Chapter 38

Preparing for Arbitration: A Plaintiff Lawyer's View

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I. INTRODUCTION

The mediation between your client and her former employer has just failed. You sent a demand letter. You tried to settle your client's claims directly with the employer's lawyer. Your client, whose resources were stretched thin because she had been terminated, would have preferred an early settlement. The employer, however, declined to offer her an amount that you could in good faith recommend. Indeed, the employer's proposals were far below the figure your client told you represented her minimum settlement number. You are now about to embark on that peculiar adventure called arbitration. Your client approaches arbitration with some trepidation, but looks to you to guide her through the process economically and successfully. What do you do?

What follows is some guidance for how to prepare yourself, your clients, and your proofs for arbitration. As a litigator principally representing plaintiffs (or claimants, as they are denominated in arbitration), I know what it is like to be faced with the financial and legal might of employers. My expertise, and my firm's, grows out of our specialization in litigating cases nationwide within the securities industry, where our clients are often required to submit their arbitration claims to self-regulatory organizations (SROs) such as the New York Stock Exchange, Inc. (NYSE) or the National Association of Securities Dealers, Inc. (NASD). I hope that what follows helps attorneys who represent claimants in arbitrating employment disputes in any forum, although it is specifically rooted in securities industry arbitration. I begin with the very first step of the process: preparing your statement of claim.

II. PREPARING THE STATEMENT OF CLAIM

Preparing a clearly written and convincing statement of claim may make the difference between winning and having to explain to your client why the arbitrators rejected your proof at the hearing. Formal and technical procedural rules, including

pleading requirements, do not govern arbitrations. Thus, the likelihood of arbitrators dismissing your client's claims outright based on what is said or not said in the statement of claim is relatively slight. Nonetheless, litigators familiar with arbitration do not put an ounce less effort into preparing a statement of claim than they put into preparing a court complaint. In a sense, the more relaxed procedural requirements of arbitration provide an opportunity to do far more than technically allege all of the elements of a particular claim.

A. Tell Your Client's Story

Some lawyers write a statement of claim in numbered paragraphs. Their arbitration pleadings are indistinguishable from their court pleadings, and both are filled with legalese. A proper arbitration pleading tells the arbitrators much more. After reading your statement of claim, the arbitrators should understand—on the basis of the law *and* on the basis of fairness—why they should award your client money. Avoid legalese and the disjointed structure common to court complaints. Write the statement of claim in the form of a letter to the arbitrators. Summarize who you are, who your client is, and the relief he is seeking at the very beginning of the statement of claim. Then tell your client's story. Factual details that should be kept out of a court complaint as extraneous may properly be included in a statement of claim if they help bring the events at issue to life. Present the facts in an organized, chronological fashion.

B. Consider Your Proof

While telling your client's story, you should know that it is accurate and that it can be established by documentary evidence or testimony. If a particular fact can only be established by a witness who may not be available at the hearing, refrain from mentioning that fact in your statement of claim. You may know more about the witness's availability by the time of the hearing and ultimately present her testimony. At the pleading stage, however, avoid undermining your credibility by alluding to facts that—as of the time you are preparing your pleading—you are not positive you can prove.

C. Build Credibility

As in all argument and legal writing, you will be most persuasive when you state in clear, simple terms the facts that support

your client's position. Avoid conclusory sentences until the conclusion of your statement of claim. Do not resort to hyperbole or excessive use of adverbs and adjectives.

In employment arbitrations before SROs, the statement of claim and the answer comprise the first exhibits at hearing. In *every* arbitration, when the arbitrators or the parties need to brush up on the nature of the dispute, they will first review the statement of claim. Devote as much time as necessary to prepare a convincing document that outlines what you will prove at hearing and why such proof merits the relief sought.

D. State the Relief Sought

Sometimes it won't be possible to state your client's damages because the harm is continuing or is measured by facts that must be elicited through discovery. In an Equal Pay Act case, for example, you may know that your female client earned less than male counterparts in identical jobs, yet you may require discovery to uncover the extent of the disparity. State with the most precision possible the relief your client is seeking. Your arbitrators (and your adversary, for that matter) must begin to understand at the earliest possible time the magnitude of the dispute. No goal is served by delaying a statement of damages, and it will be impossible to convince neutral parties to make a significant award if you cannot bring yourself to utter the amount. Most importantly, the statement of claim offers you an opportunity to lay out your damage analysis clearly so that the arbitrators can follow your proof of damages at the hearing.

