Ten Common Mistakes to Avoid in Arbitration

By Joseph P. Zammit

There is no shortage of books, articles, and CLE courses that aim to educate practitioners about commercial arbitration, both domestic and international. These typically deal with such topics as the reasons for choosing arbitration over litigation, drafting arbitration clauses, arbitral jurisdiction, comparing the rules of various arbitral institutions, enforcing and vacating awards, and esoteric issues such as whether the manifest disregard of the law doctrine survives and whether 28 U.S.C. § 1782(a) discovery orders can be utilized in international arbitrations. It hardly needs to be said that anyone aspiring to be an effective arbitration lawyer needs to be knowledgeable about these things.

However, for purposes of this article, I put aside such weighty matters and address the much more mundane topic of convincing the arbitrator(s) hearing your case that your client should win. I am currently a full-time neutral focusing on complex commercial and technology-related cases, but during my professional career I have acted both as an arbitrator and as counsel in numerous arbitrations. My thesis arising from this experience is simple: seeing things from the perspective of the arbitrator can make one a better advocate. Hardly earth-shattering news, but I never cease to be surprised at how often even good counsel miss opportunities to effectively persuade the arbitrator or do things calculated to confound, confuse, or annoy her. Don't get me wrong: we arbitrators try to get it right despite the oversights or foibles of counsel, but we're only human. We cannot rely on evidence that was never presented, or resolve issues that were never addressed.

I have distilled my suggestions to 10 mistakes to avoid in prosecuting or defending an arbitration. Making one or more of these mistakes constitutes an unnecessary obstacle to a successful outcome. I should note that every arbitrator is different, and some may not agree with everything I say here. I suspect, however, that my suggestions will resonate with most arbitrators.

Mistake # 1: Treat the Pleadings as Unimportant

The rules of most arbitral institutions do not require detailed statements of claim or answers (or, indeed, any answer at all). It is tempting, therefore, to make them as barebones as possible to save expense and keep the opposition guessing about the theory of your case. After all, we are accustomed to notice pleading in court, and there will always be time to amend after discovery is closed or to make our position clear in the pre-hearing brief.

While this attitude *might* work in court where judges do not typically read the pleadings when a case is initially filed and liberally grant motions to amend or to conform to the proof after trial, it certainly is not a wise strategy in arbitration. For one thing, after the statement of claim and answer are filed and the arbitrator appointed, amendment is normally in the discretion of the arbitrator. Why take the chance it will not be permitted? A post-award proceeding to vacate an award because of the arbitrator's abuse of discretion is not likely to succeed.

More importantly however, the first thing an arbitrator does after being appointed (if not before) is read the pleadings. They are the arbitrator's first introduction to the dispute. Why squander the opportunity to educate her about the facts and the theory of your case? It may be months before you get another chance, and it may not come until the eve of the hearing. A lucid statement of what happened and why your client should win (with key documents attached as exhibits) will linger in the mind of the arbitrator and provide her a logical framework within which to view what is to come. While an arbitrator will not make up her mind based simply on the pleadings, however good they may be, they will help the arbitrator understand what is really in dispute. It is likely that before every conference or ruling (such as on discovery disputes) the arbitrator will refer back to the pleadings to refresh herself on the nature of the dispute. Spartan pleadings, on the other hand, inevitably raise myriad questions that are not likely to get answered for a long time.

You may be concerned that a comprehensive pleading educates your adversary. While that may be true, it is foolish to assume that your adversary does not already have a pretty good idea of what your best case is. The minimal surprise value of playing it close to the vest is not worth losing the chance to begin the education of your arbitrator.

What about the possibility that discovery may provide different facts or suggest a different legal theory than you have at the outset of the case? So long as those different facts or legal theory are not inconsistent with what you've pleaded, there is no problem. An arbitrator is not going to hold it against you or your client that you discovered something that has augmented or improved your case. A problem arises only if the discovered facts

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undercut those you have pleaded or demonstrate that your legal theory cannot be supported. That, however, is a problem of your or your client's own making, because it suggests someone has not been straight with the arbitrator or has naively banked on the absence of contrary evidence to advance a false or questionable narrative. That kind of "problem" should not dissuade good counsel from drafting and filing as complete a statement of claim or defense as is possible with the facts then known to the pleader.

