

# Keys to Success in Arbitration



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# KEYS TO SUCCESS IN ARBITRATION

With fewer cases going to trial, there has never been a better time to reconsider and redesign one's litigation strategy. In every one of its annual reports, The American Arbitration Association (AAA), the world's leading provider of alternative dispute resolution services, notes dramatic increases in arbitration hearings.<sup>1</sup>

Although there are a number of tools and techniques gleaned from jury trial experience that should be applied to arbitration hearings, there are also unique constraints and issues of arbitration that require informed application of those tools and techniques. As the Honorable Kevin Midlam said: "Success in arbitration, as success in litigation, is largely dependent upon thorough preparation. It is also the result of utilizing skills and strategies that suit the forum of arbitration and are designed to support its goals and exploit its advantages."<sup>2</sup> Furthermore, Midlam continued:

Although the skills and strategies needed and utilized in litigation are similar to those required for obtaining the desired result in arbitration, they need to be modified to meet the purposes of the arbitration arena. Because the desire for expedition and economy underlies the basic reason for the arbitration process, *the skills required and the strategies used must be tailored to accommodate those requirements.* (emphasis added)

With the increase and widespread use of arbitration, it is surprising and more than a little troubling that the most common complaint of professional arbitrators is that attorneys are often unprepared and disorganized. This article identifies some of the most common concerns and complaints of arbitrators and provides attorneys with some of the tools and techniques needed to engage arbitrators in a more effective and persuasive manner. We have drawn these insights from a review of the literature, extensive interviews with arbitrators, and from our firm's experiences working with attorneys in arbitrations over the last 30 years.

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<sup>1</sup> William K. Slate II. 2005 President's Letter and Financial Statements, Annual Report of the American Arbitration Association. <http://www.adr.org/si.asp?id=4301>

<sup>2</sup> Hon. Kevin Midlam. "Rules of Engagement: Arbitration Success Depends on Specialized Skills," *Los Angeles Daily Journal*, July 26, 2002.

This article focuses on four impact areas where we have found that relatively modest efforts appropriately applied can result in substantial increments of advantage for your client. The first, *Case Strategy*, is the most thorough because it provides an overarching plan for your litigation strategy, and provides the framework within which the other sections are embedded. The second section focuses on *Witness Testimony*. The third section concerns the use of *Graphics*, and the final section addresses *Opening Statements and Closing Arguments*. Granted, these impact areas are not unique to arbitration, but the strategic application of specifically tailored techniques is.

## THE CASE STRATEGY: DEVELOPING THE NARRATIVE AND CASE THEMES

One of the biggest impact areas for a successful arbitration result comes through the development of a tight, compelling narrative. The underlying need for expedition and economy necessitates the distillation of the case to the essential elements and the presentation of those elements in an efficient and logical manner. To do this successfully requires a strategic approach that utilizes all of the quintessential elements of effective persuasion and advocacy.

Arbitrators consistently complain that attorneys are unprepared and take too much time to present their case. While one of your goals might be to be thorough, one of the arbitrator's goals is to complete the arbitration hearing as expeditiously as possible. The clash of these two goals can have far-reaching and negative consequences for your case.

Commenting on the need to appropriately package the case facts, The Honorable Michael Ballachey (ret.) pleaded: "A prayer on behalf of all arbitrators: During the hearing, act like lawyers. Be prepared and organized...think of the process as one of educating and persuading the arbitrator. The hearing should not be endless repetition of favorable facts; rather it should be an effective presentation of the facts that are necessary for success."<sup>3</sup>

Remember, also, that arbitrators are in a unique position professionally. While the lawyer may know every detail, every twist and turn of their case, an arbitrator does not, and more importantly, does not want such information. Arbitrator Norman Brand sums up the nature of the arbitrator as a professional entity:

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<sup>3</sup> Hon. Michael E. Ballachey. "Carefree Abandon of Rules Defeats Point of Arbitration," *Los Angeles Daily Journal*, December 22, 2005.