E. Listen at Mediation

In the introduction, your client was disappointed by failed settlement efforts, including mediation. What did the mediator identify as the strengths and weaknesses of your client's claims? What facts and issues did the mediator focus on? What details concerning the factual chronology appeared to interest the mediator the most? Most mediators also serve as arbitrators, so these bits of information will guide you toward preparing a pleading that will tell arbitrators what they want to know—even if the information is not technically relevant to your client's claims.

I was shocked by what one mediator told me at a mediation. He noted that my client had managed to continue his career successfully and earn substantial amounts despite the evidence that, for the year in question, the respondent employer breached

the parties' implied and express agreements by paying my client an arbitrarily low bonus. Obviously, what my client earned *after* the year in dispute lacks any relevance to whether the respondent underpaid my client for that year. The mediator's points were that (1) arbitrators will be swayed by facts that would not be admissible in a court trial; and (2) in this case, the mediator felt that the irrelevant fact was not in my client's favor. Of course, when a mediator resorts to these types of arguments to convince you to lower your demand figure, you know that your client's claims are worthwhile. What is important to your preparation, however, is knowing that subsequent earnings may affect the way the arbitrators perceive your client's case.

III. CHOOSING AN ARBITRATOR

Shortly after filing your statement of claim, you will be choosing an arbitrator or arbitrators. This may be your single most important decision because of its impact on the outcome of your case. The tendency for different individuals to view the same evidence differently reveals itself in multi-arbitrator cases. Virtually all of the arbitrations our law firm handles are before a panel of three arbitrators. In cases before such panels, each of the arbitrators will invariably reveal distinctly individual traits by comments made during presentation of testimony, disputes with fellow arbitrators when faced with evidentiary or procedural questions, and, at times, a dissent in the final arbitration award.

When clients ask me to place odds on their likelihood of prevailing if we file an arbitration, I make clear that doing so is impossible—especially because we do not know who will be deciding the client's case. Variation in the quality and other characteristics of arbitrators makes arbitration much less predictable than litigation, where lawyers generally are more comfortable giving clients some level of expectation regarding the potential outcome of a case based on the merits of the claims and defenses at issue. Given the uneven quality of arbitrators and their profound impact on the outcome of your client's dispute, what can you do to give your client the best chance to select an appropriate arbitrator? Take the time to investigate carefully each potential arbitrator.

A. Sources of Information

Although arbitrator selection methods vary, counsel can always provide some input into the selection process. This may be

through exercising peremptory challenges, exercising for-cause challenges, ranking arbitrators by order of preference, striking names from a list of prepared arbitrators, or agreeing with an adversary on an arbitrator or list of potential arbitrators. Accordingly, the quality of your input into the selection process will be a function of the amount of information you are able to assemble concerning each candidate. Unlike federal court, where information concerning individual judges is widely available in published, comprehensive format, information concerning arbitrators is limited, uneven in quality, and must be gathered from multiple sources.

Generally, the entity responsible for administering the arbitration proceeding, the SRO or private ADR organization (such as the American Arbitration Association (AAA) or JAMS/Endispute), will provide some biographical information concerning potential arbitrators. This generally consists of employment and educational background data and a partial history of arbitration awards (for example, previous determinations), which generally provide no conclusions of law, no findings of fact, and little or no reasoning or explanation.

Obviously, you must expand this information to gain a clearer picture of which potential arbitrators should be selected and avoided for a: particular case. Immediately upon learning the identities of potential arbitrators, you should seek additional awards from other sources. The time to respond to the list of potential arbitrators (through peremptory challenges, by ranking potential arbitrators, and so forth) is short, and it will take some time to get decisions. For potential arbitrators with experience in deciding cases concerning securities industry. disputes, ***Securities Arbitration Commentator, Inc.[2] (SAC) is*** an excellent source. It unfailingly finds arbitration awards beyond those that are provided by the SRO.

Given the limitations of what can be gleaned from biographical information and arbitration awards, information from colleagues who have actually conducted a hearing before an arbitrator who may sit on your panel is critical. You should devote substantial time and energy to seeking that information out. You

[1][*Editor's Note:* As noted in section I. of this chapter, the author's comments refer specifically to securities industry arbitration and are not necessarily accurate for other employment arbitration.]

