Making the Transition from Great Trial Lawyering to Great Arbitration Advocacy

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We live in an age in which basic skills and processes are being redefined: Dictation v. doing your own word processing. Trial specialists v. Pre-trial litigators. Private arbitration v. public trials. Some school districts no longer require kids to learn how to write in cursive - - it's passé. Text messaging, emails, social media posts and "tweets" diminish our traditional writing skills; yet, arguably, they constitute the dominant forms of written communication today. In the midst of all this change, we must be careful to represent our clients with a high level of professionalism. However, traditional litigation skills are falling by the wayside. Few lawyers actually try jury cases or make appellate arguments. In today's legal environment, arbitrations are occurring more frequently. But many of the combat skills learned for the theater of traditional legal warfare are useless in an arbitration setting.

In the discussion which follows, we identify ways to counter the tendency for arbitration to make us lazy lawyers. We suggest that you: (1) understand the differences between judicial trials and arbitrations; (2) frame the issues correctly; (3) make an understandable factual presentation; (4) present a thorough legal analysis; (5) help the decisionmaker define the proper basis for decision; and (6) help the arbitrator evaluate the credibility of witnesses. Finally, we offer other suggestions to help you aid the decisionmaker.

I. Understand the Important Differences Between Judicial Trials and Arbitrations

In judicial trials, we focus intently on subjective and procedural concerns:

- Formalities of the proceeding
- Preservation of the record
- Drama
- Imagemaking
- Playing to the audience
- Rules of procedure
- Rules of evidence
- Motion practice

Arbitration is less formal. There is less theater and procedure and more focus on the substance of the dispute. The whole idea is to expedite the resolution of disputes and deliver a less expensive result. To this end, many of the traditional rules of engagement don't apply: evidentiary rules are looser, the procedure is less well-defined, the ability to challenge a decision is limited. Wrapping our minds around these differences is essential if we are to fully realize the benefits of arbitration.

II. Frame The Issues Correctly

It is critically important that the issues be framed precisely and accurately. Important aspects of a problem may not be considered sufficiently, or may be left out entirely, if the issues are not adequately framed. Advocates on each side will naturally frame the issues in the light most favorable to their clients. But arbitrators have the obligation to frame issues as they truly are, not necessarily as the parties have framed them.

III. Make Your Factual Presentation Understandable

Decisions are driven by facts. Arbitrators are called on to carefully scrutinize each situation. Decisionmakers must clearly understand the factual situation before them. It is tempting to jump to conclusions before hearing all the facts, and too easy to misunderstand what has been heard or read. Being human, arbitrators may be challenged to keep an open mind and carefully absorb the facts of each matter presented for decision. Thus the advocate's task is to present the facts in a clear, understandable and complete fashion. It is far better advocacy to bring unfavorable facts to the arbitrator's attention rather than avoid or obscure them. The decisionmaker will find out about them anyway from your opponent.

IV. Present A Thorough Legal Analysis

Good legal analysis promotes reasoned decisionmaking by arbitrators. Because arbitrators respect precedent, and can be overturned if they ignore the law, attorneys should not expect them to remake the world. Nevertheless, decisionmakers are free to determine whether a particular precedent or statute is applicable. Where no precedent exists, lawyers should focus their arguments on the trend and weight of the law. Good decision making requires arbitrators to examine sufficient authority to reach a comfort level as to the proper interpretation of the law. Arbitrators mainly rely on lawyers to do the legal research necessary to reach this level.

However, lawyers frequently limit their advocacy to the details or circumstances of the dispute and give short shrift to statutes and case law. Arbitrators often feel uncomfortable deciding cases on the basis of skimpy legal authority. Too many lawyers end their legal research when they find that "one" case, rather than developing their legal analysis to the point at which they have a competent grasp of the issues. The arbitrator's comfort level can be increased by showing that your position is consistent with the existing body of case law and the flow of recent precedent.

V. Help the Decisionmaker Define the Proper Basis for Decision

A variety of intangible factors can complicate decisionmaking and make it unpredictable. The arbitrator's present or former relationship with one of the attorneys may make a matter difficult to decide. The impression may exist that one side is favored as evidenced by the quantity of favorable rulings for that side. Further, arbitrators may consciously or unconsciously attempt to "balance" rulings by ruling for the opponent more frequently. Decisionmakers must fight through this "background noise" and decide issues on their merits.

Parties sometimes feel that decisions seem to have little to do with the law. Decisions seem result-oriented or based on the factfinder's own notions of fairness apart from the law. "Splitting the baby" allows arbitrators to give the parties some of what they want while avoiding the necessity of choosing between them. Although "all or nothing" decisions are unavoidable, arbitrators prefer those which involve choices. Consequently, effective advocacy sometimes means identifying choices or giving the arbitrator a roadmap to middle ground. These decisions result from the fact that arbitrators want to do what their conscience and intellect tell them is the right thing. Arbitrators, who are human, sometimes struggle to decide solely on a reasoned basis, and not on the basis of emotion. The advocate's role is to help the arbitrator develop the proper perspective of the case and define the proper basis for decision.

