehearing process. In most arbitrations, even when there are no depositions, the parties are required to exchange documents. At the earliest opportunity, counsel should discuss issues surrounding electronically stored information (ESI), including logistics regarding appropriate search terms as well as the timing and format of documents produced electronically.

In preparing for the preliminary hearing, counsel should endeavor to reach agreement regarding limits on written discovery and reasonably prompt deadlines for fact discovery. When experts are anticipated, counsel should discuss the general subject areas for expert testimony, the template for expert reports, and reasonable deadlines for expert discovery.

If the arbitration clause does not address whether there will be depositions and the number of depositions that each party is entitled to take, it is important to discuss in advance with opposing counsel how many depositions are needed, the maximum amount of time allowable for each deposition (or the maximum number of hours for all depositions), and any other reasonable parameters to limit deposition discovery. It is most important to identify the key witnesses for each party. Unless the parties agree to forgo depositions, or the arbitration clause precludes depositions entirely or addresses depositions explicitly in some unique way, arbitrators will typically allow only a few depositions in complex commercial arbitrations so that the arbitral process does not devolve into protracted litigation.

In preparing for the preliminary hearing, confer with opposing counsel regarding the number of days needed for the hearing on the merits and the earliest time frame within which the parties and counsel are available for the evidentiary hearing. It is advisable to discuss whether some or all parties want to pay for a court reporter at the hearing. Also, decide whether the arbitrator should issue a standard award, a reasoned award, or detailed findings of fact and conclusions of law. In my experience, the parties typically want a reasoned award, which is the most prudent approach in most complex disputes.

In addition to the foregoing issues, at the preliminary hearing the arbitrator will typically address firm deadlines for (1) exchanging preliminary and final disclosures of testifying fact and expert witnesses; (2) requesting subpoenas; (3) exchanging hearing exhibits; (4) agreeing on joint exhibits; (5) exchanging demonstrative exhibits; and (6) submitting prehearing briefs.

Do Not File Unnecessary Motions in Arbitration

Frequent and unnecessary motions practice contributes to the high cost of litigation. Resist the urge to file non-dispositive discovery motions in arbitration. Some arbitrators require counsel to alert them to a discovery dispute by filing a very brief letter or email describing the disputed issue. The goal is to minimize the time and expense of formal motions whenever discovery or other non-dispositive disputes can be handled informally.

Similarly, dispositive motions should be avoided in almost all arbitration proceedings. There is a presumption against granting a dispositive motion if there is a material issue of fact in dispute. Although there are very few grounds on which an award can be vacated, one such ground is an arbitrator's refusal to hear relevant evidence. As a result, motions for summary judgment are rarely granted. The only types of issues that warrant prehearing dispositive motions are those based on jurisdictional or legal issues where there are no factual disputes, such as a non-arbitrable claim or a claim clearly barred by the applicable statute of limitations. These types of motions can and should be filed and decided as soon as possible.

Seize the Power of Prehearing Briefs

The prehearing brief is critically important. It should provide the arbitrator with additional details regarding the background of the dispute and present a clear and compelling summary of the case. The prehearing brief should provide supporting legal authority, attaching and highlighting the pertinent portions of key cases. If there are any difficult evidentiary issues, these should be brought to the arbitrator's attention. All counsel must describe the factual details and substantiate their respective claims and defenses effectively. In addition, the claimant must clearly state the relief it seeks.

Be a Credible, Persuasive Advocate

Devote the same preparation to arbitration that you devote to cases tried in court. Focus on each phase of the proceeding to maximize the effectiveness of your advocacy.

Prepare, Prepare, Prepare

Fundamentally, counsel must know the case exhaustively. Anticipate every counter-argument. Be ready for the unexpected. Read all relevant documents, especially those that are not helpful to your case. Research the law. Work with your witnesses. Prepare crisp, effective cross-examinations. Remain vigilant.

Never Pass Up the Opportunity to Make an Opening Statement

The opening statement is the culmination and synthesis of your preparation. Use it to capitalize on the months you've spent living with the case by crystalizing its critical aspects to a few salient points that can be easily understood, absorbed, and believed.

An opening statement should be brief but compelling, incorporating the most critical facts, concepts, and themes of the case. Tie the anticipated evidence to the key legal issues that the arbitrator will decide. It is crucial to describe the key facts accurately and to deal candidly with bad facts, anticipating (if representing the claimant) or addressing (if representing the respondent) opposing counsel's arguments briefly but powerfully. Reserve most of the purely legal arguments for closing argument and/or post-hearing briefs.

The opening statement is designed to reinforce what the arbitrator has already read in your prehearing submissions. Use demonstrative graphics to summarize information supporting your themes; great graphics are impactful, but misleading graphics lose lots of points (see further discussion on this below). Make sure that these graphics are accurate, because your credibility is always at stake. Strive to never overstate or lose credibility with the arbitrator.