[2]Information about SAC's services and subscriptions to the *Securities Arbitration Commentator* may be obtained by valuing (973) 761-5880, or on the Internet at <http://www.sacarbitration.com>.

will need to make a judgment as to the value of such information, however, based on its source. Consider whether your colleague won or lost, and whether your arbitration relates closely to your colleague's arbitration. The identities of the other arbitrators on the panel in the previous matter also will dictate how much you should rely on this information. In general, however, information from your colleagues will provide greater and more detailed data than you will be able to obtain from any other source.

If you are a solo practitioner, you will necessarily be consulting with colleagues outside of your own practice. If you practice in a firm setting, pooling information from all of the attorneys in your practice will promote efficiency at the time the collective experiences of the lawyers in your firm are called upon.[3]

The arbitration awards you obtain will give you a road map to more information. Telephoning counsel identified on these awards is an excellent source of data. While a confidentiality order may limit the information you can obtain from counsel, you will generally be free to explore questions concerning (1) the demeanor of an arbitrator, (2) her procedural rulings during a hearing, (3) whether she gave the impression that she was impartial or favored claimants or respondents, and (4) whether she appeared to follow and understand the evidence.

Based on biographical information provided by the forum, you may suspect that there is a basis for a for-cause challenge to a particular arbitrator, based on a conflict of interest. In that situation, you should request additional information from the potential arbitrator. Then you must follow up on this biographical information to determine whether to make such a challenge.

More and more arbitrators and mediators now maintain Internet sites. These sites provide information including a curriculum vitae, a description of the individual's areas of expertise, and brief summaries of previous matters that were resolved successfully. These sites may also describe the approach taken in arbitrations and mediations by a particular proposed arbitrator. We generally conduct an Internet search in our investigation of potential arbitrators.

Many arbitrators are attorneys. For attorney arbitrators, the *Martindale-Hubbell Law Directory* is an excellent source, available at law libraries and on the Internet. If one of your potential arbitrators is an attorney, a Westlaw or LEXIS search should direct you to cases in which the potential arbitrator

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[3]See Chapter 39, §I.A., for how a union law firm does this.

appeared. These decisions may give you more insight than you would obtain from a firm biography or other marketing piece concerning whether the potential arbitrator is pro-claimant or pro-respondent.

B. Arbitrator Characteristics

Determining what traits are desirable in an arbitrator for a particular case must be given considerable thought. Some organizations, such as the AAA, force counsel to consider this subject by soliciting proposed arbitrator qualifications. An effective method for structuring your thinking about the characteristics you want in the arbitrator is to devise an arbitrator profile. Is the strength of your client's position a technical, legal point? If so, the profile of an ideal arbitrator may include a law degree or legal training. Is your client's position weak on the law but compelling in terms of fairness or equity? In that situation, a law background may be an undesirable trait. You should scrutinize a potential arbitrator's employment background. All arbitrators claim that they can hear evidence and rule impartially. It is unrealistic, however, to expect an individual to act impartially in your case when he has been employed for years in a position where part of his job is to advocate positions adverse to those you will be taking on behalf of your client.

Although arbitrators and judges function in similar roles, arbitrators, who serve not only as arbiters of law but also as fact-finders, are more critical to the outcome of a case than a judge sitting on a jury trial. While judges find facts on those cases where there is no jury, in *every* arbitration the arbitrators make evidentiary rulings, conclusions of law, *and* findings of fact. Even more important, no matter who the judge of a court case happens to be, final determinations in court actions may be appealed as of right. Arbitration determinations (which are called awards), however, are rarely vacated or modified. The grounds for doing so are extremely limited under state arbitration statutes and the Federal Arbitration Act.

C. Client Participation in Arbitrator Selection

Arbitrator selection affects a case so greatly that you should use every available resource, including your client. Obviously, a client may be able to tell you that a conflict exists with respect to a potential arbitrator. Also important, however, is your client's expertise concerning his business or whatever else is the subject

matter of his claim. Moreover, given the scant information available concerning prospective arbitrators, you should take advantage of your client's ability to pick up on characteristics bearing on the fitness of a particular individual to serve as an arbitrator. One of the benefits of arbitration is that arbitrators are supposedly imbued with industry knowledge based on academic training, work experience, or both. Your client will know more about her own industry than you. That additional knowledge can be useful in reviewing a potential arbitrator's background.

