Global Arbitration Review

The Guide to Advocacy

Editors
Stephen Jagusch QC, Philippe Pinsolle and Alexander G Leventhal

Fifth Edition

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Publisher's Note

Global Arbitration Review is delighted to publish this new edition of *The Guide to Advocacy*.

For those new to Global Arbitration Review (GAR), we are the online home for international arbitration specialists, telling them all they need to know about everything that matters.

Most know us for our daily news and analysis. But we also provide more in-depth content: including books like this one; regional reviews; conferences with a bit of flair to them; and time-saving workflow tools. Visit us at www.globalarbitrationreview.com to find out more.

As the unofficial 'official journal' of international arbitration, sometimes we spot gaps in the literature. At other times people point them out to us. That was the case with advocacy and international arbitration. We are indebted to editors Philippe Pinsolle and Stephen Jagusch for having spotted the gap and suggesting we cooperate on something.

The Guide to Advocacy is the result.

It aims to provide those newer to international arbitration with the tools to succeed as an advocate, whatever their national origin, and to provide the more experienced with insight into cultural and regional variations. In its short lifetime it has grown beyond either GAR's or the editors' original conception. One of the reasons for its success are the 'arbitrator boxes' – see the Index to Arbitrator's Comments on page ix if you don't know what I mean) – wherein arbitrators, many of whom have been advocates themselves, share their wisdom and war stories, and divulge what advocacy techniques work from their perspective. We have some pretty remarkable names (and are always on the look out for more – so please do share this open invitation to get in touch with anyone who has impressed you).

Alas since the last edition we lost one of those remarkable names with the passing of Stephen Bond (1943–2020). Steve was a former head of the ICC and of White & Case's international arbitration team, and a refreshingly clear-eyed thinker. As with Emmanuel Gaillard in 2021, the world of international arbitration was suddenly much poorer when he went. I would urge those who have not seen the two GAR pieces published in commemoration to look them up.[1] One of the things that comes across strongly is how much Steve loved to teach, in his own fashion. With that in mind we thought it would be

1 https://globalarbitrationreview.com/tributes-stephen-bond; https://globalarbitrationreview.com/stephen-bond-1943-2020.

fitting to preserve his arbitrator boxes for the benefit of future generations. So you will still see his name appearing throughout.

We hope you find the guide useful. If you do, you may be interested in some of the other books in the GAR Guides series, which have the same tone. They cover energy, construction, M&A, and mining disputes and (from later this year) evidence, and investor–state disputes, in the same unique, practical way. We also have a guide to assessing damages, and a citation manual (*Universal Citation in International Arbitration - UCIA*). You will find all of them in e-form on our site, with hard copies available to buy if you aren't already a subscriber.

My thanks to our editors Stephen Jagusch QC, Philippe Pinsolle and Alexander G Leventhal for their vision and editorial oversight, to our exceptional contributors for the energy they have put into bringing it to life, and to my colleagues in our production team for achieving such a polished work. And also to practitioners Neville Byford, Stephen Fietta and Sean Upson ('The Role of the Expert in Advocacy') and Flore Poloni and Kabir Duggal ('Tips for Second Chairing an Oral Argument') for giving us extra material to enrich those chapters.

David Samuels
Publisher, GAR
August 2021

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Cultural Considerations in Advocacy: United States

Amal Bouchenaki[1]

The advocate must think his way into the brains of the audience.[2]
Richard A Posner

In a recent publication suggesting tools for effective 'global communicators', the authors, two faculty members at NYU School of Professional Studies, defined culture as 'patterns of thinking and doing'.[3] According to the authors, successful communication across cultures entails 'recognizing the communication patterns between us'.[4] 'Recognizing these patterns', they explain, 'is our key to communication success.'[5] They mention new research that 'shows that cultivating skills with a certain *cognitive flexibility* is what unlocks the skills of cultural competence – a global mindset'.[6]

In our office, we practise in a team of international arbitration practitioners trained in at least nine different jurisdictions. We regularly appear before tribunals where not one co-arbitrator was trained in the same jurisdiction as the other. Awareness of the legal cultures that inform our team's, our opponents' and our adjudicators' approaches to advocacy aims precisely at developing the type of cognitive flexibility needed to 'transcend legal, cultural, contextual and even linguistic barriers to secure a favourable outcome for one's client'.[7]

The corresponding chapter in the previous edition offered a US perspective on best practices in cross-examination and other aspects of oral advocacy. I will not repeat those

1 Amal Bouchenaki is a partner at Herbert Smith Freehills. The author wishes to thank Christopher Boyd, an associate in the firm's New York office, for his assistance.

