

Top Ten Mistakes Lawyers Make In Arbitration And Tips on How to Avoid Them!

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For over 30 years I have presided over or participated as a panelist in hundreds of arbitrations. Those experiences have shown me the good, the bad and the ugly. Quite frankly, there are many more seriously egregious mistakes I have seen lawyers make; it was difficult to pare this list down to 10.

#10 – Play Games: *Engage in Cheap Games and Discovery Abuse; Continue Gamesmanship During the Hearing*

Arbitration is no more a macho gladiator contest than litigation, though some lawyers (and their clients too, unfortunately) seem to believe that gamesmanship – hardball tactics, obfuscation and delay – is the way to win cases. Though they are wrong, they nonetheless:

- refuse to stipulate to anything
- object to practically everything, especially any proposal made by opposing counsel
- refuse to extend professional courtesies to opposing counsel
- insist on unbridled discovery rather than thoughtfully analyzing their client's and the opposing party's legitimate discovery needs and putting together a discovery plan that largely meets everyone's needs
- schedule depositions unilaterally and/or refuse to adjust the schedule to accommodate witness's or opposing counsel's legitimate needs
- lard responses to written discovery with lengthy and generally worthless (and usually unfounded) boilerplate objections
- unreasonably delay providing documents or information
- suddenly "discover" key exhibits during the hearing

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- reactively object to nearly all exhibits offered at the hearing by the other side
- whether at depositions or the hearing, lodge objections to examination questions that are largely specious, generally for the sole purpose of interrupting the flow of the case
- are coy about scheduling witnesses' hearing testimony
- refuse to cooperate in any respect

These lawyers and clients seem to believe that the arbitrator is impressed by these tactics or awards points based on counsel's cleverness in obfuscating matters, delaying resolution or raising the cost of the case. They don't. Indeed, tactics such as these are seen for what they are: simple gamesmanship. Parties and their lawyers who engage in them lose credibility with the only one who counts: the arbitrator.

Avoid games-playing like the plague. Like litigation, arbitration is an adversarial process; that, however, does not mean that basic professionalism and civility are ignored in favor of chest-thumping and uncooperativeness. Counsel should pick her fights with care; save arguments for those matters that are really important; try and resolve all other matters cooperatively. Remember that discovery in arbitration is substantially less broad than it is in litigation; tailor your discovery, and suggest a mutual discovery plan, that legitimately addresses the needs of the parties and the case; the arbitrator is unlikely to be receptive to a party's insistence on turning over every rock.² Avoid bringing numerous discovery disputes to the arbitrator for resolution; arbitrators don't like having to resolve such disputes any more than judges do.

#9 – Display Anger, Animosity and Rudeness: *Personalize Everything; Engage in Ad Hominem Attacks*

You have seen it before, the lawyer who:

- refers to the opposing lawyer or witness (or even the arbitrator!) disrespectfully

² The rules of most arbitration provider organizations give the arbitrator substantial power to manage and deal with discovery. See, e.g., Rules R-21, 30 and 31, AAA Commercial Arbitration Rules, and Rule L-4, AAA Optional Rules for Large Complex Cases. To the same effect, but more explicitly, is Section 17 of the Revised Uniform Arbitration Act (adopted in Washington (see RCW 7.04A.170), as well as in many other states). Moreover, commercial users of arbitration (and their general counsel), view overbroad discovery in arbitration as a significant, and expensive, negative. See Cutler, "Reclaiming the Promise of Arbitration," KING COUNTY BAR BULLETIN (July 2011), and *Protocols for Expedious, Cost Effective Commercial Arbitration* (Stipanowich, von Kann and Rothman, eds.) (College of Commercial Arbitrators, 2010), available on line at www.thecca.net. Experienced arbitrators tend to actively manage the discovery process so as to reduce the cost of arbitration and improve its effectiveness and efficiency.

- sneers, rolls his eyes or raises his eyebrows at arguments made by opposing counsel or a witness's testimony
- lards briefs or oral arguments with purple prose
- encourages or allows her client to make *sotto voce* comments about testimony, exhibits or case developments

Avoid personal attacks. Emotions can run high even in arbitration, but your clients have a dispute, which you have been hired to help them resolve – not to fan the flames. You can be a zealous advocate without stooping to the level of a street-fighter. Don't characterize the opposing side's arguments (or a witness's testimony) as "patently ridiculous" (or use similar purple prose) in your briefs, examination or oral arguments. Engaging in such conduct merely highlights for the arbitrator your (or your client's) lack of professionalism, civility and faith in the merits of your client's cause. The arbitrator is looking for objectively supportable facts and legal authority to help her decide the case. This sort of conduct detracts from the merits of your case and distracts the arbitrator from doing her job.

