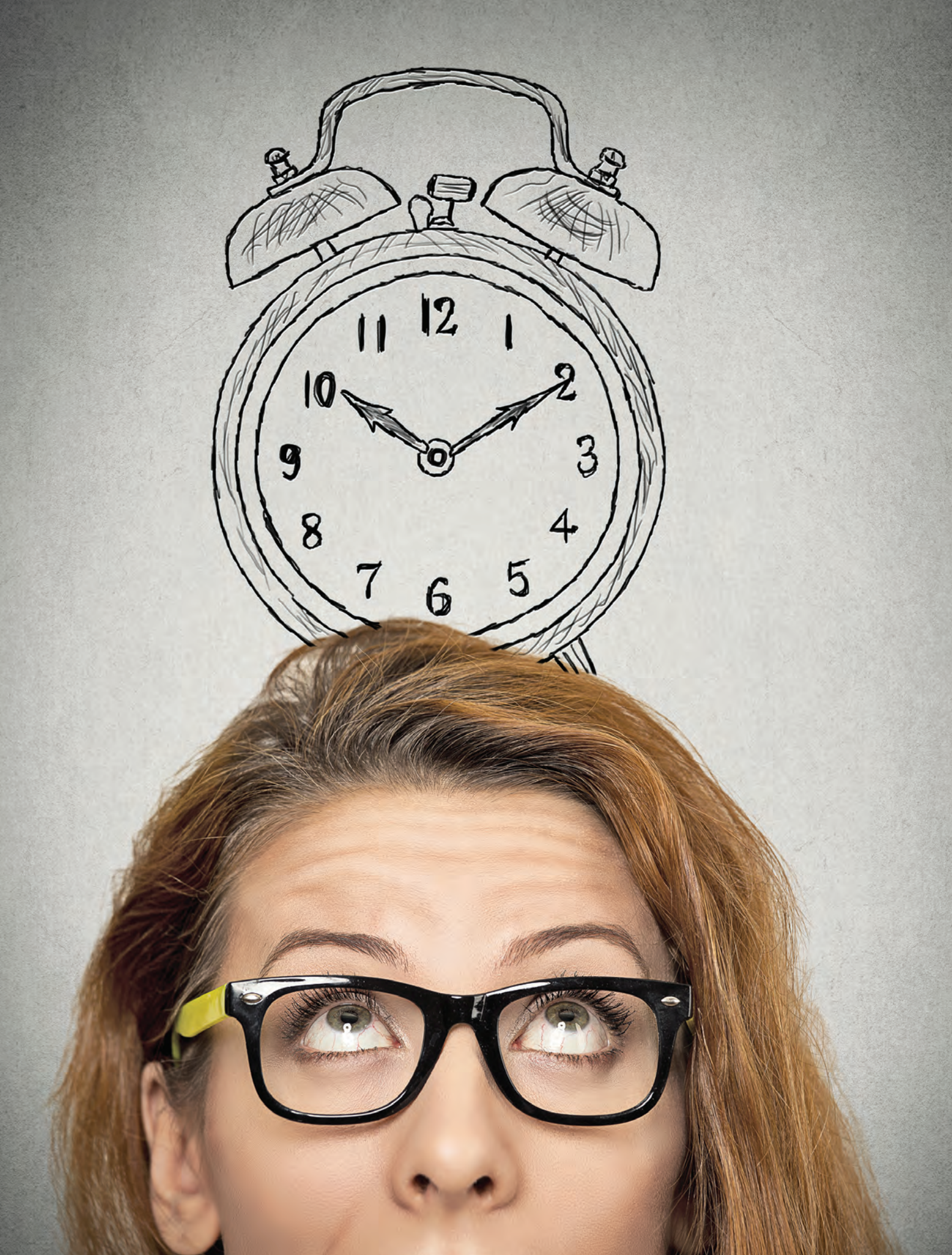
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Avoiding Arbitration Panel Fatigue

Tips for Keeping Your Arbitrators' Full Attention

By Wendy R.S. O'Connor

Maybe the case begins as a mandatory arbitration matter or perhaps, during the course of discovery, the parties agree that its value makes it a better candidate for arbitration. It could be an appeal from a district magistrate judgment. However it got there, you're about to present your case before the arbitration panel. You've prepped your witnesses, served your Rule 1305(b) designation, compiled your exhibits, drafted your notes for examinations and you're ready to go. In most cases, you'll be in and out in a few hours, and the case will probably terminate shortly thereafter. Simple, right? Not so fast.

