

Article: Ten Tips for Writing a Winning Arbitration Brief

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Ten Tips for Writing a Winning Arbitration Brief

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After days or weeks of hearings in a complex commercial case, the arbitration panel usually asks counsel to submit closing briefs. The process for submitting briefs is often the subject of discussion between the arbitrators and counsel, with the panel making the final determination on the handling of this important step. In recent years, the most common process includes the simultaneous submission of final briefs followed by closing arguments a few days or weeks later. This provides the panel with ample time to review the briefs and prepare to ask questions at the closing arguments about the most significant or contentious issues. Here are ten tips for writing a strong closing brief:

1. Success is in the simplicity: The most persuasive closing briefs focus on the key issues and are written in a clear and succinct style. Outline a concise factual background and then move to a discussion of the issues at the heart of the case. Arguments should flow easily from the relevant facts and applicable law. Avoid exaggerating the strengths of your case as well as disparaging the opposing side. Remember that professionalism and credibility are critical to persuasiveness.

One way to write a concise and persuasive brief is to prepare a draft and then review it with an eye to omitting any peripheral matters and unnecessary words. No doubt, the panel already has heard about all of the issues, probably more than once, and may be overloaded with facts and alternative arguments. Ideally, your brief will serve as a guide to writing the award, focusing attention on what really matters to a fair and lawful resolution.

2. Prioritize what's important: Do not try to summarize all the evidence. The court reporter will have prepared a transcript for that purpose. Focus on a limited number of important issues and review the testimony and documents that support your arguments on those issues. Cite to the transcript with specific page and line references and to the documents by exhibit number.

3. Use laser focus: Bolster your position with references to key cases. Again, focus on specific excerpts from the most important cases that support your arguments. Blanketing the arbitration panel with dozens of cases will not serve your interests at this late stage in the process. The arbitrators will have already seen the cases cited by both sides. Point the arbitrators to the few cases that you believe will be most persuasive.

4. Choose quality over quantity: Attach some significant exhibits. While there may have been hundreds or even thousands of documents introduced into evidence, there will be only a limited number that are key. The panel will have all the exhibits, making your goal to point to the ones that merit the most attention. Again, the rule is quality, not quantity.

5. Be diligent in documentation: Be sure that the documents you select were discussed with a witness during the hearings. If a document was not important enough to discuss with a witness, it does not belong

with your closing submissions. The arbitrators will not have had a chance to hear direct testimony and cross-examination regarding that document and will be unlikely to give it any weight at all.

6. Pay attention to details: Outline your points about damages in detail. If you represent the claimant, make a specific list of the damages that you want the panel to award. Reinforce that list with the appropriate facts and law. Be as specific as possible and include detailed calculations with references to related expert testimony. By contrast, if you represent the respondent, list the damages you know have been claimed and make a comprehensive outline of reasons not to award those items and/or why the calculations are incorrect.

7. Choose your words wisely: Sometimes the arbitrators will set a page limit for closing briefs. Usually, the panel will discuss an appropriate length with counsel and then set the limit. Do not exceed that limit. As one of my colleagues asked when presented with a 100-page brief after setting a limit of 40 pages: "Which 40 pages would you like me to read?"

8. Clean it up: Careful proofreading is extremely important. Be sure that references to the record and case citations are correct. You want the arbitrators to read an excellent brief that they can rely on. Any sloppiness undermines the strength of your arguments and raises questions about the reliability of your work.

9. Avoid the gamble of the ramble: Focus on a cost-effective and efficient process. If your brief is too long and you submit too much material with it, the arbitrators will have to spend excessive time reviewing all of that material to determine what's most important. Do that editing ahead of time, before submitting the brief. It is harder to write a short and focused brief than to submit something longer and rambling, but it is worth the time and effort to be certain that the panel will give serious attention to your view of the case.

10. Make no eleventh hour adds: Often, the arbitrators will write an interim award outlining their decisions about the merits of the case to be followed by a final award regarding items such as the award of attorneys' fees and costs to the prevailing party. After issuing the interim award, there usually will be further briefing regarding who is the prevailing party and what is a reasonable amount of fees and costs. This is not a time to raise additional new matters not covered by the evidence submitted at the hearings and included in the final briefs and oral arguments, such as new damages evidence that was not presented. That ship has sailed.

A good closing arbitration brief should be a roadmap for the panel members, directing them to the facts and law they will need to write an award consistent with your view of the case. Make it as easy as possible for the panel to follow your reasoning and decide the case in your client's favor.

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