Mistake # 2: Insist on as Many Depositions, Interrogatories, Requests to Admit, and Document Production Requests as Possible

Many advocates still approach arbitration as if it were a case filed in federal court. That is a mistake. There's a reason they call it "alternative" dispute resolution. Arbitration is supposed to be faster, cheaper, more efficient, and less formal than litigation. But many lawyers do their best to frustrate those goals by demanding the same kind of discovery as is permitted under the Federal Rules of Civil Procedure. Why? They say it's to make sure justice is served by having all the facts, but if truth be told it's more likely because they have a hard time moving out of their traditional, open-ended discovery comfort zone. It is somewhat ironic that in recent years the courts themselves have been trying to put the brakes on runaway discovery.

Of course, if your client really wants discovery *a la* the Federal Rules, they can—and should—write it into the arbitration clauses your client is agreeing to so that their wishes will be honored under the principle of party autonomy. If the arbitration clause is silent on the subject, though, and the other side is unwilling to agree, I would suggest that you be restrained in what you ask for. A demand for 20 depositions, 50 interrogatories, 100 requests to admit, and 250 document requests each beginning "All documents. . ." is likely to mark you as an arbitration novice and irritate many arbitrators who pride themselves as specialists in a process that is distinct from, and in many ways superior to, judicial litigation.

Few arbitration rules expressly authorize interrogatories or requests to admit.[1] I have never actually had a case, as either arbitrator or advocate, where they were utilized. Let's be honest, when was the last time you got an interrogatory answer or response to a request to admit (both typically drafted by counsel) that was really useful? Therefore, unless you have some compelling reason unique to your case, my advice is, retain your credibility and don't ask.

In contrast, document requests are generally permitted. The questions, though, are how specific and how closely related to the issues in the arbitration must the requests be. The answers depend on the applicable rules, whether the arbitration is domestic or international, and the predilections of the arbitrator. For example, Rule 22(b)(iii) of the *Commercial Arbitration Rules* of the American Arbitration Association permits the arbitrator to:

> require the parties, in response to reasonable document requests, to make available to the other party documents, in the responding party's possession or custody, not otherwise readily available to the party seeking the documents, reasonably believed by the party seeking the documents to exist and to be relevant and material to the outcome of disputed issues.

In practice, most arbitrators operating under the American Arbitration Association's (AAA) rules do not require a showing of relevance or materiality in advance and resolve that issue upon objection by the party resisting the request. How strictly an arbitrator applies the relevance/materiality standard varies by arbitrator and the facts of the case.

International arbitration, on the other hand, tends to reflect to some degree the hostility to discovery of its civil law origins. Some international rules do not expressly address the subject of document requests, while others leave it to the discretion of the tribunal. In many, if not most, international arbitrations nowadays, the subject is controlled by the International Bar Association's *Rules on the Taking of Evidence in International Arbitration*, which are adopted either by agreement of the parties or at the direction of the tribunal. Article 3(3) of the IBA Rules provides in relevant part that a Request to Produce shall contain:

> (a) (i) a description of each requested Document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;
>
> (b) a statement as to how the Documents requested are relevant to the case and material to its outcome . . . .

Thus the IBA Rules require significant specificity in posing document requests and puts the burden on the requesting party to identify in advance the relevance and materiality of the requested documents. A common device to organize document requests, the statement of their relevance and materiality, arguments over objections, and the tribunal's rulings is the so-called Redfern schedule (named after Alan Redfern). International arbitrators—especially those from civil law backgrounds—are generally

stricter than U.S. domestic arbitrators about enforcing specificity, relevance, and materiality standards.

Savvy counsel will strive to pose document requests that are carefully targeted to elicit documents that will significantly enhance her case or undermine her opponent's, and not simply be redundant of those already in her possession. She will be prepared to advance strong arguments about why the documents sought are not merely relevant to the subject matter of the arbitration, but material (i.e., important) to the resolution of the issues in dispute. (This goes double for international arbitration.) And she will avoid blunderbuss requests, which are likely to get short shrift from most experienced arbitrators.