2 Richard A Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts - One Judge's Views*, 51 Duquesne Law Review 3 (2013), 35.

3 Raúl Sánchez and Dan Bullock, *How to Communicate Effectively with Anyone, Anywhere*, 2021, 141.

4 Id. at 141.

5 Id. at 142.

6 Id. at 166 (emphasis in original).

7 Introduction to 4th edition of *The Guide to Advocacy*.

considerations, which remain valid and relevant. This chapter provides some of the procedural, ethical and societal considerations against which the cognitive framework of advocates in the United States has developed.

Procedural considerations

In a 1950 speech to the New York City Bar Association about the Basic Rules of Pleading,[8] Professor Jerome Michael took stock of, and set the context for, how advocacy developed in the United States:

> *[I]n our courts, when we are at peace or at relative peace, we conduct our controversies by way of language. It follows, of course, that if you want to understand procedural law, you must understand the intellectual activities.*
>
> *What, then, are those activities? In general they consist of forming issues of law and of fact; of trying issues of law by argumentation, and of deciding them by deliberation; of trying issues of fact by evidence, and of deciding them by a calculation of probabilities; and, finally, of determining the legal consequences of the decisions of the issues of law and of fact.*[9]

The decision-making process in the United States, at least in the first instance, is therefore structured around three main stages:

- First, legal issues are formulated with the assumption that the facts alleged are true and that their accuracy can be established.
- Second, each party must prove its case or disprove its opponent's case through an evidentiary phase where the parties debate the admissibility of documentary and witness evidence, and the credibility of the proof presented to a judge and, when applicable, a jury.
- Third, the parties debate the legal consequences that they wish the adjudicators to draw from the facts and the law that will have been brought to their attention.

The above outline of the stages of the decision-making process is subject to the specific rules of the trial court. Moreover, an appellate court will in most cases review evidentiary findings of the lower court for clear error, which tends to truncate the above stages to focus on issues of law. But, from the point of view of identifying 'patterns of doing and thinking,' US advocacy and the rules of evidence before the US courts are nevertheless shaped by this three-stage structure of decision-making. 'The conventions of the Anglo-American law of evidence are historically related to the development of the jury system . . . .'[10]

The function of the first procedural stage is to lay out and formulate what is to be proved and disproved during the evidentiary phase that follows. But during this stage, the 'truth' of the facts alleged is not tested. Rather, defendants would typically seek to identify and then convince the court of fundamental defects in the legal theory of the plaintiff's case that prevent the case from proceeding to the evidentiary phase. This entails both written pleadings and oral advocacy before a professional judge. At this stage, written and oral

8 Jerome Michael, *Basic Rules of Pleading*, 5 REC. Ass'n B. CITY N.Y. 175 (1950), 175.

9 Id. at 176.

10 Jerome Michael & Mortimer J Adler, *The Trial of An Issue of Fact: I*, 34 Colum. L. Rev. (1934), 1235.

Effective oral advocacy generally does not require standing

It is not uncommon for US lawyers, particularly those who are relative newcomers to international arbitration proceedings, to leave the counsel's table and to stand at a podium facing the arbitrators when delivering oral opening and closing statements. Usually, the lawyer's presentation is accompanied by a slick (and frequently lengthy) PowerPoint presentation. I have never seen lawyers of other nationalities make their oral submissions from a standing position (unless possibly compelled to do so for medical reasons), although a fondness for PowerPoint slides is not uniquely American, and their use today in international arbitration proceedings is widespread.

Now, I have never seen an international arbitral tribunal object to a US lawyer standing and facing the tribunal, and I have no particular issue with an advocate wishing to do so. However, if US lawyers believe that by adopting a vertical posture, their oral advocacy will be more effective in an international arbitration, I would have little hesitancy in disabusing them of that notion. Effective oral advocacy in an international arbitration generally does not require standing and can be accomplished just as effectively sitting down. Moreover, standing tends to add a layer of formality to a presentation in a proceeding at which the advocate should be seeking to establish a comfortable and relatively informal rapport with his or her audience (the tribunal), rather than delivering a formal speech to them.