Unlike picking a jury, arbitrator selection takes place on paper. Neither you nor your opponent will be able to include or exclude potential arbitrators based on appearance. A lawyer's ability to try to prevent or promote racial or ethnic diversity is thus lessened. Still, based on biographical information and talking to lawyers who have arbitrated cases before the prospective arbitrators, you may be able to make selections based on diversity or demographic factors. My experience, and the experience of my colleagues, however, dictates that an arbitrator's previous award history is more telling than gender, ethnicity, age, or other demographic factors.

IV. USING ARBITRATORS TO FACILITATE DISCOVERY

As a claimant's attorney, I know that most of the relevant documents in a case are usually in the possession of the other side: The employer. For claimants, discovery is a matter of seeking to extract documents and information to level the playing field.

A. Discovery Plans

In both litigation and arbitration, the ability to obtain discovery translates directly into making evidence available for presentation at trial. Because discovery is more limited in arbitration (depositions are generally not permitted in arbitration, for example), it is important to maximize your efforts to obtain information through the available discovery devices. At the outset of discovery, you should consider what your proof will be at the hearing. It is essential to scrutinize the pleadings, especially your opponent's answer. It is also critical to consult with the client. He may not know the intricacies of procedure or evidence, but he will know far more than you about what types of documents are likely to be in his former employer's possession, what information is stored on the employer's computer databases, who

is responsible for custody of data and information, and the identities of individuals who may possess relevant facts or documents.

B. Arguing Discovery Issues

As every litigator knows, when an adversary is intent on denying you discovery, she will refuse to provide responsive documents to legitimate requests—no matter how carefully and precisely you draft your requests. Unfortunately, some lawyers and law firms routinely undermine the discovery process through their tortured interpretations of simple discovery requests.

In arbitration, attorneys seeking to thwart the discovery process tend to take even greater liberties, aware that arbitrators are likely to be more reticent than judges to sanction misconduct. It is commonplace, unfortunately, for respondents in arbitration to ignore deadlines for producing documents and information, raise last-minute and questionable confidentiality concerns in order to delay discovery when legitimate confidentiality issues could have been addressed months earlier, and seek multiple extensions of discovery obligations only to refuse to produce discovery when the extensions expire.

For this reason, a claimant's attorney must be active in seeking discovery and quickly serve supplemental requests. Even more important, a claimant's attorney must seek the arbitrators' intervention in resolving discovery disputes at the first sign that the parties will be unable to resolve them on their own. The most effective technique for obtaining discovery rulings by arbitrators is to seek a live or telephonic discovery conference among the arbitrators and counsel. Do not rely on a written motion to compel discovery—it is rarely effective, because most arbitrators will refrain from compelling discovery until they have spoken to the parties. You should, however, state in a letter to your adversary and the arbitrator why the discovery sought should be provided. The letter should either discuss particular requests by category, or individually, so that the arbitrator can use the letter as an agenda during the discovery conference.

Before arguing discovery issues, always refamiliarize yourself with the discovery rules in the pertinent arbitration forum. Consider court rules as well. Even though court rules—such as the Federal Rules of Civil Procedure—do not govern, they may be referred to for their persuasive authority. Because many discovery disputes boil down to relevance, make sure you have recently reviewed the pleadings. Be prepared to explain how the documents or information you seek bear on the issues in the case

or are likely to lead to evidence that may properly be introduced at the hearing.

C. Recalcitrance, Reluctance, and In Camera Inspections

The grim reality for a claimant's attorney is to expect recalcitrance from the employer in discovery. Many employers' attorneys will contend at the last possible moment that the discovery sought is confidential. Entering into a confidentiality stipulation may remove that excuse for delay. One should not, however, blindly enter into such a stipulation simply based on an adversary's request or based on a desire to avoid conflict. While a confidentiality stipulation may speed up discovery somewhat by removing your adversary's excuse for withholding documents, it comes at a price. All confidentiality stipulations impose restrictions that render the use of documents more difficult and time-consuming. A claimant's attorney who is zealously protecting the interests of her client must always ask the threshold question: Are the withheld documents indeed confidential (in essence, protected by the attorney-client privilege or, at a minimum, nonpublic information)? In many instances employers will argue that a confidentiality order is necessary merely because the documents being withheld contain nonpublic information. The next question, however, is: Are such documents deserving of confidential treatment given other factors, such as whether the nonpublic information at issue is stale? Protecting compensation figures for personnel employed by the employer may be a legitimate interest, but not when the figures are 15 years old.