Remember that arbitrators, unlike judges, are busy entrepreneurs. Many of us are scheduled to hear multiple cases during a week or month. Professional arbitrators want to enjoy a reputation for expeditiously hearing and deciding cases. Knowing this, shrewd counsel sharpens the focus of his case, shapes the introduction of evidence to prove (but not over prove) necessary legal theories, and judiciously seeks to streamline the process...*Winning ultimately depends on the strength of your case, but assisting the arbitrator in efficiently moving the case toward conclusion can help your chance of prevailing by underscoring your confidence in the case.*<sup>4</sup> (emphasis added)

Arbitrators, like any audience, are seeking clarity and understanding, and because their role is to render a decision, they are also seeking compelling reasons to prefer one side to the other. The Hon. Charles S. Burdell (ret.) stated that first and foremost the attorney should present a compelling framework for why their argument advances the cause of justice. In any presentation to a court or arbitrator the first few sentences should state a clear, easily understood reason why a decision in their favor is fair and just. Citation to case law or statutory authority is best saved for later. Judges and arbitrators want to be fair and they should be told at the outset why ruling in the manner you request allows them to reach that end.<sup>5</sup>

Arbitrators, like any trier of fact, come to the table with their own predispositions, experiences, and knowledge. Accordingly, the narrative developed must ring true or fit with what the arbitrator already knows or thinks he or she knows. An arbitrator's decision is partially informed by their previous education and training, perhaps in the substantive field in question, or the legal field as an active or former judge or attorney. Despite this, they are still, after all, humans, with the same psychological needs of any audience. Everyone, even smart, technical, and logical people, search for ways to make decisions quickly and easily. Brand explains, "[I] always filter the testimony and evidence through my internal screening device that asks, 'why do I need to know this?' If I'm confused, I ask the parties to answer that question for me. If they cannot, I gently suggest that we move on to something that might be more interesting—or least more relevant."<sup>6</sup>

Additionally, the screening devices that influence the opinions being formed are triggered at the onset of the process. Contrary to any expectation that the arbitrator will be a

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<sup>4</sup> Norman Brand. "Streamlining the Arbitration Process," in *How ADR Works*, editor Norman Brand, 2002.

<sup>5</sup> Interview with the Honorable Charles Burdell, Jr. (ret.), conducted by Tsongas on January 30, 2008.

<sup>6</sup> Norman Brand. "Streamlining the Arbitration Process," in *How ADR Works*, editor Norman Brand, 2002.

blank slate, arbitrators, like juries, mediators and judges, will begin to form opinions of the case and parties early on in the process, which will influence their actions throughout the process. The challenge this presents is not a small one. In a recent example, we had the opportunity to work with a highly skilled and successful attorney who had been struggling for months to overcome an arbitrator's misunderstanding of a central point in his case--a misunderstanding that was created by his opposition's initial briefing of the case. Failing to control the initial framing of the matter inevitably results in an unnecessary uphill battle.

With all of this in mind, the goal of the case strategy is to development a coherent and concise narrative that serves as an organizing mechanism for the matter's facts, evidence, and testimony. Heading to arbitration instead of trial does not make this process irrelevant; instead, it makes it more critical. To this end, there are a few principles we have advocated for years. First, early in the litigation process systematically develop a case theory and narrative designed to arm and motivate your audience to understand your client's position. Second, provide the audience with appropriate language and themes to stimulate the desired thought-processes and, ultimately, decision.

### THE CASE NARRATIVE

A key means to achieving a desired outcome is to develop an appropriate narrative framework. Surveys show that most arbitrators think attorneys should do a better job at presenting their evidence in organized stories. Walter Fisher, a Professor in the Annenberg School for Communication at the University of Southern California notes, "No matter how strictly a case is argued—scientifically, philosophically, or legally- it will always be a story, an interpretation of some aspect of the world that is historically and culturally grounded and shaped by human personality."<sup>7</sup>

Your narrative must have, in Fisher's terms "fidelity" with the arbitrator; in other words, the story must "ring true" or make sense to your arbitrator. Does it fit with what they already know or perceive to be the way things work? Additionally, according to Fisher, a story should have "cohesiveness." It should hang together well; it should have internal consistency, meaning there should not be contradictions amongst the story elements (e.g., the documentary evidence and the testimony).