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Be Professional at All Times

Your reputation is your most important asset as a trial lawyer. Be professional at all times throughout the arbitration process. Civility to opposing counsel is critical. Never personally attack or disparage your opponent. Refuting an opposing argument is different from personally attacking opposing counsel.

If opposing counsel insults you (or your client) or flaunts the rules, remain calm, rational, and articulate. If opposing counsel engages in unprofessional conduct, rise above the pettiness and score points with the arbitration tribunal by maintaining your professionalism. In addition, advise your clients to be present and paying attention at the hearing, not whispering, texting, reading emails, or darting in and out of the hearing room.

Be Organized

Although thousands of documents may have been exchanged during the prehearing discovery process, it is your job to winnow those documents to the critical ones that support your case.

Consider setting up a conference call with opposing counsel to stipulate to a procedure that minimizes confusion, fosters expeditious presentation of witness testimony, and is fair to both parties. For example, counsel can agree that they will provide each other with a list of the witnesses their side will call the following day, the order of the witnesses' testimony, and a list of documents that are reasonably anticipated to be used during direct examination of that witness. Counsel should consider stipulating to the admissibility of *all* business records when appropriate and agree to avoid wasting hearing time laying an evidentiary foundation to establish that a document is a business record. If there are objections to any of the exhibits to be used in direct examination, the parties should meet and confer to resolve the objections. If they cannot reach a resolution, the objections should be brought to the arbitrator's attention as promptly as possible to avoid interference with the scheduled timeframe for the hearing.

At the hearing, counsel should provide the arbitrator and opposing counsel with a notebook of exhibits to be used during direct examination of each witness. At the conclusion of the hearing, counsel for the parties or their paralegals should confer to ensure both that they are in agreement regarding which exhibits have been admitted and that the arbitrator has copies of every admitted exhibit.

In many arbitrations, the parties desire to split the time evenly. Counsel should designate a paralegal or other individual to keep track of the time used by each side during the hearing.

Hopefully, there will be no disagreement over the allocation of time. If there are any such disputes, they should be raised with the arbitrator immediately.

The above logistical and procedural agreements are recommended because the goal of arbitration is to present the parties' dispute as efficiently, clearly, and substantively as possible, so that the arbitration tribunal can render a decision fairly and expeditiously. Seasoned arbitrators will not allow arbitration proceedings to get bogged down in procedural wrangling. Similarly, effective advocates in arbitration should act preemptively to preclude those types of distractions from occurring during the course of the hearing.

Use Demonstrative Exhibits

In preparing a case, good lawyers become completely conversant with all of the key documents, dates of meetings, and critical events. Share your knowledge with the arbitrator by presenting a clear, cogent timeline that distills these critical dates, documents, and events. A concise chronology makes it easier for the arbitrator to absorb the salient facts to reach a rational conclusion. Graphs, damages charts, maps, photographs, and videos are all useful, particularly in a complex case. It is helpful to highlight critical portions of key documents or provide "call outs" of key passages in a document.

The trial lawyer's job is to educate the arbitration tribunal regarding the case. To be more effective and persuasive, a trial lawyer should provide evidentiary support for the case theories and reinforce trial themes with documentary and graphic evidence.

Be Strategic in Direct Examinations

Learning to prioritize makes you a more persuasive advocate. Before deciding to call any witness to testify, ask yourself the following questions: Why call this witness? How will the witness address any element of the claims or defenses? What exhibits can be introduced through the witness? How can the witness bolster or detract from the credibility of others who may testify? And how can the witness strengthen the presentation of the case or appeal to the arbitrator's sense of justice?[3]

Direct examinations should provide supporting details on issues that are important to the claims or defenses of your case. Details on unessential points cause confusion and detract from the persuasiveness of your client's story. As all good trial lawyers know, the key principles of persuasion are primacy, recency, and strategic repetition. The most important information should be presented first and last. Less important details can be sandwiched in the middle. In general, dwell on the important points of each witness's testimony, emphasizing their significance. Start strong and end strong.

Present Compelling Cross-Examination

As in any trial, the advocate in arbitration must cross-examine carefully and briefly, always setting realistic goals. As a cross-examiner, you have the right to ask leading questions and the right to insist on a responsive answer. Remember that cross-examination is undertaken only to serve some purpose within your theory of the case. Before cross-examining a witness, determine whether the cross-examination can:

- be used to establish facts detrimental to the opposing party's case;
- create inconsistencies among the opposing party's witnesses;
- point out positive facts to support your client's version of events;
- discredit the witness by showing that the witness is biased or has a financial interest in the outcome of the case;
- reveal that the witness has testified inconsistently or been untruthful in the past; or
- demonstrate that the witness's testimony is inherently implausible, or that the testimony conflicts with the testimony of other, more credible witnesses.

The bottom line is that you should be selective in how you choose to cross-examine each witness.

