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Essentials For Success In Arbitration

Law360, New York (June 9, 2011) -- The objective of this article is to provide simple suggestions to avoid common pitfalls when presenting cases in arbitration.

Should I arbitrate this case?

Is the case suitable for arbitration? A high damage potential accompanied by a plaintiff who does not present well is often better suited for arbitration. Similarly, the passions and prejudices that could be evoked against a corporate defendant in trial will often be ameliorated through the analytical eye of an arbitrator. Cases with highly technical issues are often best presented to an arbitrator.

Consideration should be given to arbitration versus mediation. Where the risk and exposure ranges are high, extreme risk can be avoided and the ultimate loss eliminated through the use of mediation.

Who should be my arbitrator?

Selection of the arbitrator is a critical step in representation of an arbitrated matter. The selection process will depend, in part, on the formality or informality to be utilized at the hearing. Unfortunately, the “dark side” of alternative dispute resolution has produced arbitrators who “split the baby” in an effort to avoid offending either side. If you have a case where a compromise award is the goal, you should seek out one of those arbitrators. If the case has complex legal or technical issues, it is important to identify an arbitrator who is attentive, thorough and well-versed in the substantive law. If the plaintiff wants to hit a home run, or the defendant is seeking a defense award, you’d better find an arbitrator that has a history of “calling it as they see it” and rendering those awards when the testimony, evidence and law justifies the outcome.

The style of the arbitrator is important as well. Does your case need a strong management hand to rigorously enforce the Rules of Evidence or ensure that the requested timetables are met? Or, do the parties prefer a more laid-back approach? Some arbitrators are able to do both, depending upon the needs of the case. Others utilize a fairly autocratic style that does not change from case to case.

Establish the ground rules.

Jurisdiction of the arbitrator is determined by some form of arbitration agreement executed by the parties. In many instances, where the rules are not in a contract, counsel do not communicate, and do not create, a formal agreement. It is important to have a clear understanding of the priority of testimony, Rules of Evidence, document exchange, number and identity of witnesses, and a realistic estimate of the length of the hearing. When this does not occur, there can be surprises and undue waste of arbitration time. At worst, key evidence such as a medical report prepared after deposition testimony has been concluded, or rebuttal witnesses, could be excluded. I recommend a prehearing conference call with the arbitrator followed by a clear scheduling order establishing or confirming the rules of the process.

Meet and confer and set a discovery schedule

Avoid law and motion practice in arbitration. Work cooperatively to exchange documents, and to produce and live by a discovery schedule. The arbitrator can assist with this and then create a formal scheduling order.

The brief

A briefing schedule should be established, and the brief submitted to the arbitrator, at least one weekend prior to the hearing, accompanied by a cover letter specifically requesting that the arbitrator read the brief prior to the hearing. Do not attach hundreds of exhibits to the brief. Instead, reference transcripts and reports by page number (or page and line) and attach a copy of the operative page, with the key information highlighted. At the hearing, the entire transcript or report may be introduced. Of course, if it is a short report, it may be attached as an exhibit. The purpose of the arbitration brief is impact. The opening paragraph should tell the arbitrator exactly what the case is about and the nature of the remedy sought. The brief should be clear, concise, well written and carefully proofread. Long, ponderous tomes and briefs that lack professionalism are often not well received. Meaningful photographic exhibits should also be attached.

Prepare and produce exhibits

Make it easy for the arbitrator to read, access and review your exhibits. An exhibit does two things. First, it demonstrates to the arbitrator that you believe in your case. Secondly, it illustrates the evidence while concurrently providing you with an organized road map that will focus your presentation. If you know the order of your exhibits in examination, be prepared to hand the arbitrator or tribunal a copy rather than have everyone scrambling for the binder — and consider using a projector or Power Point. If there are a lot of exhibits and documents, provide the arbitrator with the documents on a searchable thumb drive.

Prearrange necessary witnesses

For an effective case presentation, certain witnesses must testify in person. Take the steps necessary to ensure that those witnesses are present, and that the order of testimony has been agreed to beforehand. Often you must secure the witness' presence well in advance of the arbitration date to guard against conflicts. If the witness is not your retained expert or a party, utilize a subpoena. If you don't, you run the risk of losing the testimony if the witness does not show up. If a subpoena is used, there is a remedy and, typically, a failure to appear will result in a partial or complete continuance.

Prepare your witnesses, including your client

Anticipate that opposing counsel will ask if your witnesses met with you and may inquire into the nature of the discussion. Therefore, great care should be taken to not lead the witness, and to ensure that the witness is testifying truthfully. However, you should take your witness through a dry run of anticipated questions and assist your witness in understanding the most effective way(s) to respond to examination. Witnesses should be encouraged to answer concisely, not argue with the examiner and not offer information beyond the scope of the question. If the witness uses the word "because," the witness is talking too much.

Experts, experts, experts

Experts are more effective if they are given the opportunity to analyze all the relevant information and data. It may cost more, but make sure they have the data and the time to review and prepare orderly testimony supported by an orderly graphic presentation. If the case has many data prongs, such as an errors and omissions case in the architectural context, analyze each discreet issue and monetize it. If the case involves the review of materials and a concise opinion, have the expert explain what they were hired to do, all the material reviewed and all the opinions formed.

Use objections sparingly

You are playing the scene to an audience of one (except in panel arbitration). Many arbitrators will subscribe to the rule that all evidence is admissible subject to the weight to be accorded by the arbitrator. You should expect this to be the rule, unless the parties have agreed to a different format in their arbitration agreement. Some arbitrators are particularly annoyed by objections that repeatedly interrupt the testimony. If you have that type of arbitrator, stop objecting! You can clear up most issues on cross-examination, and even make a comment in your closing argument. On the other hand, you should not be too complacent, and should utilize objections that will block inadmissible testimony as well as to control the overuse of leading questions. Finally, if you intend to utilize a speaking objection (which most arbitrators dislike), carefully consider whether you should ask that the witness be excluded while you raise the objection.

Show your warts

Every case has its problems. You should be the one to identify the problems that exist in your case, and then deal with them. This reduces the impact of cross-examination or impeachment. Prepare a concise closing argument that is focused, well reasoned and as brief as possible. Tell the arbitrator what you want to happen and why. If you're the plaintiff, ask for a specific amount of money. If you're on the defense, be sure to give the arbitrator options depending on potential findings.

Conclusion

Poor results in arbitration occur when attorneys do not prepare, when inadequate time has been reserved for the hearing, and when an air of disinterest is conveyed by counsel. Prepare and present your case with the thoroughness, commitment and dedication that you would expect of an attorney representing your interests. By following that standard, you will maximize the outcome for your client.

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