Suggestions for lawyers taking family law matters to arbitration

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This note provides some suggestions for lawyers taking family law cases to arbitration, offered from my perspective as a family law arbitrator.

The theme that runs throughout this paper is straightforward. Your primary object in arbitration is to get the best possible outcome for your client, just as it is in litigation, and your chances of getting that outcome are maximized when you make it as easy as possible for me to understand your client's evidence and comprehend your argument.

I. A peek behind the curtain

Before getting into the nuts and bolts, I think it might help to provide a sense of what it's like to work as an arbitrator; the approach I take to files as an arbitrator is radically different from that I take as a mediator or that I took as a litigator.

As arbitrator, I have but two primary responsibilities: I must provide natural justice; and, I must be and remain unbiased, and be seen to remain unbiased. That's it. I'm not bound by the rules of evidence, I'm not bound by the rules of court, and, with certain exceptions concerning children's parenting arrangements, I'm only bound to consider the statutory and common law of a jurisdiction if the parties agree that I will apply that law in making my decision.

The obligation to remain unbiased is remarkably easy to accomplish. I rarely have any particular feelings about the parties one way or another, and I always ignore evidence and allegations of misconduct except when that misconduct is actually material and relevant to the legal issues. (**Tip #1**: Don't waste your time getting into the opposing party's infidelities and your client's reaction to those infidelities. I really couldn't care less; it happens, and it happens a lot.) And by the time I get to writing my award, my recollection of the parties has faded to the observations I've made in my notes. I wouldn't recognize your client if I passed them on the street.

It's only slightly more difficult to maintain the appearance of being unbiased, and to that end I will never communicate or meet with a party in the absence of the other party, and I insist that all communications to me are copied to the other party. (See the new guidance on ex parte communications at Rule 5.1-2C of the FLSC's Model Code of Conduct.) I also limit my contact with the parties outside of the hearing, and take meals and breaks alone during the hearing.

The obligation to provide natural justice, on the other hand, manifests in a preoccupation with planning for and managing the arbitration process itself, and ensuring the perception and reality

of the fairness of the proceeding. I will only hear ex parte applications in situations of extreme urgency (see the new Rule 5.1-2B), I will almost always allow a party to respond to claims made by the other, and I will almost always adapt previously-arranged processes when counsel request an accommodation for good reason.

The biggest surprises for me as an arbitrator have come from the genuine neutrality of the position. As a litigator, I used to pride myself on having a truly objective take on the facts, the law and my clients' chances of success. Having had the opportunity to watch many highly skilled counsel present their cases, I now recognize that I could not possibly have been as impartial as I believed. Even the best lawyers can lose their objectivity when serving as advocate and wind up adopting unreasonable positions. (**Tip #2**: Make a point of learning as much as you can about enmeshment, transference and countertransference. It seems to me that these concepts apply to lawyers as much as they do to psychotherapists.)

Speaking of enmeshment, I have also been struck by the extent to which conflict between the lawyers on a file can impair the smooth functioning of the arbitration process, generate unnecessary applications and demands for disclosure, polarize the parties' positions, and increase the time and cost required to complete a file. I always enjoy files where counsel are polite and respectful of one another and willing to oblige reasonable requests despite the rancour between their clients.

Finally, I've also been surprised by how the "right" outcome usually becomes blisteringly obvious once I've finished determining the facts of a case and the applicable law. It's almost a mathematical equation, law + facts = outcome. It never seemed that obvious to me as a litigator.

II. Planning for the arbitration

Your first point of influence lies in the shaping of the arbitration process itself. Most arbitrators will ask counsel to attend a planning meeting shortly upon being contacted on a new file. The purposes of the planning meeting include defining the issues to be resolved, determining the procedures to be available in the arbitration process, identifying the materials to be provided to the arbitrator, and setting a schedule for the steps to be taken before and after the hearing.

A. Identifying the issues

It is important to carefully define the issues to be resolved, as the arbitrator's authority stems solely from the parties' agreement to be bound by the arbitrator's decision. In every jurisdiction, a party may ask the court to set aside an award that addresses legal issues not specifically assigned to the arbitrator, and all without the hassle of an appeal. You don't want to see the arbitrator's award, never mind the time and effort you put into the arbitration process, getting punted for want of jurisdiction over an issue. (**Tip #3**: Make sure that the arbitration agreement identifies all of the issues that need to be resolved, and take scrupulous care to limit your submissions to the issues clearly within the arbitrator's authority. There's no need to tempt the arbitrator into error.)