Arbitration files, unlike court files, are not publicly available. Moreover, SRO arbitration awards generally provide no reasoning, so that information elicited at the hearing rarely finds its way into an award. Even if confidential information is used at hearing, the nature of the arbitration process is private. Thus, if the parties enter into a confidentiality stipulation, or if arbitrators wish to impose a confidentiality order, it need not be overly restrictive.

Regardless of the uneven quality of arbitrators, they generally all pride themselves on their ability to separate the wheat from the chaff. For that reason, arbitrators are usually eager to review documents that are claimed to be confidential in a closed session to determine whether the documents are indeed deserving of confidentiality. Before any in camera inspection, you should be provided with general information concerning the documents

that are claimed to be confidential.[4] Armed with information of this type, you will be able to argue, if appropriate, that the documents at issue are not deserving of confidential treatment. In camera inspections should be encouraged if you have confidence in the arbitrators' judgment and you do not feel that your position requires extensive argument on a document-by-document basis.

D. Sanctions

Arbitrators will award sanctions, although such awards have been rare. In one arbitration that a former colleague and I handled, we sought sanctions based on what we believed was deliberate delay achieved as a result of a disingenuous assertion. Our adversary had argued that a crucial witness had been unavailable for the hearing. We explained in our motion papers (set forth in letter form) why we understood that the witness was available. This included the fact that the supposedly unavailable witness had gone to work on the dates he was claimed to be unavailable and had met with his lawyer and others regarding the case during the same time period. The panel refused to award sanctions on the papers alone but granted us leave to put on proof at the hearing of why we believed sanctions were appropriate, together with our proof of the claims in the case (which principally involved a modest compensation contract). We presented witness testimony bearing on the sanctions issue during the hearing and were awarded monetary sanctions.

V. PREHEARING BRIEFS

One of the oft-touted benefits of arbitration is that it is supposedly cheaper and quicker than litigation because of its less formal and streamlined procedures. Yet, many arbitrators pride themselves on managing their cases like a court. Some go so far as to require compliance with the equivalent of a pretrial order (with stipulated and disputed statements of fact, stipulated exhibits, proposed exhibits, and so forth). The result is that arbitration has become longer and more costly. Part of making arbitrations more like court actions is the trend of requiring parties to prepare prehearing briefs.

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[4] *See* FED. R. CIV. P. 26(b)(5).

On most occasions, arbitrators ask the parties whether prehearing briefs are appropriate. Whether they are depends on the following factors:

1) The amount in dispute: Does the amount at issue justify adding a step to the arbitration process? Is this a prudent allocation of your client's resources?
2) The predominance of legal issues: Does your client's case center on legal principles such that a brief would allow the arbitrators to focus at hearing on several key factual issues? Are the legal issues so complex that giving the arbitrators the opportunity to read briefs and decisions will facilitate their understanding? On the other end of the spectrum, does your client's case essentially boil down to a factual dispute?
3) In limine issues: Briefs are helpful to curb an arbitrator's natural tendency to admit evidence when he is unsure and faced with evidentiary questions for the first time in the heat of a hearing. Better to present the arbitrator a prehearing brief explaining why certain documents or testimony should properly be excluded.

You must object when, as sometimes happens, an adversary submits an unsolicited brief to the arbitrators. This tactic allows your adversary to set the agenda for what issues will be briefed and undermines the traditional sequence of permitting the claimant to present her case first. One tack is to ask that the arbitrators refuse to accept your opponent's brief. Alternatively, you may decide that briefs should be submitted, but you should be given a fair amount of time to prepare a brief, and, importantly, the arbitrators should not read your adversary's brief until both briefs are submitted. Moreover, both briefs should only address issues that are selected by the arbitrators as appropriate. If each of the parties briefs different issues, any benefit to the arbitrators evaporates, as do the fundamental principles underlying any adversarial dispute resolution process.

VI. SHOULD YOU USE A "MOCK" ARBITRATION?

Generally, when representing claimants, it is not economically feasible to run through a full dress rehearsal. There are obvious benefits to a mock arbitration, however, including helping your client to become comfortable with what the arbitration hearing will entail, helping you and your client to identify

potential areas of inquiry by your adversary and by the arbitrators, and allowing you to refine your presentations for the opening and closing statements.

While resources and time may not allow a full mock arbitration, you should help your client to acclimate himself to what will be involved in the arbitration hearing by describing in detail the setting, participants, and procedures in an arbitration. You should also prepare thoroughly for your client's direct examination and cross-examination through mock questioning. You should also prepare and review—as fully as possible—your summation, your cross-examination questions, and your opening.