Cross-examination of an opposing party's expert witness requires additional preparation. Do your homework. Your research should include the subject matter on which the expert is testifying, as well as the expert witness's professional background. What articles or books has the expert published? Can you obtain transcripts of prior trial and/or deposition testimony of the expert? Are you able to impeach the expert

10 TIPS FOR EFFECTIVE ADVOCACY IN ARBITRATION

1. Get involved in counseling clients and corporate lawyers regarding best practices in drafting arbitration clauses.
2. At the earliest stage of the proceeding, take advantage of the opportunity to make a positive first impression and begin the critical process of persuasion.
3. Prepare promptly for the preliminary hearing; work cooperatively with opposing counsel; and consider customized procedures for the hearing on the merits.
4. Resist the urge to file non-dispositive discovery motions.
5. Seize the power of prehearing briefs.
6. Keep your opening statement short, clear, and persuasive.
7. Be professional, organized, and strategic.
8. Use demonstrative exhibits effectively.
9. Embrace questions from the arbitrator.
10. In your closing argument and/or post-hearing brief, include ample evidentiary support for your case theory, invoke the trial themes, and provide analytical support in the case law.

with his own prior assertions in other cases?

Other areas for potential cross-examination of experts include favorable concessions on threshold issues. For example, the opposing expert may agree with your own expert on certain points or may acknowledge the reliability of your own expert's data or the validity of her assumptions. You may be able to elicit concessions regarding several of the major premises of your case, even if the expert disagrees with your ultimate conclusion. You may also be able to extract a significant criticism of the opposing party's conduct. In other words, even if the opposing party's expert has reached a final conclusion favorable to the party that hired her, she may be unwilling to approve all of that party's underlying conduct.

Finally, you may be able to challenge the expert witness's independence and impartiality. Some experts have an ongoing relationship with opposing counsel or the opposing party, which compromises the independence of their opinions.

Like cross-examination of a fact witness, the best practice is to cross-examine an expert witness briefly, saving the best for last, and emphasizing primacy and recency.

Embrace Questions from the Arbitrator

The arbitrators' questions may provide some insight into what is puzzling or confusing them. Don't squander the opportunity to clarify or enlighten the panel. Keep an eye out for the arbitrators' reactions to testimony. And make sure that the arbitrators have an exhibit in front of them before questioning the witness about it.

If your client can afford to use technology to project exhibits digitally on a large screen, that can be a helpful tool for the trier of fact. It enables the arbitration panel to follow along as you highlight, in real time, the key sentences or paragraphs that are the subject of fact or expert witness testimony.

Present a Powerful Closing Argument and/or Post-Hearing Brief

Final argument is a critical point in the case to demonstrate your advocacy skills. This is the time to focus your analytic, interpretive, and forensic skills on the task of persuasion. The final argument must communicate your theory of the case, supporting the themes with a synthesis of the evidence adduced from various witnesses and exhibits in a manner that leads ineluctably to the conclusion that your client should prevail. Your final argument must be logical, legally supportable, and credible. In final argument, unlike opening statement, you are entitled to draw legal conclusions based on the evidence presented.

If your client has a court reporter at the hearing, the reporter's transcript can provide invaluable assistance in preparing closing argument or a post-hearing brief. You can use excerpts from the transcript to emphasize the import of a witness's testimony. Post-hearing briefs should provide the tribunal with supporting case law, highlighting key portions of the applicable legal authority.

Your closing argument and/or post-hearing brief must tell a persuasive story, with ample evidentiary support for your case theory. It should consistently invoke the trial themes and provide analytical support in the case law.

If you represent the claimant, it is imperative to articulate clearly the relief that your client is seeking. Provide the arbitrator or arbitration panel with a calculation of the damages being sought. If you represent the respondent and are challenging the claimant's damages, provide a detailed analysis of the errors in the claimant's calculation and, if applicable, state the assumptions on which your alternative calculation is based.

To the extent possible, do not resort to reading your argument from a prepared text. Make every effort to maintain eye contact and communicate directly with the arbitrator. The speed, inflection, and volume of your voice can be important persuasive tools. If you have an impassioned closing argument, don't be overly dramatic or emotional in ways that undermine your credibility.

In your post-hearing brief, put yourself in the arbitrator's shoes. Think about what you would want to know about the case to render a decision in favor of your client. Make sure that your brief is easy to read and well organized, with headings and subheadings to facilitate access to key points. The closing argument and post-hearing brief provide opportunities to address any inferences to be drawn from your cross-examinations. These final communications with the arbitrator are the culmination of the case. A good closing argument can crystalize and enhance a well prepared evidentiary presentation, but it is unlikely to resurrect a poorly presented case.

Conclusion

Understanding the salient differences between arbitration and litigation and following the tips outlined in this article will help counsel become a more effective and persuasive advocate in arbitration. CL

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NOTES

1. If the AAA's Commercial Rules apply, the arbitrator is empowered to determine the arbitrability of a claim.

2. The AAA provides sample arbitration clauses that include the following language: "Judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof." *See* www.adr.org/Clauses.

3. For an in-depth treatment of arbitration advocacy skills, consult Cooley with Lubet, *Arbitration Advocacy* (NITA 2d ed. 2003).

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