Ten Steps to Effective Arbitration Advocacy

By Amy Lieberman

Whether you regularly represent clients in arbitration, or only rarely, these ten steps will vastly increase your effectiveness as an advocate.

1. **Review the Arbitration Agreement.** This is your guide! It defines the scope of the arbitrator's authority. It will address who pays, and how you select an arbitrator. It may or may not prescribe what you can do in terms of motions and discovery. It may simply incorporate the American Arbitration Association's Commercial or Employment Rules. It may also cover the format and deadlines for exchange of information.

2. **Evaluate the Arbitration Agreement for Unconscionability.** Case law recognizes two forms of unconscionability that leave an agreement open for attack: *procedural* and *substantive*. For the procedural analysis, look to see if the agreement was mandated as a "take it or leave it" matter, or was it optional? Were the terms negotiated? For the substantive analysis, see if the agreement is balanced. Does it favor one side more than the other in terms of who can conduct discovery, who has access to witnesses, or who pays the costs? Review the case law on this issue.

3. **If Applicable, Read the American Arbitration Association's Rules.** The AAA rules are different for commercial and employment cases. You may be surprised at the differences with respect to filing fees, payment provisions for arbitration fees, discovery, and motion rules. If the AAA has made administrative determinations regarding the type of agreement and payment of fees, if you disagree, request that the arbitrator review the issue to see if the other party should bear the fees.

4. **Move to Stay/Compel Arbitration.** Often, a party to a dispute does not realize that the dispute is subject to an arbitration agreement, and so files a case in state or federal court. The remedy is to file a motion to stay the litigation and motion to compel arbitration. Before filing such a motion, however, contact the opposing party first by email or letter, asking if they will voluntarily submit to arbitration. You will save thousands in attorney's fees for your clients if you can avoid the fees incurred in having a motion granted by the court. If there is a dispute as to the arbitrator's jurisdiction, review the case law on who has authority to decide the arbitrator's jurisdiction – the court or the arbitrator. Finally, if there is a similar dispute pending in court, raising potential issues of collateral estoppel,

consider submitting a Motion to Stay the arbitration - or the litigation - pending a forthcoming ruling.

5. **Be Specific in your Statement of Claims and Defenses.** This avoids the problems that can arise when you learn for the first time, only days before the hearing, when you see opposing counsel's pre-hearing brief, that your opponent is asserting a new claim or defense you were not aware of – and worse, were not prepared to address. Fair notice is essential. And, last minute continuances to allow you to prepare are not likely to be granted.

6. **Draft a Proposed Initial Scheduling Order.** The purpose of the management conference is to set the date for the hearing, to schedule enough days based on the estimated length of time needed, and to set dates for exchange of information, including experts, as well as for the filing of dispositive motions, if any. There is much you can do *before* the conference: (1) See if your arbitrator has a standard management conference template. (2) Speak with opposing counsel and see what you can agree on in advance of the conference. (3) Check with your client and key witnesses to insure availability prior to the conference, to avoid having to hold another conference once you learn that an important witness will not be available on the date set for the hearing. (4) Consider requesting allocation of time limits for each side's presentation, to control the length of the hearing. (5) See if you can agree on search terms and other parameters for e-discovery.

7. **Avoid Filing a Motion for Summary Judgment on a Factual Issue.** Even where dispositive motions are allowed, most arbitrators are loathe to grant summary judgment unless the issue is purely one of law, preferring instead to hold a full hearing on factual issues. If facts or credibility must be evaluated for weight, all you will have done is spent thousands of dollars in legal fees that were not necessary.

8. **Present a Detailed Pre-Hearing Brief.** This is your opportunity to fully educate the arbitrator. If you do a thorough job of setting forth your claims, defenses and evidentiary support, along with supporting legal authority, you may obviate the need for a post-hearing brief or written closing argument. If you are the claimant, include the precise relief you are seeking. Arbitrators return to pre-hearing briefs after the hearing when they are reviewing the evidence and drafting their ruling, so thoroughness here is key to effective advocacy.

9. **Prepare for the Hearing.** This may seem obvious, but every arbitrator has seen attorneys who are quickly reacting to evidence they are learning about for the first time at the hearing. Even though arbitration is less formal than litigation, thoroughly prepare by reviewing all the documentary evidence and meeting with all witnesses. Good preparation avoids the resulting scrambling to recover when time is limited, and makes all the difference between winning and losing.

10. **Prevent Postponements.** For scheduling conflicts that arise on hearing days, consider changing the order of witnesses, or shifting the hours of the hearing. Think about alternatives to live testimony, including stipulations, affidavits, and videotaped or transcribed depositions. Also, be mindful of your time. If you take too long on witnesses, you may run out of the time allotted for the hearing. Your goal should be to begin and complete the arbitration at one time, so the evidence is fresh in the arbitrator's mind. Scheduling additional days when you unexpectedly run out of time can be a challenge, and can result in a lengthy delay. Remember, efficiency is one of the hallmarks of arbitration. Lastly, be aware that arbitrators typically charge cancellation fees for last-minute continuances.

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