– *Eric Schwartz, Schwartz Arbitration*

advocacy would not typically revolve around issues of fact, for example, the facts pleaded by the plaintiff are accepted as true for purposes of a motion to dismiss, and to prevail on a motion for summary judgment, the movant must demonstrate that there is no genuine dispute as to any material fact on which the relevant claim rests. This phase consists of arguing the sufficiency of the legal elements of the claims before the court.

The second stage is the trial. It ensues if the plaintiff's case survives this first stage. Litigation in the United States has developed around the principles that 'a trial is a legal proceeding in which a legal tribunal acquires knowledge',[11] and that 'it is often unjust to resolve controversies on the pleadings because of the very frequent discrepancy between what can be alleged and what can be proved.'[12] The US system of resolution of controversies is therefore rooted in the burden that falls on each party to demonstrate to the court, and the jury when applicable, the truth of their respective allegations.

> *Some advocates may fear that a judge will feel patronized if the lawyer tries to explain the case to him in words of one syllable. Fear not; in my thirty years of judging, I have never encountered a judge who took umbrage at being spoon-fed by the lawyers.*[13]

11 Id. at 1233.

12 Jerome Michael, *Basic Rules of Pleading*, 5 REC. Ass'n B. CITY N.Y. 175 (1950), 189.

13 Richard A Posner, Judicial Opinions and Appellate Advocacy in Federal Courts – One Judge's Views, 51 Duquesne Law Review 3 (2013), 36.

Effective advocacy does not necessitate lengthy PowerPoints

I have nothing against PowerPoint slides particularly, as they can be useful when used relatively sparingly, primarily for the purpose of either illustrating complex technical matters or presenting key evidence (and saving the tribunal the effort of having to look it up in a voluminous set of documents).

Too often, however, slides are used to lay out the arguments that have already been made in pre-hearing written submissions and operate as a straitjacket that actually detracts from the effectiveness of the advocacy. More importantly, they have the disadvantage of directing the tribunal's attention towards the slides, while the effective advocate's principal objective should be to establish eye contact with the tribunal: to have the tribunal looking at him or her, while the advocate is looking at the tribunal, as if the advocate were having a conversation with the tribunal, thus placing the advocate in a better position to gauge the tribunal's reactions (from the raising of an eyebrow to a quizzical stare, or inattention or boredom), thus signalling to the advocate whether it is best to change course, to add additional emphasis or simply move on to the next point. Effective advocacy does not necessitate a lengthy set of PowerPoint slides.

– Eric Schwartz, Schwartz Arbitration

Distinguishing scientific truth from the truth of which lawyers have to convince their adjudicators, Professor Jerome points to the 'great misfortunes' of lawyers who, unlike mathematicians, deal with probabilities that are 'relatively indeterminate'. In this context, he comments that '[t]he function of the judge or the jury is to estimate the probabilities of the material propositions in the light of the proofs and disproofs.'[14]

The third stage appeals to the less rational aspect of decision-making. This is where advocates seek to convince adjudicators that their version of the truth is the one that ought to prevail, and of the legal consequences that should be drawn from such truth.

Advocacy in the second and third stages of this process differs. The second stage proceeds within a rational framework of evidentiary rules that govern which pieces of evidence can be properly admitted for consideration by the judge and the jury, and which should be excluded. Advocacy in this second stage cannot be separated from the rules of evidence. An important component of effective advocacy in the United States is knowledge of the exclusionary rules. As professors Michael and Mortimer had put it in the 1930s, these evidentiary rules are imposed by 'the rules of reason without which [proof] is not proof'.[15] There is less room for appealing to the emotional brain of the adjudicator during this phase. Advocacy during this stage is driven by a deep knowledge and understanding of the rules of evidence, and a crafty and strategic use of them.

Appeal to emotions through advocacy comes into play during the last stage of this process. This phase calls for less rational advocacy techniques, because 'reasonable men can in some cases be differently persuaded by the same proof.'