When it comes to depositions, there is a definite dichotomy between international and domestic arbitration. Depositions are almost unheard of in international arbitrations. Except in rare circumstances, it is a waste of breath to even ask for one.

On the other hand, depositions in domestic arbitration have become more common in recent years, at least within limits. Some arbitral rules explicitly address the subject of depositions. For example, Rule L-3(f) of the *AAA's Procedures for Large, Complex Commercial Disputes* provides:

> In exceptional cases, at the discretion of the arbitrator, upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator may order depositions to obtain the testimony of a person who may possess information determined by the arbitrator to be relevant and material to the outcome of the case. The arbitrator may allocate the cost of taking such a deposition.

Other rules implicitly recognize an arbitrator's authority to permit the taking of depositions.[2]

Note, however, that the AAA procedures contemplate that depositions will be permitted only in exceptional cases and the International Institute for Conflict Prevention and Resolution's (CPR) rules emphasize "the desirability of making discovery expeditious and cost effective." In practice, where the parties are in disagreement, whether and how many depositions will be allowed depends on the inclinations of the arbitrator. In my experience, arbitrators are often skeptical of the argument that permitting depositions of adverse party employees will "streamline" their cross-examination at the hearing. More likely to succeed is an argument that a deposition is necessary because a witness is or likely will be unavailable to attend a hearing due to illness or infirmity, or because attendance at the hearing cannot be compelled or would cause a non-party significant inconvenience or expense. Arbitrators might also be inclined to permit a deposition where they are convinced it may enable a party to discover facts essential to establishing its claim or defense; for this purpose, a 30(b)(6) type deposition of an adverse party representative might be appropriate. In short, don't just ask for depositions because you can, and be prepared with solid reasons to explain why you need to take a person's deposition even though they are available to testify at the hearing.

Mistake # 3: Ignore the Contract

You're probably saying to yourself, "What competent lawyer ignores the contract?" My response is: more often than you would think.

I recently served as an arbitrator in a dispute in which one party was seeking reformation of the agreement between the parties. The parties battled back and forth vociferously about whether a basis for reformation had been shown. Curiously, until drawn to their attention by the arbitrators, neither side dealt with a provision in the arbitration clause that said the arbitrators were without authority to modify or amend the agreement. Even after the provision was pointed out, the party advocating reformation failed to address the question of arbitral jurisdiction head on, and the party opposing reformation devoted a single paragraph in its post-hearing brief to the issue.

Why this somewhat cavalier attitude to what one would think was a pretty fundamental point, especially in light of the arbitrators' expressed concern about it? Perhaps it was because it was not within the parties' preconceived theory of the case. Perhaps it was because they found no controlling legal authority on whether such language deprived the arbitrators of jurisdiction. Or perhaps it was because they simply missed it. I don't know. However, I think it was a mistake because they surrendered the opportunity to persuade the arbitrators one way or the other, and left the arbitrators to struggle with the issue on their own.

When preparing a claim or defense for an arbitration, counsel should scour the contract to ascertain what provisions might have a significant bearing on the outcome, and formulate their arguments accordingly. It rarely does any good to hide one's head in the sand and ignore problematic contractual provisions. It certainly makes no sense to ignore helpful provisions because you missed them or because you think the facts are so good for you that you don't need the help.

The practice of many, if not most, arbitrators is to read the contract soon after being appointed. You don't want to leave them to wonder why a seemingly pertinent provision such as the one in the example discussed above is not addressed in the pleadings. Most arbitrators take very seriously their obligation to enforce the contract. If the contract is clear, they are generally more comfortable making decisions based on that contract, if possible, than

in resolving tough witness credibility issues or weighing hotly contested expert opinions.

Mistake # 4: Rely on the Equities

There seems to be an almost unconscious belief on the part of many counsel that arbitrators should want to do what's "just," regardless of "technical" legal rules or the formal provisions of the contract, and that this is what really distinguishes arbitrators from judges. Frankly, a few arbitrators seem to share this view.[3] This belief leads counsel who have what they feel is a sympathetic client and facts to focus on the "equities" and give relatively little attention to the legal arguments. I would suggest that that is a mistake.