In many instances, you will not have received full compliance on document discovery before the first day of your actual hearing. You will generally not be armed with deposition testimony, previous affidavits, or other statements to lock in an employer's testimony because depositions and affidavits in support of prehearing motions are the exception and not the rule.

You will generally need to rely more on your presence of mind at the hearing itself in arbitration than in litigation. In arbitration, you will cross-examine critical witnesses that you have seen and heard for the first time only minutes before your cross-examination begins. You will be devising many (indeed, most) of your cross-examination questions on the spot while the witness is testifying on direct examination. Given these characteristics, conducting a mock arbitration that approximates the actual arbitration will be difficult.

VII. EXPLAINING THE SIGNIFICANCE OF ARBITRAL FINALITY

An arbitration award is more final than a judgment from a court. A party is rarely able to succeed in overturning an arbitration award on the very limited grounds for which an award can be vacated or modified. Many clients do not understand the finality of the arbitration process. Some confuse arbitration with mediation, and others have read in newspapers about nonbinding arbitration and view an arbitration award as a mere recommendation or report rather than a final determination.

Even with clients who are otherwise sophisticated, it is best to avoid assuming that your client has any knowledge about arbitration. You should explain arbitration from start to finish. Give the client a sense of how long it will take to arbitrate a claim to completion as well as how long each step along the way will take. Explain the physical setup of an arbitration hearing,

who will be present, how the proceedings will be recorded, and each participant's role.

VIII. TEACHING YOUR CLIENT TO RESPOND TO QUESTIONS YOU DO AND DO NOT ASK

A. The Client's Role

Once the arbitration begins, your client should (1) be willing to help educate the arbitrators, and (2) reflect that willingness in her manner, testimony, and tone. Arbitrators, like any other fact-finder, become irritated at litigants who create the impression that they are frustrating the process of developing a full factual record. Your client should follow your lead in conveying to the arbitrators that you want to help them to resolve all of the factual issues fairly. This includes helping the arbitrators to understand your client's testimony. Through your questioning, make sure that your client has the opportunity to act as a field guide—explaining terms, describing industry customs, and unraveling the relevant facts in a chronological, easily understood fashion.

B. Arbitrators' Questions

Just as a judge may take over the questioning in court, arbitrators may ask their own questions in an arbitration rather than merely relying on the questions posed by counsel. Indeed, this is more common in arbitration than in court. For this reason, you should discuss with your client how he should respond to an arbitrator's questions. Your client should understand that she must focus on being responsive to the question asked. Arbitrators generally only ask questions after counsel have concluded their questioning. Accordingly, the arbitrators frequently want only to elicit information concerning discrete areas of inquiry that have been overlooked or deliberately ignored by counsel. Your client should avoid the appearance that he is obstructing an arbitrator's efforts to obtain information and should simply answer the questions asked. Most critically, this involves listening carefully to the arbitrators' questions and answering those questions directly and succinctly. Your client must understand that in tone, attitude, substance, and presentation, she should make clear that she is trying to cooperate and help the arbitrators understand the events at issue.

In some instances, the arbitrators will ask questions in the nature of cross-examination. Obviously, these questions will be aimed principally at the vulnerabilities in your client's position. Nevertheless, just as in cross-examination, your client must be told to answer the questions in a straightforward manner. Trying to volunteer information, rephrase the arbitrators' questions, or draw fine distinctions in the questions in order to provide a hypertechnical answer will only create the impression that your client is seeking to be evasive. Worse still, it will look like your client has concerns about the substance of his testimony. Your client must learn to trust your ability to address any seemingly "bad facts" through additional questions or, if no opportunity to ask further questions is provided, through your questioning of other witnesses or during summation.

C. Opponents' Questions

Even if you have arbitrated many cases, in all likelihood this is the only arbitration in which your client has ever testified. Requiring him to remember different rules or guidelines for how to answer questions, depending on who is asking the questions, will complicate matters and raise his anxiety level. In its worst manifestations, this may result in your client appearing to be untruthful when she is providing completely accurate answers.

It is better to give your client one rule for answering questions: directly answer the question asked. This again comes back to instilling in your client faith in your ability to elicit further facts from his testimony through additional questions if necessary. Just as you would prepare your client for a deposition or cross-examination in litigation, you should interrogate your client with questions she is likely to face during cross-examination at arbitration.