Essentially, your narrative should be more coherent and compelling than your opposition's. You should develop a story that accentuates your case strengths and ameliorates your case weaknesses. Particularly, for the defense, your narrative should

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<sup>7</sup> Walter R. Fisher, *Human Communication as Narration: Toward a Philosophy of Reason, Value, and Action* (Columbia, SC, University of South Carolina Press), 1989, p. 49.

be an affirmative, not a defensive or reactive, response to the issues in contention. Once your narrative has been developed, you can turn your attention to on-point refutation of your opponent's case theory or narrative in order to show how their theory lacks coherence, is weak from the standpoint of supporting evidence, and offers a solution that is inconsistent with fairness and justice.

In sum, the narrative offers the arbitrator a tool with which to assess what issues are germane and which are less relevant. Controlling the narrative is a means to controlling the framework of the dispute. Through a cohesive and compelling story you are setting the boundaries for the arbitrator's decision-making process.

### LANGUAGE AND THEMES

Most litigators clearly understand the importance of appropriate language in jury trials, and arbitration is no different in this regard. Language theorist, Benjamin Whorf wrote, "Language shapes the way we think, and determines what we think about." All reasoned judgments come through the use of words, either in deliberation with others or through internal thought processes. The way your arbitrator thinks about your case will be influenced by the language you use to characterize the issues. The goal is to shape the way the arbitrator will choose to think about your case by carefully crafting and using words that accurately, vividly, and judiciously characterize your case. Appropriate language can enhance a more favorable understanding, retention, recall, and evaluation of your case. Inappropriate language, however (e.g., hyperbole or antagonistic language), is the hallmark of desperation and will likely weaken your position.

Most attorneys understand the benefit of using themes for a jury trial, but often neglect to develop themes for arbitration, falsely believing that arbitrators will not find them useful or compelling. It cannot be said enough that arbitrators are people too, and, again, themes help them adopt a reference point for sifting through the issues. A theme can make an issue more salient, which is important when the arbitrator is quickly synthesizing a lot of information. At the very least, themes can bring the matter to life. Once a theme is created, focus on it in witness testimony, graphics, opening, and closing. This will result in an interesting presentation that has continuity and will capture the arbitrator's attention.<sup>8</sup>

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<sup>8</sup> The Hon. Kevin Midlam, "Rules of Engagement: Arbitration Success Depends on Specialized Skills," *Los Angeles Daily Journal*, July 26, 2002.

The case narrative and case themes provide a blueprint for your persuasive efforts. Such a blueprint, a process that can begin very early in the life of litigation, can then be translated into effective and efficient discovery, the construction of initial briefs, and form the basis of your eventual opening statement to the arbitrator.

Although there is an increasing trend toward more extensive and costly discovery in arbitration, it is often less extensive than in a jury or bench trial. Having an understanding of what you eventually want to say to the arbitrator will help you ask the right questions, seek out the right documents and facts, and defend against your opponent's efforts. Although the process of discovery may well modify the narrative you will eventually present, the hope is that the modifications will be slight rather than fundamental. As the old adage goes, the only bad plan is one that cannot be altered. Having an established narrative and themes should make your efforts more targeted and, therefore, more effective for your client.

Writing your brief is a specific example of where the early narrative and thematic efforts can pay dividends. A coherent narrative makes difficult choices much easier as to what to include, what to emphasize, and what to discard. The brief is your first opportunity to establish your case. Nothing can hurt your credibility more than presenting a brief that is disorganized, redundant, and advances inflated claims.

As a summary, during the case strategy session, the goal is to proceed in a systematic manner toward crafting a case narrative that:

- Creates an overall framework that strategically situates the evidence and testimony.
- Highlights the case strengths while minimizing, but still addressing, the weaknesses.
- Identifies themes that can be employed in opening, testimony, and graphics.
- Explains and/or clarifies processes or concepts with which an arbitrator might be unfamiliar.
- Provides clear links to the legal issues used as part of the arbitrator's decision.
- Requests an appropriate (or presents an alternative) remedy.

## WITNESS TESTIMONY

In a survey of construction arbitrators, topping the list of effective persuasive techniques was emphasizing or focusing on the facts through testimony from the witnesses.