Unless the parties have expressly agreed that the arbitrator may act as an "amiable compositeur" or decide disputes *ex aequo et bono*, she is obligated to enforce the provisions of the arbitration clause and substantive law chosen by the parties. While courts will not vacate an award merely because an arbitrator erred in construing a contract or interpreting the applicable law, they can and will vacate an award (either on the basis that the arbitrator has exceeded her powers or through the manifest disregard doctrine) where an arbitrator has flagrantly and intentionally disregarded the terms of the contract or applicable law in an attempt to dispense her own brand of industrial justice.

More to the point for present purposes, however, I do not believe most arbitrators (especially if they are lawyers) *want* to decide cases this way. They are uncomfortable deciding matters based only on the abstract concept of doing the "right thing," unguided by established principles of law. Instead, they strive to understand what the parties agreed to in their agreement and to determine liability based on that understanding and their application of the substantive rules of law. To arbitrators, that constitutes doing "justice." Therefore, arguments pitched exclusively to fairness and equity are likely to receive a skeptical reception.

For example, in the arbitration I alluded to earlier, the party seeking reformation of the contract introduced an expert who testified that, based on the theory of economic rationality (i.e., that business people act in their own economic self-interest), it did not make any sense for that party to have made the agreement described in the contract as written because it was clearly a money-loser, and hence that the contract should be reformed to what the party claimed was the true intent of the parties. This testimony was unaccompanied by either any satisfactory evidence that the parties had in fact reached a different agreement than that set forth in the written contract, or by the citation of any legal authority that the principle of economic rationality can support a ruling in favor of reformation. Unsurprisingly, the panel held that, even aside from the question of jurisdiction, the party had failed to satisfy its burden of proof on the issue of reformation.

The foregoing does not mean that equities are unimportant. Arbitrators are human, and long to do what is fair. However, it does mean that an advocate must proffer a legally principled route to that "fair" result. Take advantage of the opportunity to submit well-reasoned prehearing and post hearing briefs, supported by citation of relevant legal authorities, to provide the legal framework upon which to build your case, and show how the legal principles apply to the facts.

Mistake # 5: Focus on Liability and Damages Will Take Care of Themselves

Too often, advocates become so focused on proving or refuting liability that they do not pay enough attention to the question of damages. Respondents are particularly prone to fall into this trap out of fear that proffering an alternative damage theory suggests that they are implicitly conceding liability. This is not a problem unique to arbitration, and can be found in court litigation as well. Regardless of the forum, this attitude can lead to disastrous results. The classic example is the $10.53 billion jury verdict in the Pennzoil-Texaco litigation (subsequently reduced by settlement to a mere $3 billion).

Arbitrators are not jurors, and they are unlikely to view a respondent's alternative damages theory as a concession of liability. Simply attacking the claimant's damages analysis is necessary, but not sufficient. If the respondent fails to put in its own damages case, and if liability is found, the arbitrators will be left with only one side's version of what an appropriate damages award should be. Counsel for a respondent would be well-advised to devote substantial attention to developing and presenting relevant evidence and convincing expert testimony leading to the conclusion that claimant suffered quantifiable damages in an amount substantially less than that sought. Doing so may not only soften the blow of an adverse finding on liability, but may also result in the incidental benefit of calling into question the claimant's entitlement to a finding of liability: if claimant is inflating its requested damages, what else might it be exaggerating?

Claimants are not immune from the temptation to devote insufficient attention to damages. The danger here is not that the arbitrators will be left with a one-sided view of damages, but that they will be unconvinced by the view expounded by the claimant. Even if the respondent fails to put in its own damages case, it is not inevitable that the claimant will get what it asks for simply because it prevails on liability. An arbitrator is not precluded from slashing elements of a requested damages award because she feels that the evidence does not support them, or, for that matter, refusing to award any damages at all because she finds that they are speculative. It behooves claimant's counsel, therefore, to spend the time to develop a valid damages model, to find relevant evidence to satisfy that model, and to select and work with an experienced dam-

ages expert to present a cogent and convincing damages case.

Mistake #6: Assume That a Tutorial Is Unnecessary Because the Arbitrator Is an Expert

It is commonplace these days for arbitration clauses to specify that arbitrators have certain industry experience or technical backgrounds, and for arbitral organizations to maintain specialty panels of arbitrators with such experience and backgrounds. This is one of the reasons that arbitration often offers a superior dispute resolution mechanism than court litigation.