B. Shaping the arbitration process

The planning meeting offers you an opportunity to shape the conduct of the proceeding that is never available in litigation. You can have a process that gives you all the bells and whistles of a trial, but do you need all those bells and all those whistles? Is oral evidence really needed? Can you get by with affidavits and oral cross-examination? Will a statement of agreed facts do? Is the issue really about a point of law that requires no evidence at all, just argument? Must you schedule those examinations for discovery or can you get by with interrogatories and requests for admissions? (**Tip #4**: Your client has chosen to opt out of the litigation process; respect their decision, get creative, and do your best to streamline the process of getting to the award.)

Remember that the arbitrator's fundamental concern is to have enough information and evidence to fairly determine the issues before them, and that the minimum required information will vary from case to case. I have resolved some files, usually those focused on points of law, based on briefs of argument, without evidence. I've resolved others on the basis of arguments, statements of agreed facts and experts' reports. Other files have indeed required all of the trappings and folderol of a superior court trial to fairly resolve.

C. Screening for family violence

I expect that counsel will have done a screening for family violence. If you have, please give me your assessment at the planning meeting. If you haven't, tell me, and I will arrange for a screening. (I use the online screening service provided by Sagesse, a Calgary-based family violence organization. This service is fast, available to anyone in Canada, and, at $50 per party, inexpensive. It also lets me defer responsibility to an organization with more expertise on the subject than I can ever hope to have.)

The results I get are of the red-light/green-light variety, and tell me nothing about the parties' responses or which may be the perpetrator or the victim. These results will have an impact on how the day of the hearing itself is arranged, and may suggest that a remote hearing is to be preferred over an in-person hearing.

D. Written materials

I confess to preferring written materials. I like to be able to read and reread affidavits and briefs, I like being able to bring everything with me on my tablet when I'm out of town, and I like being able to highlight things and make marginal notes. I would much rather have a document I can refer back to when writing my award than scribble notes of a witness's testimony or your brilliant oral argument, and then try to read my handwriting afterward. I also rather suspect that you might prefer written materials as well; it gives you the opportunity to reflect on your case and craft an articulate argument well-supported by the law, and, if you present your evidence by affidavit, you never have to worry about the words that are going to pop out of the witness' mouth during their oral evidence. (**Tip #5**: Try to reach an agreement that as much as possible of your arguments and the witnesses' evidence will be presented in writing.)

I also really appreciate statements of agreed facts, the more comprehensive the better. These statements give me a buffet of uncontested facts from which to draw without the necessity of reconciling the version of events provided by Party A with those provided by Party B. The more facts I can use without addressing issues of credibility, the more quickly I can write my award, and the more quickly I can write my award the less expensive the process will be.

If the arbitrator fails to raise the subject of page limits at the planning meeting, don't hesitate to bring the possibility of limits up yourself. Page limits have the obvious effect of reducing the volume of materials the arbitrator may need to read and speeding up the process of getting to an award. They have the less obvious but infinitely more important benefits of forcing you to sharpen your argument in written briefs, helping you focus on the most import facts in affidavits, and minimizing the opportunity for inconsistencies and contradictions to slip into your materials. (**Tip #6**: Always ask that page limits be imposed on affidavits and arguments, and keep those limits short!) There seems to be a correlation between brevity and quality in both arguments and affidavits; some of the worst materials I have read have also been the longest.

The arbitrator will also want to talk about the other materials they will receive, usually statements of claim or statements of relief sought, and books of documents. I personally don't find opening arguments and statements of claim to be particularly helpful. Most of the time, what I really want is a precise, concise statement of relief sought that describes the specific awards your client is looking for. Save your arguments for your closing. I'll cover books of documents shortly.

E. Oral evidence

Despite my views about oral versus written evidence, oral evidence can be important when credibility is at issue. Even though judges and police officers (and arbitrators, it follows) have been shown to be no better than anyone else when it comes to identifying liars, being able to observe a witness's demeanour, tone of voice and body language at least gives me a solid and virtually appeal-proof foundation from which I can draw conclusions about someone's reliability and credibility. Needless to say, an adverse finding of credibility can have a profound impact on the outcome of a case. (**Tip #7**: Always include submissions on the credibility of the key witnesses in your arguments.)

Even when oral evidence will be presented, there are steps you can take to streamline the arbitration process. You could propose that the parties' evidence in direct be presented by affidavit, but that they be subject to oral cross and oral redirect; you can propose limits to the time available for direct, cross and redirect; and, you can propose limits on the number of witnesses each party may call.

F. Deadlines and due dates

A good amount of time at the planning meeting will be spent setting dates by which disclosure must be complete and materials must be exchanged, both before and after the hearing. The

materials to be prepared and exchanged in advance of the hearing typically include experts' reports, valuations, financial statements, statements of relief sought, and affidavits; the documents exchanged after the hearing are usually limited to written arguments.