14 Jerome Michael, *Basic Rules of Pleading*, 5 REC. Ass'n B. CITY N.Y. 175 (1950), 196.

15 Jerome Michael & Mortimer J. Adler, *The Trial of An Issue of Fact: I*, 34 Colum. L. Rev. (1934), 1235.

> *[T]he task of the advocate in what can be called probative opposition is different from his task as opposition in persuasion; in the former, he tries to make certain proofs and to prevent or counteract disproofs; in the latter, proofs and disproofs having been accomplished, he carries the opposition by forensic oratory in which he tries to persuade either judge or jury or both to estimate the probabilities of the propositions, which have been proved in a certain way.*[16]
>
> *The character of persuasion which occurs during the stage of proof is subtle or covert, whereas summation is avowedly and openly a process of persuasion. It is the persuasive aspect of the stage of proof which is indicated by the phrase 'flirting with the jury'.*[17]

Commenting on how far an advocate should go in appealing to the emotions of his or her adjudicators, Professor Jerome pointed to a statement by the Supreme Court of Tennessee in response to a complaint about defendant's lawyer weeping when making his case to a jury: '[i]t is not only counsel's privilege to weep for his client; it is his duty to weep for his client.'[18]

Addressing the appellate advocate, Judge Richard Posner wrote:

> *Most judges are a blend of formalism and realism. They want to reach a sensible, reasonable result in those cases that are not governed by clear statutory text or precedent. They are interested not only in the rule, but also in the purpose of the rule that you are invoking; and not only in the facts that have been developed in an evidentiary hearing, but also in the non-adjudicative facts that illuminate the background and context of a case – that makes the case come alive to a person not immersed in the field in which it arises.*[19]
>
> *[R]arely is it effective advocacy to try to convince judges that the case law compels them to rule in your favor. Just think: how likely is it that if the case law relating to the case at hand were one-sided, would the case . . . have gotten to the appellate stage?*[20]

Advocacy in the United States is often criticised as relying on a web of complex and cumbersome rules of evidence that make the process inefficient. As discussed below, arbitration often prides itself for being a more flexible and efficient process, free of US evidentiary rules where extensive discovery practices have developed. International arbitration advocates also at times like to distinguish themselves from more aggressive and guerilla-like advocacy techniques that are associated with US-style advocacy.

Advocacy in the United States: an inherently immoral endeavour?

In a 2008 legal ethics book,[21] Professor Daniel Markovits stirred, or revived, a debate around the ethics of adversarial advocacy in the United States. At the risk of oversimplifying, Professor Markovits's proposition was that American lawyers' ethical obligations,

16 Id. at 1240.

17 Id. at 1240, n.19.

18 Jerome Michael, *Basic Rules of Pleading*, 5 REC. Ass'n B. CITY N.Y. 175 (1950), 200.

19 Richard A. Posner, Judicial Opinions and Appellate Advocacy in Federal Courts - One Judge's Views, 51 Duquesne Law Review 3 (2013), 36.

20 Id. at 37.

21 Daniel Markovits, *A Modern Legal Ethics: Adversary Ethics in a Democratic Age*, 2008, Princeton University Press.

Speak with, not at, the arbitrators

Throughout my career as a lawyer, I stood in awe of the great oral advocates (co-counsel and adversaries alike) that I encountered in US litigations and international arbitrations. I admired (and envied) the confidence of their voices, the eloquence of their words and the majesty of their presentations during oral openings, closings and other arguments. I admired them so much, I didn't always hear what they actually said.

My perspective has changed since I began sitting as arbitrator, initially part-time while I continued to practise as an attorney, and now full-time since I retired from my law firm. As arbitrator, I still admire the skill and performances of the great orator advocates who appear before me, but I find myself more readily persuaded by advocates who adopt a conversational, less dramatic, approach to oral argument. When lawyers speak with me person to person, rather than at me as performer to audience, the psychological distance created by our respective roles as advocate and arbitrator narrows, and I find myself more focused on what they say than on how they say it. The conversational argument remains a performance, of course – and not an easy one – but it is a performance that engages as much as it impresses.

Speaking with, rather than at, your arbitrators is a matter of both style and substance. As for style, the advocate who speaks with arbitrators prefers to present argument from his or her seat rather than from behind a podium, adopts a conversational tone rather than an argumentative one, and refers to his or her notes as little as possible so as to maintain eye contact with the arbitrators. As for substance, the advocate puts himself or herself in the arbitrators' shoes (empathises with them, in non-legal parlance), identifies with candour the issues the arbitrators are likely to be struggling with, and explains why his or her proposed solutions to those issues are the most sensible and fair. 'Let me try to address the key questions that I imagine the tribunal may be asking itself', the conversational advocate might begin. And just as conversation is both give and take, so is the persuasive advocate's argument both assertion and concession. While many lawyers are reluctant to concede anything on any issue, the most persuasive ones concede what should be conceded – and find something to concede if no other concession is apparent. Concessions beget credibility, in life and in law. Persuasive advocates use candour and concession to gain in credibility more than they lose on the merits.