But just because the arbitrator possesses industry experience or a technical background does not mean that a tutorial may not be useful. If a matter involves complex information technology, for example, the fact that the arbitrator may be an attorney with substantial IT industry experience does not mean she will necessarily have expertise in the specific technical area involved in your arbitration. It may be quite helpful to provide a tutorial for the arbitrator on that specific area as background to her consideration of the evidence and determination of the relevant factual issues.

It is difficult to generalize on the subject of how tutorials should be conducted. Every case is different, and every arbitrator has her own predilections. For me, the chief benefit of a tutorial is to educate me about those aspects of the technology (or other area of specialized knowledge) as to which there is no dispute so that I will be in a better position to evaluate the evidence (including expert testimony) as to those aspects that are in dispute. I do not find it of much value to have two separate tutorials that themselves are in conflict, or that are used *sub rosa* to color disputed questions of fact. If a neutral statement is not possible, I'd rather scrap the idea of a separate tutorial altogether and just hear what the contending experts have to say during their respective hearing testimony.

Fortunately, this should not normally be necessary. Counsel can and should work together to develop a tutorial that is unbiased, technologically sound, and as complete as possible given the factual issues upon which the parties disagree. A tall order perhaps, but one that will pay dividends in terms of streamlining the hearing and providing a better-educated decision-maker.

One way to accomplish this is for the parties to mutually appoint a single expert whose sole function is to provide the tutorial, and who may not be examined about the specific technological issues in dispute in the arbitration. Alternatively, the arbitrator can, in consultation with the parties, appoint an expert to serve the same purpose. Yet another way is for the parties to jointly prepare a written or video description of the technology. This approach may provide a less satisfying tutorial, but has the advantage of avoiding the expense of a separate tutorial expert.

What form should the tutorial take? There are myriad possibilities. These include a live expert lecture, PowerPoint slides, a video presentation, animations, a stipulation of undisputed facts, glossaries, or some combination of these. What works best for any given matter depends on the subject matter, the extent to which the parties agree about the technology, the level of cooperation of counsel, and the preferences of the arbitrator.

Whatever method is chosen, it would be a waste to forgo the opportunity to provide a tutorial in those cases in which it would be helpful to the arbitrator. How do you know if it would be helpful? Listen to see if the arbitrator broaches the possibility or ask the arbitrator yourself.

Mistake #7: Don't Let the Arbitrator's Silly Questions Get in the Way

We've all been there: you're comfortably into your examination of a witness, proceeding in a logical sequence to establish facts or an expert opinion consistent with your theory of the case, when out of left field, the arbitrator interrupts to ask you a question that (a) jumps ahead to matters you were planning to get to later in your examination, (b) makes no sense to you, (c) reveals a worrisome view of the facts or the law, or (d) raises a problem with your case that you were trying to skirt. While it may be tempting to give short shrift to the question and get back to your examination of the witness, I don't recommend that approach.

One of the advantages of arbitration over jury trials is the opportunity for real time feedback. With a jury, you typically don't know if you are in trouble until the verdict is in, by which time it is too late to do anything. An arbitrator's questions at least give you a hint regarding where her head is at. Use the opportunity to educate your arbitrator. Avoiding an arbitrator's question, or deferring a response, is only going to annoy and frustrate her or, worse, suggest that you are trying to conceal or avoid something.

Deal with the question head on. If the question raises something you planned to cover later with the witness, go with the flow. Respond with something like, "I was planning to get to that a bit later, but let me ask the witness right now." Whatever tactical advantage you had perceived in the planned sequence of your examination, it is outweighed by the value of immediately satisfying the arbitrator's interest or concern. If need be, you can always return to the point again at the time you had originally planned.

If the question does not seem to make sense or is just plain stupid (it happens), you might start with something like, "Could you please ask me that again, so I can make sure I'm answering the right question." If that fails to help, you need to do your best to explain—politely—why, for example, the fact that the respondent is a cat hater is

not legally relevant to the issue of whether he breached a contract to provide outsourcing services. Needless to say, this must be done in a fashion that treats the question as a serious one, and avoids a tone that implies the arbitrator is playing with something less than a full deck.

