HUMAN FACTORS

Arbitrators can be counted on to respond favorably when counsel is well-prepared, thoughtful and courteous. Anticipating a neutral's needs and planning ahead also help.

By Deborah Rothman

Some employers choose arbitration over trial to avoid the unpredictability of jury decisions. However, an important element of winning an arbitration is counsel's knowledge of human nature: arbitrators, though usually lawyers, are also human.

Briefs. The ideal arbitration brief would constitute a combination of jury instructions and fill-in-the blanks award: the brief is no place for boilerplate. For instance, following a fairly even-handed recitation of the facts, claimant's brief in a wrongful termination dispute might contain a separate paragraph for each element of the claim, with the name of each element highlighted, a description of the precise facts expected to be proven and an indication of whether the evidence will be introduced via testimony, exhibits, or both.

In addition, the brief should list and evaluate the defenses raised, specifically indicating why each defense must fail—no credible evidence, not a legally cognizable defense, etc. It is astounding how many briefs do not articulate the relief sought, including attorneys' fees, costs of arbitration, the arbitrator's fee, etc. After reviewing the brief, even the most inexperienced arbitrator should be able to render a favorable and—just as important—confirmable award.

Exhibits. Trial exhibits, if they are to be relied upon by the arbitrator as authoritative rather than be discounted, should be comprehensible and persuasive, and should demonstrate as little bias as possible. An enlarged copy of the timeline, for example, allows the arbitrator to more easily imagine significant events in context. The dates, if fixed, should never be shaded. However, arbitrators are generally not put off by counsel's advocacy in the use of descriptive labels applied to events, as long as counsel stands far back from the line separating advocacy from fibbing, and description from whining.

Because document binders are heavy and must be transported several times during lengthy arbitrations, counsel should attempt to prepare a joint exhibit binder, with all duplicate documents eliminated. Some arbitrators directly annotate exhibits in response to testimony. When opposing counsel directs the arbitrator to turn to the identical document with a different number, the arbitrator may be inconvenienced, spending time trying to find the annotated version of the same document. What if the two sides possess slightly different versions of the same document, *e.g.*, one version contains hand-written notes in the margin? Perhaps the two documents could be listed consecutively in the exhibit binder to make comparisons easier.

Indices. Another winning technique involves exhibit preparation. If the economics of the case warrant it, counsel in a case involving forty or more documents should consider

offering the arbitrator, in addition to the numerically-ordered joint exhibit list, one or more additional indices to their own documents. For example, while the jointly prepared exhibit list will contain a numerically ordered list of the documents in no discernible order, counsel may wish to prepare another list using the commonly-referred to names of the documents, e.g., "Buy-Sell Agreement," "Whistler's 12/7/85 letter to his mother," etc. Another index might be chronological, and a third, a list of documents in the order counsel considers persuasive.

Experts. It is critical that the arbitrator be able to follow the expert's technical testimony. An excellent trial attorney recently did precisely this, in a clever, non-condescending way. He was leading his expert, a CPA with a Harvard Ph D. in financial analysis and physics, through her analysis of his client's damages. She had performed three different valuations of the company from which claimant had been terminated, using three different methodologies. Counsel stooped her several times after she had completed weighty, technical paragraphs worth of testimony and said, for example, "Dr. Smith, I'm sorry, that's a little over my head. Could you go back and explain for me again, perhaps in simpler language, how you reached the conclusion that the arbitrator should use this particular valuation methodology in making her damages calculation?" It was not until after the expert had left the stand that the arbitrator realized that counsel, having retained and prepared her, was intimately familiar with the expert's testimony, and that the entire repetition exercise had been for the arbitrator's benefit.

Witnesses. Counsel should rein in well-intentioned witnesses who might shade their testimony in order to support the claim. First of all, shaded testimony is easily impeached, occasionally by another of one's own percipient witnesses. Second, shaded testimony often lacks the ring of verisimilitude that can sway an arbitrator from equipoise to an award in one's favor. For example, skillful defense litigators lead aggrieved plaintiffs and their supporting witnesses into conceding that the plaintiff was angry, even furious, after the act(s) which engendered the claim. Testimony that that employer's actions angered the claimant is a weapon the defense can use to attack the claimant's credibility. Denying anger, on the other hand, in the face of arguably provocative misconduct, might be interpreted by the arbitrator as dissembling. This shading hurts claimant's case even more than the truth, for it leaves the arbitrator in the untenable position of having to decide if the plalintiff is inhumanly insensitive, or purposely shading the testimony to appear to lack a motivation to fabricate. If the arbitrator believes the former, a hefty award for emotional damages is unlikely. If the latter, the arbitrator cannot help but wonder what other testimony this witness has shaded.

Motions. Frivolous motions are to be avoided, of course. But there is no reason not to make a motion for non-suit when claimant rests. The shibboleth of many arbitrators, especially more inexperienced ones, is "when in doubt, don't throw it out." Naturally, arbitrators seek to avoid the overturning of their award for failure to consider material evidence in contravention of CCP§ 1286.2 (3). However, the granting of some or all of a motion for non-suit does not prejudice claimant's right to have all material evidence considered. Rather, it furthers one of the touted benefits of arbitration, efficiency, by permitting an early testing of the viability of one or more claims after the claimant has

rested. The granting of a motion for non-suit as to one or more claims can significantly reduce the resources—attorney time, client time, expert witness, brief writing, etc.—necessary to successfully defend the remaining claims.

Record All of these considerations can be enhanced by some simple preparations designed to keep the record clear and accurate. In making a record, assuming a court reporter has been retained, counsel may wish to provide the reporter with an alphabetical list of every potentially unusual or difficult words that counsel wants spelled quickly and accurately. While reviewing the transcript, the arbitrator may be subliminally swayed by the fact that all of one side's testimony is readable and clear, while the other side's testimony appears to have a number of typos.

Etiquette. Another area in which counsel can enhance persuasiveness is etiquette. Counsel who take every opportunity to needle opposing counsel do their clients a serious disservice. Some attorneys are so adrenalized that they cannot let even an insignificant misstep avoid their sword. These petty, aggressive breaches of etiquette embarrass arbitrators and do nothing to further the client's cause.

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