The best way for an advocate to appreciate the power of speaking with, as opposed to at, arbitrators is for the advocate to serve as an arbitrator himself or herself. I can think of nothing in my career as an attorney that improved me more as an advocate than my experience as an arbitrator.

– Robert H Smit, Independent arbitrator

particularly their loyalty towards their clients, fostered unethical conduct 'deeply ingrained in the genetic structure of adversary advocacy'.[22]

22 Id. at 2-4.

This view was criticised[23] as misunderstanding the principles that underlie adversarial advocacy. 'Advocacy's legitimate and central role in [the US] legal system' is 'to facilitate construction of an accepted and authoritative version of truth upon which disputes can be resolved and justice administered.'[24] The reality that shapes the art of advocacy is that truth in litigation is mostly uncertain. No one actor in the litigation process can claim full access to the truth. 'As opposed to the certainty of theoretical knowledge, practical knowledge is contingent and contextual. In Aristotle's words, it is at best "approximately" true . . . . Circumstances are always subject to change, information is always incomplete, and human action is always enveloped in some degree of uncertainty.'[25]

The function of advocacy then, is to 'facilitate construction of an authoritative version of the truth upon which disputes can be resolved and justice administered'.[26] One has to agree with professors Hazard and Remus when they dismiss the criticism that the ethics of advocacy in the United States lead to a type of loyalty towards one's client's version of the truth, that would inherently obscure the truth. First, loyalty to clients is at the centre of any legal practitioner's values in a democratic society. It is not specific to the United States. It is shared among advocates of both the common law and civil law traditions.

Second, such a criticism is based on an incorrect assumption: that 'lawyers have access to "correct" and "proper" views in the first place',[27] which they would then choose to distort out of loyalty towards their clients. But '[a]s an initial matter, and as Aristotle explains, uncertainty inheres in any context of "practical knowledge" – any context of human affairs. This uncertainty is heightened in the subset of human relationships that deteriorate into litigation . . . .The engagement of lawyers will not dissipate the disagreement or clarify the objective truth of a dispute.'[28]

The advocate's role is, therefore, to assist a tribunal in reconciling conflicting accounts of a dispute. But because the advocate is educated about the case by the clients' perception of their story, they tend to develop a natural bias towards their clients' story and version of how a dispute should be adjudicated. This is not to say that zealous advocacy cannot also rely on trickery and cheating. But such conduct is not inherent in how lawyers implement procedural and evidentiary rules. On the contrary, the rules that govern the admission of proof are intended to create a predictable, rational playing field, consistent with the principles of due process and other considerations, such as privacy, that are prevalent in a given society.

In this regard, while in many respects the flexibility or absence of precise rules of evidence in international arbitration can be celebrated, they can also raise issues. Unlike the more limited scope of discovery in international arbitration, which is viewed as a positive,

23 Monroe H Freedman & Abbe Smith, *Misunderstanding Lawyers' Ethics*, 108 Mich. L. Rev. 925 (2010); Geoffrey Hazard, & Dana A Remus, Advocacy Revalued (2011), Faculty Scholarship. Paper 1103, http://scholarship.law.upenn.edu/faculty_scholarship/1103?utm_source=scholarship.law.upenn.edu%2Ffaculty_scholarship%2F1103&utm_medium=PDF&utm_campaign=PDFCoverPages.

24 Id. at 756.

25 Id. at 758.

26 Id. at 755.

27 Id. at 760.

28 Id. at 760 (internal citations omitted).

in the words of one of my very experienced litigation colleagues, 'throwing out hundreds of years of evidence can be a negative.'

A non-exhaustive look into how some key exclusionary rules in the United States compare to the 2020 IBA Rules on the Taking of Evidence in International Arbitration sheds some light on how unsettling international arbitration advocacy can be for a US litigator. For example:

> *Federal Rule of Evidence (FRE) 611. Mode and Order of Examining Witnesses and Presenting Evidence*
>
> *(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:*
>
> *(1) make those procedures effective for determining the truth;*
>
> *(2) avoid wasting time; and*
>
> *(3) protect witnesses from harassment or undue embarrassment.*
>
> *(b) Scope of Cross-Examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.*
>
> *(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:*
>
> *(1) on cross-examination; and*
>
> *(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.*

This Rule can be used for a number of different objections during cross-examination, for example, 'argumentative', 'asked and answered', 'assumes facts not in evidence', 'compound', 'cumulative', 'leading' and 'non-responsive'.