An arbitrator's question may not be an unintelligent one, but rather suggest that her perception of the facts or the applicable law is one not favorable to your client. Here the response must be two-fold. First, you need to immediately answer the question calmly, succinctly, and in a way that conveys that the facts or the law (or both) actually support your client's position. This requires that you have a detailed command of the facts and the law, and the ability to use them to formulate a cogent answer on the spot. But often this is not enough. The question may be a red flag that the arbitrator has an inclination that must be addressed and overcome in presenting the balance of your evidence and in the post-hearing briefs.

An arbitrator's question may spotlight a hole or weak point in your case. Truth be told, if you have been hiding your head in the sand and have not already dealt with such a hole or weakness before the arbitrator asks the question, you are in trouble. The ostrich-like approach rarely is a wise strategy. You are usually best off acknowledging the problem from the beginning, and having an explanation or rationale worked out to deal with it. Having been upfront with your explanation, the arbitrator's question may never come, but if it does, you will be prepared to respond credibly and in as strong a manner as possible.

Mistake #8: Never Use One Witness or Exhibit Where You Can Use Two or More

Although counterintuitive, it is frequently true that the evidentiary hearing in an arbitration can last longer than a jury trial of an equivalent case in court. Why? Because overworked judges in busy venues often impose strict limits on the length of trials. It is not unusual for even complex matters, like patent cases, to be tried in four or five days. Arbitrators, on the other hand, are sensitive to the principle of party autonomy and more inclined to be flexible on the question of hearing length if the parties are in agreement. While there is value in having an adequate amount of time to present one's case, there is also the danger that evidence will expand to fill the time allotted. Aside from the waste of unnecessary time and expense, having three witnesses testify to essentially the same thing poses a strategic risk. Almost inevitably, two of the witnesses are going to be weaker than the third, and only result in dissipating the impact of the strong witness. Even worse is the risk that the multiple witnesses will contradict each other, even if only in small ways, either on direct or cross-examination, thereby undermining your case.

The best advice is to go with the fewest number of witnesses possible to make out your case or defense, and those of course should be the strongest of the possibilities, even though that may be an articulate lower level employee rather than a senior executive. I hasten to add that there is at least one exception to this rule. If you are planning to call adverse witnesses on your case in chief, it may be beneficial to call overlapping witnesses for exactly the same reasons you want to avoid doing that with your own witnesses: they may contradict, and thereby impeach, one another.

When it comes to exhibits, there is a kitchen sink approach on the part of many counsel. There will be many large binders (or the electronic equivalent) filled with hundreds of exhibits, generally broken down into joint exhibits, claimant's exhibits, and respondent's exhibits. Typically, only a relatively small percentage of these are referenced in any witness's testimony or even cited in any brief. Apparently, they are there "just in case." Yet counsel almost invariably move that all the exhibits be deemed in evidence.

What is the point? If the document was not important enough to address with a witness, or even cite in a brief, how material to your case can it be? Submitting such documents into evidence is, in effect, asking the arbitrator to do your work for you, and implicitly laying on her the burden to read, interpret, and determine the significance of the documents, unaided by any witness testimony or legal argument. That is, at best, unfair to the arbitrator and, at worst, constitutes a cynical attempt to lay the basis for a manifest disregard argument on a motion to vacate in the event of an unfavorable award. I do not believe an arbitrator has any obligation to consider such documents, and in fact think that attempting to do so is prone to error and borders on inappropriate *ex parte* factual investigation. My own view is that an arbitrator can and should exclude such documents from evidence.[4]

My recommendation to counsel is that they offer in evidence only the documents they actually use, and that they withdraw the unused documents at the end of the hearing or after submission of post-hearing briefs.

Mistake #9: Give 'em the Ol' Razzle Dazzle

By now, the use of animations, computer-driven presentation systems, projectors, charts, graphs, and all sorts of audio-visual aids during arbitrations is old hat. Sometimes it seems like counsel are competing for the title of "The Greatest Show on Earth." At the risk of sounding like a Luddite, I suggest that you show some restraint in the use of all the fancy technology and colorful graphics. It's not that I am against technology (after all, I concentrate on technology-related matters), it's just that I think overdoing it during the hearing can be distracting and become an obstacle—rather than an aid—to understanding. After all, your goal is to inform and persuade, not to entertain.