#8 – Overuse or Misuse Technology: *Use Fancy but Unnecessary Technological or Demonstrative Aids; Fail to Know how to use Them*

Technology is a wonderful teaching and learning tool. But using power-points or electronic displays for everything is generally unhelpful and can be distracting. Technology is especially unhelpful (and distracting) if it doesn't work. Moreover, unless you print out whatever you display electronically, the arbitrator won't have a record of your "techy" presentation available to refer back to after the hearing.

In deciding what technology to use, and how, remember that the point of the hearing is to tell your side's story to a particular audience: the arbitrator. Ask yourself if your proposed tech aid facilitates the telling of that story or gets in the way. You will have presented exhibits in paper form (commonly in a tabbed ring-binder), which both the arbitrator and the witness will have available during the hearing. Putting exhibits up on a screen (generally with ambient lighting making it difficult to read and follow along; extinguishing the lights makes note-taking difficult or impossible) is frequently unhelpful and often counter productive. If there is a key phrase or section in an exhibit that you wish to highlight, have a large and readable blow-up made; it will be easier for the arbitrator and witness to read and assimilate. Most arbitrators appreciate counsel highlighting (a yellow marker does the job nicely) key portions of exhibits in their binder. The same holds true for squibs from deposition transcripts. If you are using technology, be sure you practice beforehand so that your presentation is flawless. If you are using a video squib (from a deposition, for instance), limit use to the really important parts and cue up any squibs so that the presentation is effective. If you intend to use a power-point presentation during your closing argument, be sure to print off a copy and give it to the arbitrator (and opposing counsel, of course) before the argument.

#7 – Waste Opportunities to Persuade the Arbitrator: Assume the Arbitrator Shares Your Knowledge of the Case; Fail to Analyze, Distill and Organize Your Case; File Long and Unpersuasive Briefs

By the time the hearing rolls around, you will have lived with your case – the facts and the law – for several months. The arbitrator may be a quick study, but she doesn't have the same knowledge base as you do. Your task at the hearing is to bring the arbitrator along – don't waste the opportunity to educate her. Your hearing brief ought to highlight the critical facts that will be adduced at the hearing, put those facts into context so their importance is obvious, and apply the law to the facts. Make sure the arbitrator knows who the main players (and witnesses) are, and why their testimony is important; cover the elements of your claim or defense. If a timeline is important, consider preparing a chronology.

Briefs should be focused and as short as possible. Even if the arbitrator doesn't place a page-limit on briefs, use local federal or state brief limits as guidelines. If your hearing brief is longer than 30 pages, try again. Remember that a reply brief is designed to reply to an argument that your opponent has made in opposition (and which you may not have addressed to your satisfaction in your opening brief); don't simply repeat all the arguments made in your opening brief.

#6 – Ask Inappropriate Questions; Fail to Pickup on an Opportunity to Deal With Something the Arbitrator views as Important; Ignore a Witness's Non-Responsive Answer: Ask Questions That are not Really Questions or ask Overly Legalistic Questions of a Lay Witness; Rebuff Questions from the Arbitrator

Long, wandering "questions" are to be avoided, as are questions asking for a legal conclusion – from either a lay or expert witness. Strive for short, crisp questions. Write your questions out ahead of time or practice them. Be sure there is a question mark at the end. The power of the witness's answer depends on the clarity of the question it responds to; if the witness is confused, the arbitrator will likely be confused as well.

Ask questions of witnesses; don't testify yourself. The arbitrator is interested in the witness's testimony, not yours.

Listen to the witness's response: the arbitrator will hear what the witness says, not what you expect him to say. If the witness fails to answer the question you asked, repeat it and ask for a response. A motion to strike as non-responsive will highlight for the arbitrator that the witness may be evasive or not paying attention.

Welcome questions from the arbitrator; if she asks questions, assume that she really is interested in the answer. Don't put the arbitrator off by saying, "I'll come back to that."

In all likelihood you won't. Even if you do, you will have missed an opportunity to respond timely to something the arbitrator wanted more information about.