Be sure that the deadlines you agree to are reasonable and can be managed along with your obligations on your other files. For some reason, dates are easy to pick when the materials won't need to be prepared for months. (**Tip #8**: Be cautious and conservative when selecting dates, and consider giving yourself more time than you think to be necessary.)

When deadlines and due dates are established, you must do your best to comply with those deadlines, as well as any other restrictions that have been agreed to, such as page limits. You must not count on late or additional materials being admitted or considered, especially when the admission or consideration of those materials would be prejudicial to the other party. (**Tip #9**: When it becomes clear that you may have a problem, contact the other lawyer and me as soon as possible. Accommodations will usually be possible.)

III. Preparing your materials

I encourage you to take a logical, methodical approach in preparing your written materials. Sometimes the best approach is chronological; sometimes it's thematic and sorted by issue. You might even structure things around the legal tests which must be met. Whatever approach best suits the facts and the issues, your goal is to lead me through the facts, the issues and the law by the nose. Keep it simple and clear; lengthy, meandering and repetitive materials are tedious and usually far less persuasive than materials that are brief and to the point.

Other arbitrators will take different approaches, but I prefer to receive all documents in electronic form. (I have a paperless office, and I'd like to keep it that way, please.) Exchanging electronic files simplifies issues about delivery and creates a reliable record of what was provided and when. Don't be worried about the number of electronic documents or file size; if that becomes an issue, it's easy enough to set up a shared file repository through an online service like Sync or Dropbox.

Here are a few suggestions that apply to all of the materials you might produce.

1. Set your line spacing somewhere between 1.1 and 1.5, avoid font sizes smaller than 12 points, and use one-inch margins.

2. Always number paragraphs and pages.

3. Never use bold, italics, underlining or all-caps to emphasize a point in your materials. This is not helpful and, rather than adding to the force or significance of the point you're making, tends to subtract.

4. Make liberal use of headings and subheadings. These give me a roadmap to your document that I usually find helpful.

5. Make liberal use of lists, and make sure each list item is numbered rather than bulleted.

6. Make similarly liberal use of tables. Tables are especially useful for listing incomes and expense sharing ratios over time, listing arrears and retroactive support obligations calculations, and, especially, for showing the values of property and debt and their proposed distribution.

7. Consider using the bookmark function in your PDF software to mark major topics in your materials. This is particularly useful for lengthy documents.

8. Please save your materials as a searchable PDFs whenever possible. It's really helpful when I can search a document for a specific word or phrase.

9. Review the PDF version of your materials to make sure everything is legible.

10. Please take the time to correct the orientation of any pages displaying sideways, usually because a document prepared in landscape format is shown in portrait mode. My PDF program lets me rotate pages with a simple keystroke combination.

11. I assume that all references to currency are expressed in Canadian dollars unless otherwise indicated. When discussing foreign currency, feel free to express values in that currency but please also provide the Canadian equivalent. The Bank of Canada is a reputable and reliable source for currency conversions, and provides daily as well as weekly, monthly and annual average exchange rates going back a number of years.

12. Feel free to use common abbreviations and acronyms, such as FLA, SSAG and CRA, but please refrain from using your personal abbreviations unless the meaning of those abbreviations is stunningly clear. I don't live inside your head and may not be able to deduce the meaning of acronyms that are obvious to you.

A. Affidavits

Here are some additional suggestions specific to affidavits.

1. Handle affidavits intended to be used at a hearing for a final award in the same way you would handle affidavits used at trials and summary trials. Never have your witnesses provide evidence based on information or belief, and never use affidavits to make statements about the law or legal arguments. Evidence like this

   > *I am advised by my lawyer and verily believe it to be true that, pursuant to section 94(2)(b)(iii) of the Family Law Act and the leading case of Ewart v Ewart*

> *(1893), 1 Eq.R. 536, agreements which are executed within two days of a full moon are unenforceable.*

drives me nuts.

2. I will usually allow evidence that is hearsay in affidavits prepared for a hearing for a final award, although I will give diminished weight to such evidence. I will never consider evidence that is double hearsay or anonymous hearsay.

3. I would also suggest that you refrain from providing: evidence which consists of speculation, guesswork and hypotheses; evidence going to the motives and state of mind of someone other than the deponent; evidence concerning the deponent's emotional reactions to events; and, evidence which strays into the histrionic and hyperbolic. Restrain yourself, no matter how compelling you find your client's position.

4. Whatever evidence you provide, think about that evidence in terms of how the arbitrator is going to approach the legal issues. This is difficult, as even the best counsel can get pulled into their client's emotional universe. What are the factors and tests that the arbitrator must consider? Have you presented clear evidence addressing those factors and tests? Perhaps most importantly, have you presented evidence addressing each head of relief claimed by your client and by the opposing party? Unless you are addressing a pure point of law, I cannot make awards on matters about which I have no evidence.