The use of technology can definitely serve very useful purposes. An animation illustrating how a complex system or process works, for example, can be extremely helpful to an arbitrator. But sometimes technology does not add much, if anything. It is not particularly helpful, for example, to project on a screen the simple image of a page from a document if, as should be the case, the arbitrator has a copy of the full document in front of her. Indeed, doing so can interfere with the arbitrator's focus. Moreover, the overuse of technology can come across as "dumbing down" your presentation. You picked your arbitrator because of her sophistication and subject matter expertise; don't insult her by acting as if you think you must spoon-feed her your argument.

I suggest you attempt as best you can to assess in advance the arbitrator's preferred method of absorbing information and tolerance for showy displays. Some people learn best by listening, others by reading, and still others by seeing. At the risk of gross overgeneralization, I suspect that in general younger arbitrators are used to receiving information visually, whereas older arbitrators are quite comfortable receiving information through reading and listening. In any event, be judicious in your use of trial presentation technology.

And one more thing: if you are going to use it, make sure in advance it works and that you are fully prepared to integrate it seamlessly into your presentation. Few things are more deflating to counsel and annoying to an arbitrator than having to waste time because of balky technology or an advocate uncomfortable using it.

Mistake #10: Don't Forget to Pound the Table

Let me conclude with what should be an obvious point. Respect—for the arbitrator, for opposing counsel, for witnesses, and for the process itself—is the key to being an effective advocate.

Some lawyers view arbitration (as well as litigation) as a form of warfare. While there may be some theoretical validity to that analogy (there is, after all, a winner and a loser), my strong advice is: do not go there. Raised voices, *ad hominem* remarks, sarcastic tones, feigned incredulity, and belligerent cross-examinations don't win you any brownie points with the arbitrator. Rather, the opposite is true. As noted earlier, arbitrators are not lay jurors, and they are rarely impressed with theatrics. Moreover, aside from being rude and inconsistent with the notion of arbitration being a business-like means for resolving disputes, such behavior inevitably raises the question whether it is a smokescreen to hide a lackluster case.

Being respectful does not mean counsel cannot be aggressive. To be effective, counsel may have to be aggressive, for example, in cross-examining an adverse witness who is dissembling, evasive, or argumentative. Counsel must be persistent, demand an answer to the question asked, and refuse to let the witness off the hook. However, at the same time, she must be invariably civil and polite. The contrast in demeanor between counsel and the witness will make the cross-examination all the more devastating.

Likewise, respect for opposing counsel does not mean that one should not vigorously object to a clearly inappropriate line of questioning or argue strongly that an opposing party's position is not supported by the facts or the law. In doing so, though, counsel must let clarity of expression, the force of logic, and legal principle carry the day, and not the number of times she can interrupt or belittle her colleague.

Respect for the arbitrator does not mean counsel should be obsequious. Directness and simple courtesy are far more prized by most arbitrators than flattery. Respect means listening to the arbitrator's questions and concerns and attempting to address them head on with logic and law, rather than evade them. If you disagree with the arbitrator, politely tell her so, but be sure to tell her why.

Finally, it should go without saying that counsel should never stretch or shade the truth. If you are discovered, and you probably will be, it is the kiss of death. It can cost your client the case, and severely damage your reputation. Worst of all, it demonstrates disrespect for perhaps the most important person of all, yourself.

Endnotes

1. One notable exception is the CPR Institute's Rules for Non-Administered Arbitration of Patent and Trade Secret Disputes, which contain a presumptive limit of ten interrogatories.
2. *See, e.g.,* International Institute for Conflict Prevention & Resolution, Administered Arbitration Rules, Rule 11 ("The Tribunal may require and facilitate such discovery as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective.").
3. I once was taken aback to hear a retired federal appellate judge turned arbitrator say that, as an arbitrator, he strove to do what he thought was "right," even if that meant ignoring the law.
4. My comments do not apply to documents that underlie a summary presented through a witness or documents reviewed by an expert for purposes of formulating an opinion.