EIGHT TIPS ON HOW TO IMPRESS YOUR ARBITRATOR

By Hon. Richard A. Levie (Ret.)

While the most successful way to impress your arbitrator is with the merits of your case, there are smaller, but important, ways to create a favorable impression of yourself and your client's case. Below is one arbitrator's guide to creating an arbitral environment favorable to you and your client. These tips are presented with the important caveat that they represent only one person's list, based on 30 years of judging and arbitration.

1. Do not email your adversary with negative, insulting and arguably inflammatory comments about counsel and your opponent's case, and send copies of these emails to the arbitrator. While arbitrators likely know that communications between counsel may take on a different tone than communications shared with the arbitrator or comments made in the hearing room, sending such emails to the arbitrator will create a very definite impression of counsel in his or her mind. Sharing communications with the arbitrator is not likely to sway the arbitrator to the correctness of the author's position more effectively than a carefully crafted, non-confrontational explanation of the client's position.

2. When serving motions and filing briefs with the arbitrator, avoid using sarcasm and hyperbole to make your points. Instead, assume that the arbitrator will read your submissions and conclude that the positions you advance are compelling and deserving of favorable results.

3. Do not serve a motion for summary disposition when it is clear that the matter involves a disputed material issue of fact. Where permitted by the rules of the administering arbitral body or agreement of the parties, a motion for summary disposition may be very effective in narrowing issues and educating the arbitrator on the issues. Before serving such a motion, however, consider what reaction the arbitrator may have to the motion. Ask yourself whether the arbitrator will view the motion as one that advances the arbitral goals of efficiency and cost-savings or one that was served for less lofty reasons.

4. Do not bury the arbitrator with documents measured in feet or banker's boxes. When you have difficulty seeing the arbitrator or the documents block your view of the arbitrator, consider whether you have submitted too many documents. Ascertain whether your arbitrator wants documents submitted on a disk and/or in hard-copy form, and then submit documents in tiers. Tier one should be the documents most essential to the case; tier two should be documents that provide foundation, authenticity or other background information; and tier three could be other documents that your cautious genes or your client feels should be admitted "for the record."

5. Do not object as if you are at trial in court. Be cognizant of the institutional rules governing the arbitration and what grounds those rules delineate as bases to object to admission of (usually limited to relevance, materiality and cumulative). The likelihood that frequent and indiscriminate objections will convince the arbitrator that you know what you are doing is slim.

6. When submitting pre- and post-hearing briefs, do not view length of the brief as any measure of persuasiveness. Do not assume longer is better or that

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string cites will impress the arbitrator with one's legal erudition. Remember that the arbitrator must read, absorb and remember what you have written and, most of all, be persuaded by what you write. The succinct, punchy legal argument has a much better chance of advancing your case.

7. Do not offer into evidence at the hearing a non-impeachment document that was not provided to the opposing party in response to a discovery demand covering that document. Attempting such an action is very likely to irritate opposing counsel's nerves and temper, and distract the arbitrator from carefully focusing on the merits of your case.

8. When presenting oral or written arguments, do not lump all the evidence together and leave it to the arbitrator to determine what is important. Do not be afraid to acknowledge that some arguments are stronger than others, which will enhance your credibility with the arbitrator. ■

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