It focuses on the form or timing of questions; it stands for the elaborate protocol surrounding evidentiary issues that so characterises litigation in the United States. In comparison, there is no parallel guidance under the IBA Rules, which do not contain this level of granularity.

Yet, this rule does play an important role in demonstrating the truth US counsel is seeking to prove by tying and limiting testimony to facts that have been deemed admissible as evidence. This winnowing function limits and focuses the scope of the inquiry on cross-examination by virtue of the prior admissibility and other evidentiary rulings.

> *FRE Rule 701. Opinion Testimony by Lay Witnesses*
>
> *If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:*
>
> *(a) rationally based on the witness's perception;*
>
> *(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and*
>
> *(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.*

This Rule can be used for objections such as 'speculation' or 'improper lay opinion'.

> *Not only does the rule require that the opinion be 'helpful' [to the jury's determination of a factual issue] (requirement (b)), but also that it be 'rationally based on the perception of the witness' (requirement (a)), that is, the witness must have first-hand personal knowledge of facts that reasonably justify the conclusion the witness has reached.*[29]

The rule therefore aids the advocate to highlight how – apart from experts and character witnesses – the admissibility of 'opinion' is strictly limited under the Federal Rules of Evidence. Also 'helpful[ness]' to the jury is the basis for the rule, a consideration that obviously doesn't arise in the arbitration context.

Unsurprisingly, there is no parallel rule under the IBA Rules and objections drawn from such a rule in cross-examination of witnesses in international arbitration proceedings is rarely available.

> *FRE Rule 702. Testimony by Expert Witnesses*
> *A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:*
> *(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;*
> *(b) the testimony is based on sufficient facts or data;*
> *(c) the testimony is the product of reliable principles and methods; and*
> *(d) the expert has reliably applied the principles and methods to the facts of the case.*

Rule 702 governs expert testimony, which is another area where broad contrasts can be drawn to the IBA Rules.

Article 5 of the IBA Rules gives the parties wide discretion on the individuals that can be appointed as an expert.

In US litigation, an expert may be challenged initially in an admissibility hearing (a *Daubert* hearing) on the basis of this rule, and the expert's opinions could be excluded from the universe of proofs that form the basis of the adjudicator's determination.

Under US rules of evidence, expert testimony is essentially a carve-out from the general rule excluding 'opinion' testimony, hence the rigorous, complex procedure for defining 'expertise', which generally limits the scope of potential experts in US litigation compared to arbitration.

> *FRE Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay*
> *(c) Hearsay. 'Hearsay' means a statement that:*
> *(1) the declarant does not make while testifying at the current trial or hearing; and*
> *(2) a party offers in evidence to prove the truth of the matter asserted in the statement.*

Section (d) details the statements that are not hearsay.

29 Paul Rothstein, *Federal Rules of Evidence*, (3d ed.), Rule 701.

Rule 801 defines hearsay, while the rules that follow in Article VIII play other key roles in relation to hearsay, for example, Rule 802 (prohibiting hearsay); rules 803, 804, 807 (key exceptions to hearsay).

The IBA Rules do not refer to hearsay. Yet, hearsay is a key tool in cross-examination. The purpose of the rule is designed to, in theory, at least, ensure the reliability of witness

Learn to read the room

Every arbitration has its own culture. No algorithm or artificial intelligence will completely sniff it out. It is always unique and sometimes subtle. Advocates who home in may adapt to, shape or even resist the case culture but will surely benefit from understanding it. Those who miss it will be at a distinct disadvantage.

Much has been written about cultural distinctions between the civil and common law traditions, the inquisitorial tribunal as against the adversarial system and the benefits of harmonisation. Attention to these factors should not obscure the fact that, in every commercial arbitration, there are a lot of individual actors, including parties, companies (with corporate cultures), counsel, witnesses and arbitrators. In many cases, human factors, less binary and more complex than classic cultural divides, may prove more important. And while individuals are shaped by their cultural background, life experience and policy preferences, in any particular matter they may react against type.