There may be five witnesses and 20 documents that corroborate a single point; your panel will appreciate it if you limit your presentation to those that are most salient and definitive.

Mandatory arbitration has been around for a long time and it's an excellent method for disposing of cases in an efficient and cost-effective fashion. It saves courts and judges time and resources by eliminating the need for jury trials and it encourages the parties to be judicious in their discovery. The arbitration process itself is straightforward and speedy; in most cases, your matter takes an hour or two at most to present because the matters concerned are fairly standard issue (in my practice, mostly motor vehicle accidents or slip-and-falls). As well, there aren't many witnesses, and the exhibits are minimal. At least one member of the panel tends to be familiar with the applicable law, the medical expert reports usually provide a good summary of the treatment, injuries and prognosis, and the parties generally agree — tacitly, anyway — to set aside a strict application of the Rules of Evidence in order to move things along.

Thus, your client doesn't have to spend hours or days sitting in a courtroom or pay for the cost of a jury trial and, in a matter of a few hours, you've presented your case. It's efficient, and the award is usually one that the parties can live with or, at worst, use as a basis for getting the case settled. Generally speaking, it's a win-win, even for the panel, made up of practicing attorneys who usually get paid for their service and can use the arbitration as an opportunity to learn something new or hone their own litigation skills.

But what if your matter, though not one that suggests a high-dollar figure, isn't so straightforward? What if your case involves a relatively obscure question of law or a convoluted fact pattern? What if it's document intensive or you face an opposing party who's obstructive or must be repeatedly (and tediously) impeached or confronted with contradictory evidence? We've all had instances in which, after about 90 minutes, the panel members start to shuffle papers, glance at the clock or get that glazed-over look that tells you they'd really like you to wrap it up. Maybe they even tell you to wrap it up.

I would never suggest that a panel would penalize a party because of the time it took to present his or her case, but it's hard to ignore the fact that most arbitrators are paid per session, not by the hour. Who wouldn't prefer to hear the 15-minute credit card case as opposed to an intricate, multi-witness, multi-exhibit dispute? If you're the attorney who's handling the latter, the question then arises, how do you present your case — the entire case —

As with all aspects of life, communication is key.

without fear that your arbitrators will at some point succumb to panel fatigue and stop listening?

There are obvious suggestions that most of us have already incorporated into our practice, and the Rules of Civil Procedure help, too: By requiring parties to predesignate their intended exhibits, objections as to authenticity and the need to elicit the testimony of records custodians are eliminated at arbitration. Parties may also negotiate ahead of time whether or not there will be objections to the admission of certain evidence and pre-arbitration stipulations of fact: An agreement to limit the scope of the arbitration by dismissing parts of the complaint that discovery has shown to be unsupported can also help streamline the process. As with all aspects of life, communication is key and can greatly reduce some of the haggling that goes on at arbitration over evidentiary issues.

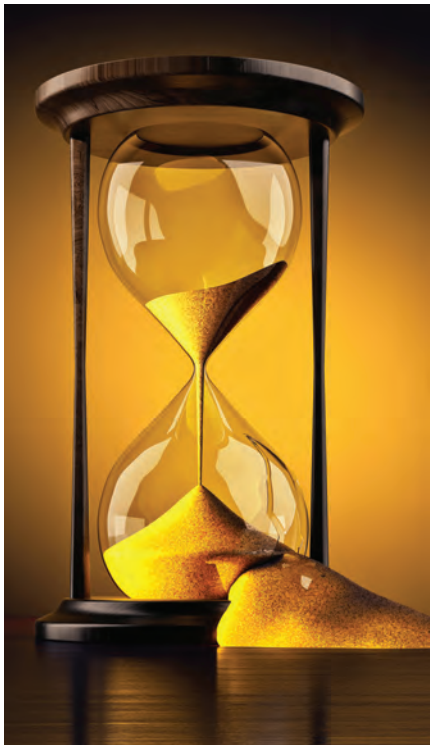
Even assuming the most collegial and concerted pre-arbitration coordination between counsel, there remain instances in which the arbitration will likely exceed the typical length. What can you do in order to ensure that your panel will remain alert and invested, even three hours in?