“There is nothing like a good witness to bring the contents of a document to life in the mind of an arbitrator.”<sup>9</sup>

Although the vast majority of witness preparation efforts are directed at clarifying the content of the testimony, vocal qualities, and non-verbal messages are just, if not more, important. Arbitrators use their eyes and ears to judge the credibility of witnesses just as jurors would during trial. There are often times when the clear language of the testimony is overwhelmed by vocal qualities or non-verbal behaviors that may be seen as inconsistent. It is just as important in arbitration for the witness to effectively communicate his or her message without non-verbal distractions that could be interpreted by the arbitrator as indicators of dishonesty, incompetence, ill-intent, or untrustworthiness.

For many witnesses, testifying is unfamiliar territory. Attending to witness preparation by putting them in a realistic setting is critical to helping them develop confidence and competence in testifying. There is no good substitute for role-playing in this situation. Part of the preparation should include having your witness ready and able to answer questions from the arbitrators. It is essential to invite others to interrupt and ask questions. Your witness must practice alternating between answering your, opposing counsel’s, and the arbitrators’ questions. The more you can make them comfortable with the rules of the hearing, the more you can make them comfortable understanding how they can firmly, but with civility, stand up to the efforts of opposing counsel. Equally important, the more comfortable they are, the more effective they will be in supporting your case narrative.

Finally, the preparation session is equally helpful for the attorney. The witness and attorney must prepare a succinct line of questioning that quickly gets to the heart of the testimony without some of the more typical background questioning that accompanies most trial testimony. We often encourage attorneys to ask “introductory” types of questions to give the witness a chance to build rapport and establish credibility with the jury. In arbitration, establishing credibility is still important, but it can best be achieved by getting right to the point. Because the witnesses must be prepared to clearly and concisely tell their story and explain critical issues, the attorneys must prepare their line of questioning accordingly.

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<sup>9</sup> Utah State Bar website. “Arbitration Advocacy Part II.”  
[http://www.utahbar.org/sites/adr/html/arbitration\\_advocacy\\_part\\_ii.html](http://www.utahbar.org/sites/adr/html/arbitration_advocacy_part_ii.html)

## GRAPHICS

Successful trial attorneys universally acknowledge the key role of demonstrative evidence. Many lawyers still consider it an open question for arbitration, but when arbitrators were asked, “Do graphics and other forms of demonstrative evidence assist you in arriving at an appropriate award?” they overwhelmingly answered “Yes.” Graphics should be viewed as one of the most effective persuasive tactics you have. As you craft your case narrative, identify demonstratives for every stage of the hearing: opening, witness testimony, and closing.

Recently, an attorney called to share with us how the arbitrator repeatedly referenced their timeline and explanation boards (the other side had no visuals), even asking to keep them while he made his decision. These graphics were critical in providing a visual organizational tool for the arbitrator to make sense of the case’s complex information and to view it favorably for our client.

Good graphics can reduce complexity, help deliver themes, and ensure effective communication in a short period of time. Some examples of key arbitration demonstratives include: 1) Timelines that can cleanly represent what happened and when; 2) Summary charts that cut down on needless repetition and aid recall of key pieces of evidence and critical testimony; 3) Process or concept graphics that provide simple explanations of fundamental principles or processes (but only when it is known that the arbitrator has limited knowledge); and 4) Organizational or “who’s who” charts that can help the arbitrator get up to speed quickly. Remember, you may have lived with this case for a long time; your arbitrator has not.

Arbitrators are no different than jurors when it comes to an important communication principle: People appreciate those who can make sense out of the confusion, bring order to the chaos. If you are contributing to the chaos and the other side is not, the arbitrator will turn to your opponent for guidance. Obviously, it is better if you are the one controlling the presentation of the information. If the arbitrator relies on your timeline or your process-graphic to help him or her understand the case, you have gained a great advantage over your opponent.

In an arbitration hearing, time is of the essence and the arbitrator does not want his or her time wasted with repetitive or unstructured arguments. Demonstratives can be one of the most effective ways to persuasively summarize your points and effectively condense your presentation.