It is critical, then, to understand the human element in every case and the way in which the unique mixture of human beings who have come together is functioning. Be attentive to whether the arbitrators, to use Professor Draetta's phrase, are visibly a 'triad', working in an integrated and complementary way, or if there are signs of stress, silos or even hostility. Note in real time whether the tribunal seems interested and engaged or bored; receptive to opening statements or impatient to dig into the facts. Consider how aggressive questioning, legal arguments, logic or even humour will land with this group of individuals. The advocates' relationships with each other and the tribunal may have an impact. Cultural background and experience have the potential to affect how deferential an arbitrator will be to expert testimony and how documentary and witness evidence will be perceived, but we cannot assume how these predilections will unfold in an actual case.

Too often, I think, counsel seem inattentive to what is happening in the room and unprepared to adjust. There is the advocate who ploughs on with an unwelcome US jury-style opening, persists in objections the tribunal has made clear it doesn't want to hear, or in arguments the tribunal has heard enough of. Sometimes even major cultural issues of the moment may be a subtle influence though they are not directly relevant. Life assuredly would be easier for the advocate if it were possible to sit in one's office before a hearing and define cultural issues in terms of nationality, legal tradition, race, gender or other objective information about the tribunal. All that may be relevant, but it is surely just a start. Real-world arbitrators may not be predictable in their outlook and, indeed, may act in ways that are counterintuitive to a fact-based profile. The wise advocate will be prepared to pivot in reaction to the real-time dynamic of what is happening in the room.

– Mark C Morril, MorrilADR

statements. It can aid counsel overall by restricting the scope of material for an adjudicator to consider.

By contrast, arbitration is predicated on the idea that arbitrators will generally be in a position to make wise and informed choices about the reliability of testimony – the arbitrators do the winnowing. By excluding such testimony altogether on hearsay grounds, Article VIII of the FRE in a sense may take certain issues off the table by excluding them from the adjudicator's consideration. The lawyers in the case, by being expert at the evidentiary rules such as the rules on hearsay, separate the wheat from the chaff.

These rules are also viewed as rational tools to contain lawyers' zealous partisanship and temptation to seek to engage in the type of immoral advocacy for which they are sometimes criticised. One of the reasons for Hazard and Remus's defence of adversarial advocacy as not inherently immoral is precisely that the advocate's rhetorical skills are contained in a system of rational and predictable evidentiary rules.

But in international arbitration, cross-examination has been adopted by practitioners of all legal traditions, without the system of evidentiary rules within which cross-examination sits in the United States. This takes me back to Laurence Shore's dismay[30] at a French arbitrator's frustration in reaction to the 'textbook cross-examination' Dr Shore had just conducted. Contrary to what would have happened in a US trial, cross-examination of the witness was that arbitrator's only opportunity to hear from that witness in the witness's own words. A written witness statement, carefully crafted by counsel, can be a poor substitute for a direct examination of a witness, conducted within the confines of applicable evidentiary rules, and an unsatisfactory precursor to cross-examination. But who knows? Could a year of pandemic-driven virtual interactions inspire some tribunals and parties to give a chance to Dr Shore's suggestion that parties submit videos of their witnesses' direct examinations, in lieu of witness statements.

Societal considerations: a white, male-driven culture?

In 2017, and again in 2020, the New York State Bar Association (NYSBA) conducted an extensive and sobering survey on the level of gender diversity among advocates holding lead advocate positions in federal and state courts in the State of New York. The 2020 Report summarises results from over 5,000 responses. A few numbers:

- *Female attorneys represented 26.7% of attorneys appearing in civil and criminal cases across New York.*
- *Female attorneys accounted for 25.3% of lead counsel roles and 36.4% of additional counsel roles. This represents a disappointingly tiny increase of only one-half of a percentage point in lead counsel roles but a healthy increase of 9 percentage points in additional counsel roles – which means that more women attorneys are appearing in court even if they are not lead counsel.*
- *In the current study, women made up 35.1% of public sector lead attorneys but just 20.8% of private practice lead attorneys. . . . These figures show little progress with respect*

30 Laurence Shore, 'Cultural Considerations in Advocacy: United States', *The Guide to Advocacy* (4th ed., Global Arbitration Review 2020).

> *to private sector attorneys, whose appearances as lead attorneys grew by just over one percentage point* [compared to the 2017 Report].[31]

The 2020 NYSBA Report also points to an American Bar Association (ABA) study of randomly selected federal cases. The study found that 76 per cent of trial teams and 79 per cent of criminal teams were led by men.[32] In the United States Supreme Court, 'a mere 12 per cent of the arguments were conducted by women during the 2017-18 term.'[33] Further studies show that underrepresentation of female advocates is even more blatant when it comes to women of colour.