VI. Help the Arbitrator Evaluate the Credibility of Witnesses

The spectrum of cases tried by arbitrators ranges from complex, factually intensive cases to simple collection cases. The process of deciding each involves sorting through facts, determining what is relevant, identifying the issues, and applying the proper legal precedent. In every case, one of the most important factors is credibility. Simply put, credible parties and lawyers are more likely to obtain favorable rulings than those who lack credibility. Evaluating credibility, however, is tricky business. Credible witnesses are not necessarily the ones who testify with the most fervor or who most seem to believe in what they are saying. During many arbitrations witnesses passionately and sincerely testify to one set of facts, yet are confronted with their prior statements which contradict those facts. Focus the arbitrator's attention on the plausibility of the testimony, the consistency of the story, and the likelihood that the testimony is true in view of all the other evidence. In most situations decisionmakers should rely on their objective assessment of the testimony rather than their subjective reaction to it. Occasions when the arbitrator discounts the objective evidence and relies instead on "gut feelings" and instincts should be the exception rather than the rule.

VII. Suggestions to Aid Good Decisionmaking

Good decisionmaking has readily identifiable, tangible elements as well as elusive human elements. The arbitrator's task is to proceed methodically, master each element, and render a decision accordingly. The advocate's task is to engage the arbitrator as a partner in this mysterious process. Here are some tips:

1. **Give the Arbitrator a Roadmap.** Let the arbitrator know where you are going and what you are trying to prove with the evidence and witnesses you offer.

2. **Organization Works.** Arbitrators are psychologically inclined to favor parties who are organized rather than disorganized.

3. **Don't Be Afraid to Object.** Lawyers are always concerned about whether they risk offending the decisionmaker by making too many objections. Objections are not a problem for most arbitrators, but always seek out the arbitrator's preference.

4. **Expect Nearly Everything to Come In.** In some form or fashion, most of the evidence will get in. Evaluate the case with that expectation.

5. **Opening Statement Should Outline Case Theories and Evidence.** Take advantage of the opportunity to introduce the broad outlines of your case.

6. **Tell a Story.** It is much easier for arbitrators to understand your case in narrative form.

7. **Witness Order is important But Not Overwhelming.** Arbitrators are accustomed to testimony taking place out of order, even over a period of many days. You shouldn't have a problem with taking witnesses out of order as long as you have otherwise made a coherent presentation.

8. **Don't Read Too Much Into What You Believe Are Positive Signals.** These may be "false positives." The arbitrator is unlikely to know how the case is going to come out until all the evidence is in and the final arguments are made.

9. **Be Willing To Adjust To The Arbitrator's Style And Preferences.** Be sure to ask about and tune into the manner in which the arbitrator wishes to proceed.

10. **Watch Your Time**. Be careful to properly allocate your time so as to allow sufficient time to make your case without taking all of your opponent's time.

11. **Highlighting Transcripts is a Good Thing.** Highlight the points which are important to you.

12. **Think Deeply.** Think through your case deeply enough so that it is internally consistent and isn't contradictory.

13. **Control Your Clients During the Arbitration.** They are often tempted to speak out during another witnesses' testimony.

14. **Don't Over-Lawyer the Case.** Arbitrations are supposed to be quick, efficient, less formal. Embrace the spirit of the process.

15. **Skip the Drama.** Overly dramatic, emotional, and argumentative language obscures your presentation. Decisionmakers aren't persuaded by drama. It isn't probative - - it just gets in the way.

16. **Be Reasonable.** Over-the-top, one-sided presentations aren't helpful. Be fair to your opponent and credible in the positions you take. If you are unreasonable, the arbitrator will discount much of what you say.

17. **Use Exhibits.** Documents, diagrams, pictures and other exhibits are helpful. Have a binder of exhibits for the arbitrator, the other side, and the witness.

18. **Stipulations are Good.** It is very helpful for the parties to agree on undisputed facts and exhibits.

19. **The Arbitrator's Questions May Create Windows of Opportunity.** Realize that the arbitrator will likely ask some questions. These are clues as to what the arbitrator wants to hear more about or clarify. Be sure to address the arbitrator's concern.

20. **Make a Meaningful Post-Hearing Submission**. If the arbitrator wants post-trial submissions, make it a truly useful document. Address critical facts, resolve disputed facts, provide helpful precedent, and address obvious concerns.

CONCLUSION

Arbitration is here to stay. It is changing the litigation landscape. Make the transition from being a superior trial lawyer to being a superior arbitration advocate.