Make sure your client understands that you will be given limited opportunities to object. In arbitration, arbitrators are more prone than judges in court actions to allow questions to stand despite objections. Accordingly, much depends on your client's ability to avoid volunteering information in his answers. Witnesses usually volunteer information based on the mistaken notion that they can help their cause by giving a fuller account of the facts. Usually, of course, such volunteering results only in prolonging the cross-examination and providing the cross-examiner with leads to additional areas of inquiry that might never have occurred to the questioner. Your client must be reminded that any favorable additional facts or context will be

brought out through your redirect examination. Tell your client that it is usually impossible to anticipate every question or area of inquiry that may be addressed during cross-examination. For this reason, your client must develop sound witness technique—listening carefully to questions, answering questions directly, only answering the question being asked, and not volunteering information.

D. Teaching Your Witness to Talk to the Arbitrator and Respond to Nonverbal Cues

One of the principal advantages of representing claimants is that they are generally human beings. This is an advantage on several levels. In terms of professional satisfaction, lawyers who represent claimants feel the impact of helping their clients enforce their rights more immediately than a lawyer who represents a company and answers to an employer's in-house legal or personnel department. In arbitration, you may be able to instill in the arbitrators this same sense of satisfaction.

Talking to arbitrators about the subject matter of an arbitration outside of the hearing room is forbidden, and your client must be so instructed. It will be helpful, however, for your client to learn to help the arbitrators understand that she is a person who is probably not much different from the arbitrators themselves. When your client is giving an answer on direct examination, he should not speak merely to you but should also turn to the arbitrators and look them in the eye as he is testifying. Your client should maintain as close to a conversational tone in her answers as possible and should reflect in her demeanor that she is comfortable speaking to the arbitrators and comfortable with what she is saying to them.

Sometimes the arbitrators will indicate nonverbally that they want more information or that the information that your client has already provided is sufficient. Your client must be looking at the arbitrators in order to pick up on these nonverbal cues and should remain attentive enough to notice them, just as you should. On many occasions, your client's position will be strengthened by saying less rather than more. In the informal environment of arbitration, an arbitrator may refrain from cutting off a witness's testimony as cumulative even though he may feel that he has heard enough and wants you to move on to the next witness or exhibit. In these situations, remember that the opportunity for review of an arbitration award is extremely limited, and therefore there is less of a need to create a record for

review. The point is to win at the hearing. To help accomplish that, your client and you must develop a keen sense—from what the arbitrators say and from what they communicate in unspoken terms—of when to provide more information and when to move on.

E. Presenting Evidence and Argument in Formats That May Not Be Normally Received in Court

How a particular arbitration will unfold is unique. The arbitrator will conduct the hearing in a way that differs from how every other arbitrator conducts hearings. You and your client must be prepared to adapt quickly to the practices, customs, and idiosyncracies of your particular arbitrator.

A good way to anticipate what will be required of you at hearing is to ask for a prehearing conference. In the conference, you can discuss any administrative issues that have not already been addressed. During that conference, you may ask about whether the arbitrator wants prehearing briefs, whether the parties should stipulate to facts before the hearing, the format for marking exhibits, whether the arbitrators would like to be provided with copies of cases, whether the arbitrators are willing to take witnesses out of order to accommodate scheduling issues, and any other procedural or administrative matters.

At the hearing, arbitrators will certainly be willing to accept evidence and argument in a less formal manner than courts. Most arbitration codes of procedure explicitly state that formal rules of evidence and formal rules of procedure do not apply. In most court actions, judges seek to structure the trial so that the plaintiff puts on her entire case first, followed by the presentation of all of the defendant's case. In arbitration hearings, it is common for arbitrators to shorten proceedings by having witnesses who appear on both your witness list and the employer's testify for all purposes at the earliest possible time. For example, you may be calling your client's former supervisor as a witness on a claimant's direct case. One way for the case to proceed would be for you to call the supervisor as a witness during the claimant's case, for your adversary to cross-examine the supervisor on your direct case, and then for the employer to call the supervisor again as a witness on its own case, whereupon you will have the opportunity to cross-examine the supervisor. In an arbitration, it is likely that the arbitrators will direct that the supervisor appear during the claimant's case and testify then and there

on all subjects and for all purposes, rather than recalling the supervisor as part of the employer's case.

