# Keys to Effective Arbitration Advocacy Agenda

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**Price: $175 (before April 15), $225 (on or after April 15)**
**Date: Saturday, April 30, 2011**
**Time: 8:30 am-3:45 pm (registration and continental breakfast 8-8:30)**
**Location: Harper Center, Creighton University**

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| **8 a.m.** | **Registration and continental breakfast** |
| **8:30 – 9:00 a.m.** | 1. **Overview of the Key Distinctions between Arbitration and Litigation in the United States.**<br><br>• Scope and Limits on Your Right to Customize the Adjudication |
| **9:00 – 9:45 a.m.** | 2. **Zeroing in on the ultimate objectives that guide the decisions of the Arbitrator. (45 minutes)**<br><br>• Remember Arbitrator's universal guiding principle – protecting his or her ultimate award from the prospect of being vacated under 9 U.S.C. section 10 or similar state arbitration act provisions.<br><br>➢ Main impact at hearing: because failing to provide an opportunity to present relevant evidence and failing to postpone the hearing where good cause is shown are two of the few grounds for vacating an award, the arbitrator will have a greater tendency to **let in evidence** a court may well exclude, and **grant postponements** a court might otherwise exclude. |

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| | • Note also, a common but less universal guiding principal – to avoid legal error, and thereby provide consistent, predictable results.<br><br>➢ This principle is not universal in part because the concept of using law as the source of substantive rules for decision-making is, at least historically, not an inherent part of the ethos of arbitration itself. The rejection of law runs deeper than the elimination of the right to appeal errors of law. (As a philosophical matter, one could eliminate appellate enforcement of rules, and still have rules.) For some, arbitrators not only have the power to reject the law, they are free of the expectation that they even supposed to follow the law. *See, e.g., Nogueiro v. Kaiser Foundation*, 203 C.A.3d 1192, 250 C.R. 278 (1988). |
| **9:45 – 10:30 a.m.** | 3. **Optimizing the likelihood that favorable law will be applied (and not the less predictable arbitrator's private sense of fairness).**<br><br>• Review Arbitrator resumes and reputation with a view to selecting those that respect the ethos of the Rule of Law.<br><br>• Take note of the "footing" provided in the arbitration clause. If it provides for application of law, bring that to the arbitrator's attention as early as the preliminary hearing.<br><br>⇒ Note that in *Hall Street v. Mattel* 128 S. Ct. 644 (2008), the Supreme Court eliminated the power of contracting parties to limit the power of the arbitrator to ignore |

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| | the law. An arbitration clause providing for application of law is now merely precatory under the FAA, but is not for that reason valueless. It is not precatory under the arbitration laws of all states, making it important to determine and be ready to argue, what law governs the arbitration proceeding. |
| **10:30-10:45 a.m.** | **Break** |
| **10:45 – 11:45 a.m.** | **4. Choosing wisely among (then wisely using) the three "extras" – reasoned awards (or not), recorded proceedings (or not), and three arbitrator panels (or not).**<br><br>• Note that **transcripts**, which are automatically prepared in court, are only an option in arbitration. In major cases, consider making arrangements for a transcript. The "record," otherwise, is only the arbitrator's memory assisted by his or her own notes.<br><br>➢ Ordering daily transcripts gives you the ability to use earlier testimony in examining later witnesses, without risk that you will be thought to be "assuming facts not in evidence".<br><br>➢ Having the transcript at least available at the time of closing or post hearing briefing gives you the assurance that the good testimony you have elicited won't be second guessed as a figment of your partisan imagination. |

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| | • Note that **three arbitrator panels** and **reasoned awards**, both useful additional aids for fallible mortals to "get it right," are costly but frequently valuable options not often (in the case of reasoned awards) or not ever (in the case of three judge panels) available in trial courts.<br><br>➢ Multiple functions served by reasoned awards<br><br>➢ Maximizing the benefits of a three judge panel |
| **11:45 a.m. – 1 p.m.** | **Lunch break (on your own)** |
| **1:00-1:30 p.m.** | **5. Assessing, and taking advantage of, the arbitrator's "subject matter expertise".**<br><br>• Select for, and take advantage of, the arbitrator's subject matter expertise – it will save you from the burden of starting at "ground zero," and sometimes prevent your opponent from "bamboozling" the arbitrator into error.<br><br>➢ Use the AAA on-file resumes as a "keyhole" into the arbitrator's expertise<br><br>➢ Take note of tools for finding expertise beyond that set forth in the AAA resume<br><br>➢ Wisely assess the depth of expertise |

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| | needed<br><br>• At the same time, recognize that purported expertise can be a "dangerous thing."<br><br>➢ Take measures to prevent the arbitrator from letting his or her own presumed knowledge block him or her from truly hearing your case. |
| **1:30 – 2:00 p.m.** | **6. Handling the challenge and opportunity of the arbitration's relaxed rules of evidence.**<br><br>• Note that while the rules of evidence will be relaxed – if the proffered evidence is relevant and material, it is going to come in – the principles behind those rules are not relaxed.<br><br>➢ The goal is not just to get the evidence in. The goal is to make it matter.<br><br>➢ The arbitrator's phrase "I will give it the weight it is due" may be the functional equivalent of a judge saying "sustained."<br><br>➢ This is particularly true as to foundation, when it is left unclear how the witness was in a position to know, and hearsay, when there has been no opportunity for cross-examination. |
| **2:00 – 2:15 p.m.** | **Break** |
| **2:15-2:45 p.m.** | **7. Taking control in a world of minimal discovery.**<br><br>• If your client has most of the relevant |

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| | documents, stress the expedited nature of arbitration and request a showing of good cause for depositions or interrogatories. If your client is in the dark and needs liberal discovery, stress the importance of fairness in arbitration. |
| **2:45-3:15 p.m.** | **8. Making strategic use of the setting in which there is no appeal, and thus freedom from the need to "protect the record". (30 minutes)**<br><br>• Remember there is no appeal. Some strategies one uses to "protect the record" in a court setting are not needed in arbitration.<br><br>➢ The obvious example: making objections you know will be overruled. |
| **3:15-3:45 p.m.** | **9. Exploiting special procedures – summary issue dispositions; creative bifurcations; interactive closings; dueling experts; and other opportunities rarely, or never, available in court. (30 minutes)**<br><br>• Remember, unlike in a court setting, you can, with the agreement of your opponent, take advantage of the informality of arbitration setting to tailor-make the proceeding to fit your special needs.<br><br>⇒ How to adjudicate 16,000 sizeable claims in 18 days flat, and perform other miracles never achievable in court |
| **3:45 p.m.** | **Adjourn** |

**About the Lead Presenter:** In addition to his role as Resident Professor and Chair of the Arbitration Program at the Werner Institute, John (Jay) McCauley has been a neutral with the American Arbitration Association since 1998. He serves on the Large Complex Case Panel and the Employment Panel of the Association, where he has arbitrated more than 100 cases, including a wide range of matters ranging from tens of millions to more than a billion dollars in dispute argued by leading advocates throughout the nation. He is an honors graduate of Harvard Law School, a former partner of a large, Los Angeles based, international law firm, a Distinguished Fellow of the International Academy of Mediators, and a Fellow of the College of Commercial Arbitrators. Jay has taught at several major law schools and has conducted workshops in commercial, international, and labor and employment arbitration, trial and appellate advocacy, and mediation. Jay also has years of experience as a trial lawyer and arbitration advocate in business, real estate, employment, and other substantive areas.