## THE OPENING STATEMENT AND CLOSING ARGUMENT

Opening statements, whether in arbitration or at trial, all serve the same function: to establish the narrative foundation of your case in a manner that analytically orients and psychologically motivates the arbitrator, mediator, or jurors. Your opening must make your audience want to hear more about your case, process the evidence in your favor, and render or negotiate a resolution favorable to your client. Just because an arbitrator or mediator differs from ordinary jurors in knowledge and experience does not mean the function of the opening statement is diminished in importance.

Although it is possible that you will not have an opportunity to present an opening in arbitration, if it is an option, it should be taken. Oral communication is fundamentally different from written communication and provides something written communication cannot. It offers an opportunity to get the arbitrator involved with the attorney, and sometimes to engage directly with them in the articulation of the case. It also offers an opportunity to use the power of rhetorical style and structure to craft arguments that are memorable and meaningful. The goal is not to over-claim, over-promise, or attempt to inflame the passions. On the contrary, the language of the opening should be firm, reasoned, and reasonable. If you began setting the right tone with your brief, your opening presentation gives you a chance to reinforce it and to create the lasting impression of the case.

There is a caveat, though: Because of the special emphasis in arbitration placed on efficiency, you do not want to laboriously and at length re-state everything that was said in your brief. “When this occurs, at least two messages are sent to the arbitrator: You believe that he did not read the brief or that, if he read it, he did not understand it.”<sup>10</sup> Instead, think of the opening as the opportunity to focus the arbitrator’s attention on the parties and the facts in a manner most conducive to your success.

Crafting the message, and the selection of the appropriate use of technology and visual advocacy, comes first. The actual delivery of the opening, however, is just as important. An audience does not simply evaluate the verbal message; they also evaluate the non-verbal cues of the speaker, whether those cues are intended or not. Therefore, your demeanor—the way you gesture, move, make eye contact, control your voice—sends important signals to the arbitrator

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<sup>10</sup> The Hon. Kevin Midlam, “Rules of Engagement: Arbitration Success Depends on Specialized Skills. *Los Angeles Daily Journal*. July 26, 2002.

about your credibility, your confidence and competence, and your overall command of the case and the arbitration process.

To make sure that you are sending the right message through your delivery, there is no better preparation than rehearsing the entire presentation with an audience, integrating technology and graphics, and employing audio-visual feedback in a structured and facilitated feedback session. Oral communication is a skill that can be practiced and improved. Those who not only have a command of the entire litigation process, but also of the tools and techniques of effective presentation methods have a tremendous advantage.

If closing arguments are made, all of the admonitions about making sure one's opening is clear and concise apply to closing as well. "Closing arguments that re-hash the evidence may be interesting to the parties, but do not help the arbitrator. Ask the arbitrator what issues should be addressed and whether those issues could be best addressed through closing argument, in written briefs or both."<sup>11</sup> One arbitrator cautions attorneys about becoming overly dramatic in closing. "Closing should be concise, focused, well-reasoned and calm."<sup>12</sup> You are attempting to win your case by satisfying the needs of the arbitrator. Provide clear reasons to prefer your client's case.

## CONCLUSIONS

Effective preparation for arbitration is not unlike effective preparation for trial, with a heightened focus on efficiency. In an arbitration hearing you must deliver powerful advocacy in a short amount of time. Every decision that is made, every piece of evidence that is used, every witness that speaks, and every visual that is offered must be done with this goal in mind. An informed arbitration strategy should include the same rigorous preparation one would expect with a case intended for trial. A positive outcome begins with the development of an overall strategy, translated into an effective and efficient case narrative that powerfully positions your witnesses and testimony. The elements outlined above should work together, consistently and coherently to accomplish your persuasive goal.

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<sup>11</sup> Utah State Bar website. "Arbitration Advocacy Part II.

[http://www.utahbar.org/sites/adr/html/arbitration\\_advocacy\\_part\\_ii.html](http://www.utahbar.org/sites/adr/html/arbitration_advocacy_part_ii.html)

<sup>12</sup> Alexander S. Polsky, Esq. "Taking Control," *Daily Journal EXTRA*, May 5, 2003.