#5 – Assume the Evidentiary Rules in Arbitration are the Same as Those in Court: Fail to Take the Time to Understand the Rules of Evidence; Make Numerous and Ineffective Evidentiary Objections

While “not everything goes” in arbitration, arbitration hearings are generally unfettered by the evidentiary rules applicable to court proceedings. It behooves counsel to know what rules there are and to act accordingly.

Most arbitration providers have rules similar to Rule R-34, AAA Commercial Rules³, which states the general evidentiary rule applicable in arbitration: “Conformity to legal rules of evidence shall not be necessary” and “The arbitrator shall determine the admissibility, relevance and materiality of evidence offered....” To the same effect is Section 15 of the Revised Uniform Arbitration Act.⁴

Most arbitrators will allow leading questions on preliminary matters or matters which are not critical to disposition. Avoid, however, leading your own client: doing so telegraphs to the arbitrator that your client is unable to testify . . . so you have to do it for him.

Lay an appropriate foundation for key evidence, but don't overdo it. Faced with a “lack of foundation” objection, many arbitrators will overrule it and tell you that you may demonstrate the unreliability (or irrelevance) of the evidence on cross. Pick up on that and heed her advice. The case will move along more quickly and, assuming you ask crisp, focused questions on cross, the arbitrator will get the point that your opponent's evidence is to be ignored or not to be accorded much weight.

While arbitrators will not generally accept 3rd or 4th hand hearsay, they will frequently allow hearsay if the evidence is of the sort that a reasonable and prudent business-person would rely on, reserving for herself a decision on the weight that such evidence should be accorded. Just because a hearsay objection could (and perhaps should) be made at trial, does not mean that objection should be made at the arbitration hearing.⁵ Making numerous and repetitive objections, especially hearsay objections and sweeping admissibility objections to exhibits on any ground, at the hearing is most often counterproductive and serves only to diminish counsel's effectiveness in the eyes of the arbitrator. Wise counsel will limit her objections to those which are recognized in almost

³ References to the AAA's Commercial Rules are to the October 1, 2013 edition, available at www.adr.org.

⁴ See RCW 7.04A.150(1).

⁵ A key reason for objections at trial is to preserve one's record for appeal. Not only is there commonly no transcript of the arbitration hearing, there is very limited judicial review of an arbitrator's award. See 9 U.S.C. §10 (Federal Arbitration Act), Section 23 of the Revised Uniform Arbitration Act and RCW 7.04A.230.

every context, such as those based on attorney-client privilege, or which are not only critical to the case but also likely to be sustained (*e.g.*, questions about settlement or mediation).

At trial, counsel would hardly ever get away with introducing a declaration or affidavit from a witness. The same is not true in arbitration. *See, e.g.*, Rule R-35, AAA Commercial Rules, which permits such evidence under certain circumstances. Your chances of getting the arbitrator to give your witness's declaration or affidavit substantial weight will be improved if you make the witness available for cross-examination either by telephone or video conference; indeed, the arbitrator may require that as a condition of admitting the statement.

#4 – Misuse Cross-Examination of Witnesses: *Try and use Cross to Prove Your Case in Chief; Fail to Plan Cross Before the Hearing*

Any student of trial advocacy knows that cross-examination is one of the most powerful tools available to counsel. Nonetheless, lawyers continue to:

- ask open-ended questions on cross, giving the witness an(other) opportunity to tell “his” side of the story
- ask questions to which the lawyer does not know the answer (a bad idea unless the lawyer doesn't care what the answer is)
- try and use cross to prove her case-in-chief
- spend time on cross laboriously challenging every jot and tittle of the witness's direct examination, especially as to matters that are not important

Generally, the most that counsel can hope for from a witness on cross-examination is that some in-roads can be made debunking a key point of the other side's case. If you have prepared your case well, you will know what points you can get from the witness on cross. Make a short list and get to it. Except in the unusual case, resist the temptation to grill the witness for hours on everything he or she said on direct. While there is truth to the “death by a thousand cuts” maxim, it is rare that such a strategy yields significant results at a hearing.

#3 – Continue Blithely on, Ignoring What Common Sense Tells (or Should Tell) You: *Fail to Know When to Stop; Treat the Arbitrator as an Unsophisticated Rube*

The arbitration hearing should not be an endurance contest. Counsel's task is to present sufficient evidence on key factual points to sustain her client's burden of proof and provide a foundation for closing argument; do so and then STOP! There is a difference between “corroborating” evidence and “cumulative” evidence. Recognize it.