IX. PREPARING EXPERT WITNESSES

As arbitration has become more prevalent, more experts have become accustomed to testifying in arbitration. Even so, you must take pains to prepare your expert for the informality of arbitration. This includes preparing your expert for extensive questioning by the arbitrators, as well as preparing the expert for direct and cross-examination. Your expert should be made aware that, unlike the formality of a court proceeding, an arbitrator may interject himself in the middle of your direct examination of the expert or during the expert's cross-examination. The expert must realize that questioning by arbitrators will take up a significant proportion of her testimony and must learn not to become impatient with the questioning. An effective expert witness tailors his testimony to the audience. In arbitration, the audience is presumably more knowledgeable about the subject matter than a layperson. The expert should be told this.

Better still, it is well worth the trouble and expense to send your expert witness all of the background biographical information and previous award history that you have accumulated on the arbitrator or arbitrators. This will give your expert the best possible opportunity to determine the sophistication of her audience and how to present the expert testimony appropriately. Some arbitrators will be generally less impressed with expert testimony than others. Some arbitrators believe that they themselves are sufficiently expert that no expert testimony is necessary. Again, it is a good idea to gauge these types of considerations through a prehearing conference, where you can ask the arbitrators directly whether they are interested in hearing expert witness testimony.

In general, arbitrators who are attorneys seem to appreciate more fully that certain areas of proof—such as industry custom or practice—should properly be the subject of expert testimony. If you determine that an expert witness is appropriate, your expert should be prepared to speak to the arbitrators as equals. A condescending expert witness is inappropriate in any type of case and in any forum. In arbitration, such an approach by an expert will be especially problematic, because the fact-finders—the arbitrators—are likely to be professionals who consider themselves as educated and knowledgeable as the expert himself.

X. SHOULD YOU USE A TRANSCRIPT?

Unless the amount in dispute is extremely modest, it is good practice to hire a stenographer to transcribe the arbitration hearing. In nearly every instance, the employer's attorney will consent to splitting the expense of a written transcript. Even though an accurate record is arguably less necessary in arbitration than in court, because review is unlikely, a written transcript is useful for several reasons. In many cases, arbitration hearings do not take place in one block of time. Instead, several hearing dates are completed, then weeks or months may pass before the schedules of the arbitrators, parties, and counsel allow the hearing to continue. Without a written transcript it becomes virtually impossible for counsel—and, more importantly, the arbitrators—to recall the earlier evidence.

When a written transcript is not taken, proceedings are sometimes recorded on cassette tapes. Audio recordings are of limited use, however, because it is difficult to locate specific testimony. Many times counsel end up paying to transcribe cassette tapes so that the record can be reviewed more easily. Thus, little or no expense is saved by audio recordings. The transcriptions of such recordings are only unofficial records of the proceedings in any event. Transcriptions usually end up riddled with gaps and inaccuracies because the tape was inaudible and there was no stenographer to alert the parties when a word, phrase, or sentence was muffled or inaudible.

XI. PHYSICAL EVIDENCE AND DEMONSTRATIONS

Any opportunities to introduce physical evidence or to employ demonstrations should be maximized because of their persuasive power. Any type of chart, demonstration, or unusual evidence will keep your presentation stimulating. As anyone familiar with arbitrations knows, by the 6th, 7th, or 8th day of testimony, if not sooner, boredom sets in. Unlike jurors, who may exhibit enthusiasm initially because they have not previously been in a courtroom, arbitrators are professional fact-finders. Sitting in a conference room with you, your client, your adversary, and her client will be neither new, nor different, for the arbitrators. You must make every effort to keep them engaged. The point you elicited in a specific answer will be lost if the arbitrators are not paying attention. Even though the helpful testimony may be preserved on a transcript, there is no guarantee

that the arbitrator will read the transcript even if you cite the relevant testimony in your summation or post-hearing brief. You and your client must convey by your enthusiasm, vigor, and conduct that your dispute is important.

XII. CONCLUSION

Your thorough preparation for the hearing will give your client confidence that you will represent his interests effectively. Even more important than winning is your client's understanding that you did everything possible to maximize the probability of achieving a good result. Matters outside of your control—such as the underlying facts, particular characteristics of your arbitrators, the availability or unavailability of witnesses, and others—remain outside of your control. Your client can appreciate and understand the full extent of your efforts on her behalf only if she sees that her case has been fully prepared for hearing. Whether you are trying an arbitration case for the first time or the hundredth time, you will need to reach the highest level of preparation that makes economic sense to represent your client's interests effectively. Neither you nor your client should expect anything less.