Practical Tips for Excelling at Court-Annexed Arbitration, Straight from the Arbitrators

Jennifer Durham
Hiefield Foster & Glascock LLP

Contributing Arbitrators
Kent Whitaker, Paul Xóchihua, Judge Douglas Beckman, and Jim Hutchinson

Whether you are preparing for your first or your 50th arbitration, I think it's common to wonder: What is important to the arbitrator? Am I doing too much? After all, arbitration is not trial. Should I prepare an arbitration memorandum? Should I give an opening statement? Should I call my witnesses live or by telephone, or will a declaration suffice? Do the rules of evidence apply? I routinely look to the Arbitration Uniform Trial Court Rules (UTCR Chapter 13) but have often wanted to ask arbitrators many of these questions, especially those that are not addressed by the UTCRs. To try to shed some light on what arbitrators want, I went straight to the arbitrators. My conversations with the Honorable Douglas Beckman, Kent Whitaker, Paul Xóchihua and Jim Hutchinson are excerpted below.


Jennifer Durham

My goal with this article was to gather practical tips for young attorneys arbitrating court-annexed arbitration cases. However, as a couple of the arbitrators I surveyed agreed, the following guidelines may offer some benefit to all attorneys.

Pre-Hearing Statements

How They Should Be Used –*"Pre-hearing statements are a communication device, first, between the lawyers, then from lawyer to arbitrator. They are helpful to the arbitrator in assessing the magnitude of the production which will occur at the hearing. They are also important when parties do not agree on the admissibility of evidence."*

Request Witness Information and Documents Prior to the Hearing –*"If one side does not believe it has been provided with the documents to be offered, or perhaps with the contact information of a witness, the rules allow for a request for the production of the same in advance of the hearing. [See UTCR 13. 170(1)(a)-(b)]. Don't show up at the hearing with objections to documents listed on the pre-hearing statement for which you made no request."*

Arbitration Memorandums

When to Submit –*"I like to receive them two to four days in advance of the hearing. But why wait? Primacy is important, so get your memo to the arbitrator first and early. It will set the stage for how the arbitrator sees the case. Arbitrators bounce the more recently received memo off of what we have already read in the first memo."*

What Should it Contain –*"The memo should contain a brief statement of the factual and legal issues, so the arbitrator will know what to listen for. Also, to the extent you can, try to specifically set forth what it is that you want the arbitrator to do. What do you want in the award?"*

- "They are most helpful in setting out the facts of the case, and any unique legal issues which may be encountered. They are not a great tool for pre-arbitration persuasion."

Opening Statements –*"Focus, focus, focus. Get to the heart of the issue so I can put the evidence into the framework you created."*

-"An opening statement is helpful to explain complicated facts and evidence requiring expert testimony."

-"If the opening is a mere repeat of the pre-hearing statement then it is probably not necessary."

Witness Examination

Direct Examination –*"Have them sit where they are not between me and you."*

-"Only ask the necessary questions that will likely persuade the arbitrator."

-"Experts should be asked their opinion first, then the basis of their opinion.

Continued on next page

Practical Tips for Excelling at Arbitration
continued from page 8

If they wrote a report that is in evidence then ask just a few key questions that support their opinion."

Cross Examination -*"Only cross-examine lay or expert witnesses when it will support the theme of your case. Generally do not cross-examine relatives or friends."*

-*"When impeaching (or trying to impeach), offer the witness a copy of their deposition or at least give the page and line, and read the Q & A; don't just paraphrase."*

-*"Proper use of the deposition on cross can be effective. Improper use of the deposition often results in the witness who is the target of impeachment worming out of a previous inconsistent statement."*

- *Improper: 'You say you were going 30 on Johnson Street. Do you remember before, saying you were going 50 miles per hour on Johnson Street?'*
- *Proper: 'Do you remember during your deposition giving the following answer to the following question? Page 30 Line 17, Question: How fast were you going on Johnson Street? Answer: 50 miles per hour.'*

Don't Treat it like a Deposition – *"Just because the arbitration is in a cozy conference room where you often take depositions, do not conduct witness examinations as if they were discovery depositions. And do not argue with experts to try repeatedly to improve their testimony, as you might try to do in a deposition."*

In Person v. Telephone v. Declaration Testimony –*"If possible have a witness appear in person."*

- *"Sometimes arbitrators have questions not answered in reports, and there is no way to get an answer when there is no live witness."*

-*"In non-binding matters an [expert] report or declaration is usually fine. Just be sure it isn't too canned. There's nothing good about a report that is a 'fill in the blank' type, or one the expert uses containing large boilerplate statements, supplemented by an attempt to connect it to the facts of the case at hand."*

-*"The expert should identify all the documents he or she reviewed and list those in the declaration. If the expert reviewed another expert's report he or she should comment on their opinion and why they disagree."*

Objections/Evidence –*"Don't object for the sake of objecting. All attorneys probably know hearsay when they hear it. Sometimes it doesn't matter if it comes in. An arbitration hearing is not an opportunity for lawyers to display their command of the Rules of Evidence. Ask yourself in that split second, 'Will this negatively impact my case?' If the answer is no, there's probably no reason to interrupt the proceeding."*

-*"Don't keep objecting to bad questions. We arbitrators are used to hearing all kinds of compound questions, hearsay, cheap shots, etc. We will give the testimony the weight to which it is entitled."*

Closing Statements:

Importance –*"A closing statement is important. It is a chance for the attorney to provide an accurate summary of the evidence, and to comment on it. Because it often occurs immediately following the submission of evidence, it requires the lawyer, while keeping a straight face, to urge and recommend the arbitrator to take a particular action."*

Tips –*"Make that closing argument recommendation realistic in light of the evidence, because the credibility of the lawyer and the case will be reflected in the decision."*

- *"It never hurts to use one or two relevant jury instructions during argument. They mean more to arbitrators than they do to most jurors."*

-*"Be realistic and acknowledge the weaknesses of your case while explaining them away in the context of the big picture."*

Additional Tips for Excelling at Arbitration:

Be Organized –*"Don't make the arbitrator wait around for witnesses: have them ready. Get your evidence out in an orderly, systematic fashion. Make your closing argument flow from the evidence, and your case will make sense and be easy to remember as it is being decided."*

Use Demonstrative Evidence/ Tools – *"Keep your presentations interesting and persuasive by using demonstrative evidence such as charts, summaries, timelines, photographs and drawings."*

Keep it Short –*"Brevity is a virtue. More is less and less is more. The more often you repeat things, the weaker it sounds. Show confidence by focusing on a point once, and trust that the arbitrator has heard it. You can always refer to the main points again in closing to remind us what we heard."*

There you have it: some ideas to consider for your next arbitration – literally, straight from the arbitrators. Good luck.

A very special thank you to the arbitrators who took the time to contribute to this article: *Kent Whitaker, Paul Xóchihua, Judge Douglas Beckman, and Jim Hutchinson.*