

12 Arbitration Tips to Reduce Stress, Increase Opportunities

By David H. Lichter
October 06, 2014



Arbitration is not only an effective way of resolving a dispute, it also has several advantages over the courtroom. An arbitration hearing creates less stress and can present more opportunity. It can even be fun—if you've done your homework to avoid common pitfalls.

Here are a dozen tips to help get you through the process:

1. Select the right arbitrator. You have far more say over who is going to decide your case than you do in court. Delve deeply into the backgrounds of potential arbitrators, and talk to people who have appeared before them. Research any cases they may have tried as attorneys or decided as arbitrators.

2. Pick one, not three. Unless money is no object and you expect the hearing will be so long, complicated and contentious it will require three people putting their heads together, one arbitrator can handle the job and likely will reach the same decision a panel would at much less expense for your client.

3. Use whatever evidence is at your disposal. One of the few ways for an arbitrator to get reversed is to exclude potentially important evidence. Most arbitrators, therefore, will let almost anything in, giving you the opportunity to tell a fuller story and color the arbitrator's view of the other side. One exception: trying to use someone's arrest records without convictions will only hurt your credibility.

4. Be entertaining. Although many arbitrators are "old school," that doesn't mean they don't enjoy a streaming video. Especially since you are not constrained (at least most of the time) by the rules of evidence, use charts, drawings, photos, PowerPoints, Facebook posts, YouTube clips, tweets or other snippets from social media to keep the arbitrators' interest, and have a flash drive available to give to the arbitrators. But don't bore the arbitrator with a screen full of nothing but black and white text you simply read. And test any technology in the room where you will be making your presentation to make sure it works.

5. Don't waste the arbitrator's time. Like the adage says, "When the horse is dead, stop beating it." You don't need to make the same point six times. And just because you can make an argument doesn't mean you should. Weak arguments only hurt the rest of your case.

6. Use dispositive motions carefully. Dispositive motions are not quite the no-no they used to be in arbitration, but save them for when you've got close to a slam-dunk legal argument.

7. Sweat the small stuff. Not resolving what may seem like minor issues can complicate your life at arbitration. Example: If you are using an interpreter, vet him beforehand to make sure he's up to the job, particularly if it involves a language not often spoken where the arbitration will occur. If the hearing is going to be lengthy or extend over multiple sessions over a period of weeks, use a court reporter. It will make your life a lot easier both at arbitration (not worrying about writing down those key admissions while listening to the witness) and after the final hearing (when you're preparing your proposed order).

8. Be brief. If you have to introduce deposition testimony, keep the reading short and to the point and offer to submit sections from long depositions to the arbitrator.

9. Work with the opposition. See if you can agree on joint exhibit binders with Bates-numbered exhibits and move them in at the beginning of the hearing. This will save time and trees, the arbitrators will appreciate it, and you won't have to keep track of what's admitted and what's not.

10. Make everyone comfortable. If you are hosting the hearing, make sure everyone has enough space at the table to open and close those bulky exhibit binders and not be on top of each other. Keep the arbitrators well stocked with beverages and snacks. You want them paying attention to you, not their stomachs.

11. If you have a fairness argument, make it. Arbitrators are not bound by the same constraints as a judge. I am familiar with arbitration decisions where the law indicated one outcome, but its application would have been so grossly unfair that the panel opted for the fair, not legal, result.

12. Opt for a reasoned award. Given the near impossibility of reversing an arbitration award, avoid lengthy and expensive findings of fact and conclusions of law and opt for a relatively short, reasoned award. After the hearing, send your proposed award to the arbitrator in Word so that she can cut and paste pertinent information into the final award. It gives you some control and is better than relying on the arbitrator's memory.

David Lichter, shareholder and cofounder of Higer Lichter & Givner in Aventura, is an experienced litigator whose work is substantially devoted to mediating, arbitrating and litigating a wide range of business disputes, class actions and employment matters. He may be reached at dlichter@hlglawyers.com.