Contact court administration, or whichever court office manages and coordinates arbitrations, and advise in advance that the arbitration may take several hours or more, and seek to notify the panel of that fact, either through the court or by means of jointly-submitted correspondence. This will alert panel members who have other appointments scheduled for the day to either find a substitute arbitrator or rearrange their schedules.

In lieu of the former, advise your panel at the beginning of the arbitration that the hearing may run longer than normal and explain why. People tend to be more accommodating if you notify them in advance of what their expected time commitment is likely to be.

Prepare your presentation with a stringent view toward keeping things short. Avoid any duplication of evidence, keep openings and closings (when allowed) to a minimum and, rather than oral argument on a point of law, have an appropriate case ready to hand to the panel for its consideration.

Though it may seem self-evident, take time to prepare your witnesses thoroughly. The better you understand the content of their expected testimony and the better they understand the factual points you need to elicit, the more likely they will be to keep their answers focused and to the point.



Limit the evidence to only what is entirely necessary. There may be five witnesses and 20 documents that corroborate a single point; your panel will appreciate it if you limit your presentation to those that are most salient and definitive.

Be ever-alert to your panel's concentration level and to whether they appear to be getting bored or tired. Take your cues from evidentiary rulings and be prepared to move things along even if you haven't elicited the precise testimony you had hoped for. Panel members usually understand where you're going and can quickly assess for themselves whether an obstructive witness is credible. Watch your panel members as you conduct your witness examinations. If you sense impatience, move along.

Consider taking the opportunity between witnesses to discuss what remains to be presented.

Refrain from making objections unless absolutely necessary to protect your case. Much of the evidence presented at arbitration is potentially subject to exclusion on relevance or hearsay grounds, but arguing over objections that don't significantly impact your position is a poor use of time and usually annoys the panel. In particular, if you can reach an agreement with counsel that there will be no objections to leading witnesses as to facts that are not in dispute (generally, a much quicker method of eliciting testimony), you can dispose of many witnesses fairly quickly.

Where possible, attempt to distill large volumes of documents by means of charts or bullet-point summaries — medical chronologies, for example, or line-item damages breakdowns. Provide these to counsel in advance of the arbitration and follow up before the start of the hearing to resolve any objections. In this way, the panel is spared having to page through thick medical charts or the like in order to complete their factual investigation.

In the instance that an arbitration is taking significantly longer than you had originally anticipated, consider taking the opportunity between witnesses to discuss what remains to be presented, thus permitting the panel to take a bathroom break or make phone calls to address scheduling issues.

Consider private arbitration. It costs more, but it may be worth it if the legal issues are abstruse and/or the necessary facts lengthy and complicated. Alternatively, the parties could attempt to remove the matter from arbitration for bench trial with the understanding that any damages will be capped at the arbitration limit regardless of award.

We all want the best outcome for our clients, but sometimes the facts and/or the law suggest that a favorable result may not be possible. While we can't control the operative facts or applicable law, we can control how the panel members respond to and view the advocates who practice before them. Communicating to panel members that you value and respect their time will go a long way toward diffusing any frustration on the panel's part and will ensure that the consideration of the merits of the case is given the time and attention it deserves.

Some cases will inevitably require more time to present than others, and it's possible to do so without alienating your arbitrators, so long as they understand why more time is needed and don't feel as though their time is being wasted. In most cases, less is more — and your panel will thank you. ⚖

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