This data is difficult to ignore when addressing cultural considerations of advocacy in the United States. What to say about the place of women advocates in the United States? I would venture two observations on where we are.

First observation: while best practices in advocacy should be gender-neutral, they are not. Professor Lara Bazelon, USF School of Law Chair of Trial Advocacy and former prosecutor concludes a story in *The Atlantic*[34] on sexism in the courtroom with this 1820 quote from Henry Brougham:

> *An advocate in the discharge of his duty knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and among them, to himself, is his first and only duty.*

Yet Lara Bazelon reckons that she cannot train her female students to be trial beasts without telling them that 'in the courtroom . . . women lawyers don't have access to the same "means and expedients" that men do.' Professor Bazelon undertook to interview numerous women advocates across the United States. She gives colourful examples of the sexism they continued to encounter in 2018. She explains that every woman she has interviewed recognised having found themselves facing the 'double-blind' of 'the imperative to excel under stressful courtroom conditions without abandoning the traits that judges and juries positively associate with being female. It is a devilishly narrow path to walk . . . .'

So, she writes:

> *I tell my female students the truth: that their body and demeanor will be under relentless scrutiny from every corner of the courtroom. . . . That they will have to find a way to metabolize these realities, because adhering to biased expectations and letting slights roll off their back may be the most effective way to advance the interests of their clients in courtrooms that so faithfully reflect the sexism of our society.*

Gender and race biases are undoubtedly part of the cognitive flexibility that female, as well as minority advocates continue to have to master in the United States and elsewhere. '*The*

31 Report of the NYSBA Commercial and Federal Litigation Section, The Time is Now: Achieving Equality for Women Attorneys in the Courtroom and in ADR, 2020, p. 6.

32 Lara Bazelon, 'What It Takes To Be A Trial Lawyer When You're Not A Man', *The Atlantic*, September 2018.

33 Report of the NYSBA Commercial and Federal Litigation Section, p. 14.

34 Lara Bazelon, 'What It Takes To Be A Trial Lawyer When You're Not A Man', *The Atlantic*, September 2018. .

American Lawyer has forecast that given current trends, gender parity among equity partners [in law firms] will not be achieved until the year 2181.'[35] The proportion of female equity partners in law firms is one indication of how the allocation of advocacy roles can operate.

However, and this would be my second observation, the legal community in the United States is moving the needle. Law firms are having to catch up, and as a result of this movement, law firms in the United States are increasingly attentive to the development of more diverse talent. The United States judiciary has been particularly innovative, with many judges, men and women, starting to amend procedural rules to foster more diversity in the pool of advocates that argue before them.

'[M]any judges [are] now adopting standing orders that encourage participation from less-experienced lawyers.'[36] Following the NYSBA 2017 Report, 'legendary federal judge Jack B Weinstein in the Eastern District of New York, amended their practice rules by inviting "junior members of legal teams" to argue "motions they have helped prepare and to question witnesses with whom they have worked."'[37] These new rules also removed the limits on the number of advocates authorised to appear for each party so that more than one lawyer can argue for one party. The 2020 Report has counted that '[s]ince 2017, more than 150 state and federal judges have adopted some variation of the rule, where "less experienced lawyers, lawyers from diverse backgrounds and lawyers who are women" or historically underrepresented attorneys are encouraged to participate in courtroom proceedings.'[38]

35 Report of the NYSBA Commercial and Federal Litigation Section, p. 8, fn.5.

36 Id at p. 14, (referring to Britain Eakin, 'Judges Outline Ways Judiciary Is Pushing For Attorney Diversity', Law360, (27 September 2019)).

37 Id. at p. 61.

38 Id. at p. 62.

Successful advocacy is always a challenge. Throw in different languages, a matrix of (exotic) laws and differing cultural backgrounds as well and you have advocacy in international arbitration.

Global Arbitration Review's *The Guide to Advocacy* is for lawyers who wish to transcend these obstacles and be as effective in the international sphere as they are used to being elsewhere. Aimed at practitioners of all backgrounds and at all levels of experience, this Guide covers everything from case strategy to the hard skills of written advocacy and cross-examination, and much more. It also contains the wit and wisdom on advocacy of more than 40 practising arbitrators, including some of the world's biggest names in this field.

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