Know your arbitrator's professional background and work history; know the elements of proof needed. Prepare your case accordingly. While your arbitrator may not be an expert on your client's industry or the particular legal issues your case presents, he is an intelligent individual, who frequently has "tried" cases before, if not as an arbitrator then as counsel. If the arbitrator tells you that "I got it", believe him. Burdening him with hours more testimony on the same subject will not help him rule in your favor; it will likely antagonize and frustrate him.

#2 – Make it Difficult for the Arbitrator to Rule in Your Client's Favor: *Fail to Organize Your Case and get Your Client's Story Across*

One would think that counsel would do everything possible to help the arbitrator rule in the client's favor. It's amazing how many times counsel does not do so. In arbitration, your only audience should be the arbitrator. Make it easy for the arbitrator to understand your case and follow along.

The arbitrator can only rule in your client's favor if he understands the facts and why they are important. In order for the arbitrator to "get it" he needs to be told clearly who did what to whom (or didn't do something) and how that plays with all the other facts that are important. Begin to do that in your arbitration brief (if you haven't had an opportunity before then to give the arbitrator a taste of what the case is about).

Similarly, the arbitrator needs to understand the key legal principles that undergird your case. While some believe that arbitrators try and do equity (some say, by "splitting the baby"), in my experience arbitrators do their best to apply applicable law to proven facts and let the chips fall where they may. To that end, counsel needs to clearly and cogently – and persuasively – demonstrate to the arbitrator what the law is, and how the law compels an award in your client's favor. Do not assume the arbitrator knows what the law is.

Every case has a "story" to tell. That story should be simple, interesting and based on fact – not fiction. Commonly, exhibits are an important part of that story. Prepare your witnesses to tell the story in their words; let them tell it. Make sure you integrate exhibits with testimony. If, as is most often the case, chronology is important, prepare a chronology or time-line; find a way to use it as an exhibit, even a demonstrative one.

Organize the exhibits chronologically, or by issue; eliminate duplicate copies of exhibits (there should be only one exhibit that is the contract at issue); number exhibits so that there is only one "Exhibit 1" (you want the arbitrator to be able to easily find, track and follow exhibits and witnesses' testimony). Tell the arbitrator how you've organized your case.

Put all exhibits in one or more tabbed ring-binders. Be sure the arbitrator has her own set of exhibit binders; all counsel and the witness should also have their own set: don't

expect to look over the arbitrator's shoulder. Don't use binders with more than a 3-inch spine; when filled with paper, large-spine binders are too heavy and unwieldy. Put a few extra tabs in the arbitrator's binder to accommodate the inevitable "late" exhibits. When bringing additional exhibits to the hearing for insertion in the binders, make sure the exhibits are hole-punched so the arbitrator can easily add them. Consider using a separate binder of "core" exhibits that will be referred to frequently during the hearing.

#1 – Fail to Tell the Arbitrator Exactly What Your Client Wants: *Don't Tell her, Keep it a Secret; Hope the Arbitrator "gets it" by Osmosis*

Well before the hearing, develop a theory of the case and be sure your story is laid out by your witnesses (and the answers to your focused cross-examination) and exhibits. The arbitrator will never have the breadth of knowledge that you do – and probably doesn't want or need to. She does need a clear roadmap, however. Give her one.

Use your arbitration brief to tell the arbitrator exactly what relief your client wants, and why; repeat it in your opening statement ("the evidence will show that . . . and that an award of . . . should be entered") and again in closing argument. Give the arbitrator a draft award laying out the relief your client wants her to award. If you want injunctive relief, say so and tell the arbitrator what conduct should be prohibited and for how long; give her the legal basis for such an award. If you're seeking pre-award interest, specify the date and amount on which such interest should begin to run and the interest rate that should be used – and why.

Be careful what you ask for, you may get it. In Washington, attorneys' fees are awardable only where specifically provided for by contract or statute. However, if your arbitration is administered under the AAA's Commercial Rules, be aware of Rule R-47(d): "The award . . . may include . . . an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement." Asking for attorneys' fees only because your opponent has requested such relief (and there is no statute or contract authorizing it) can expose your client to an award for substantial fees even if they would not otherwise be available.