5. Mark the introduction of each exhibit – the first instance of mentioning an exhibit in an affidavit – in bold, like this

   > *Attached to this my affidavit as **Exhibit "F"** is a true copy of Pat's report card from Grade Two.*

   This lets me find the paragraph introducing the exhibit quickly and easily.

6. You might also consider marking the first instance of a defined term in bold as well, like this

   > *I worked for Sanjay Electrical Systems Design and Repairs ("**Sanjay**") between January 2018 and March 2021.*

   You also don't need to be too fussy about defining everything. I know what CIBC, CRA and ADHD stand for, and you can be fairly confident that I would've cottoned on to the idea that subsequent references to Sanjay likely referred to the company mentioned earlier. Less is more.

7. Sequentially number the pages of your exhibits, and always provide a table of exhibits at the beginning of that portion of your affidavits. The table should show the exhibit number, a short identifying description of the exhibit, and the page number at which the exhibit can be found.

8. Always, always, always use the bookmark function in your PDF software to mark each exhibit. Bookmarks make it extremely easy for me to find a particular exhibit, and I often find myself flitting from exhibit to exhibit as I draft my award. Please take the same approach to tax returns, notices of assessment, paystubs and other attachments to financial statements.

9. Carefully review the PDF version of your affidavits to make sure everything is readable. Exhibits seem to be the documents most likely to be illegible.

B. Arguments

Here are some additional suggestions specific to briefs of argument.

1. As I've mentioned, opening arguments are rarely helpful. I know what the issues are because, unlike a judge, I'll have been involved in the file from the outset. What I really find helpful are concise statements of the relief sought. The only circumstances in which opening arguments are likely to be useful are those involving facts or law of unusual complexity. In cases like this, I would appreciate a brief of the facts or the law, presented in as ecumenical a fashion as possible.

2. Always provide pinpoint citations when referring to the law or to the evidence provided. Don't make me read a 150-page Supreme Court of Canada decision to find the context for the one-sentence proposition you're advancing.

3. Cite cases using their neutral citations so that I can easily find them online, or, even better, include active links that I can click to take me to the case on CanLII. If you do this, you won't need to provide me with copies of the case law you're relying on, other than cases not available from CanLII.

4. Be specific about the award you are asking me to make. Don't just say "an order that Mr. Chan pay spousal support to Ms Peterson," tell me exactly how much spousal support should be paid, what date payments should begin, and what date payments should end. If an equalization payment is necessary, tell me the amount payable and don't make me guess or do the math myself. Likewise, don't say that "Mr. Chan's income is between $210,000 and $225,000," tell me exactly what his income is, if you know, and the year in which that was his income.

5. Having said that I'd like you to be specific when providing me with numbers, whether you're describing income, support amounts, or the value of assets, being exact to the

penny generally doesn't add much value. Please use whole dollars, rounding up or down as necessary.

6. As with affidavits, think about how the arbitrator is going to approach the legal issues. Have you clearly described the factors and tests that the arbitrator must consider? Have you presented clear arguments addressing those factors and tests? Have you addressed each head of relief claimed by each party?

(**Tip #10**: I would also encourage anyone preparing briefs of argument, whether for litigation or arbitration, to read *Good Judgment: Making Judicial Decisions* by Justice Robert Sharpe, formerly of the Court of Appeal for Ontario. This is a book I wish I had read when I was called to the bar. It provides invaluable insight into the mind of a decision-maker and how decision-makers make decisions, and what decision-makers look for in the arguments they receive.)

C. Other materials

I prefer that documents are provided in joint books of documents – in PDF form – to the extent possible. Among other things, this means that the RBC account statement from April 1997 is found at a single page in a single tab in a single electronic book, rather than at page 16 of tab 52 of volume 2 of the claimant's book of documents as well as page 78 of tab 31 of volume 3 of the respondent's book of documents. I take notes on these documents, and it's helpful when there's only one copy of each.

There's nothing wrong with providing supplemental books of documents, as may be necessary for new documents and documents subject to objections. However, I prefer that as many documents as possible go into the joint book of documents. You don't need to agree that a document is relevant to include that document in the joint book; what counts is that one of you thinks it to be relevant.

Please ensure that all books of documents include a table of documents and that all tabs are bookmarked, not just for my convenience but also that of the witnesses who will be asked to comment on those documents. Tables should show the tab number, a short identifying description of the exhibit, and the page number at which the tab can be found.

I find property charts, or "Scott schedules" as they're known in British Columbia, to be universally helpful, as well as any other materials, including maps, charts, diagrams or tables, that are likely to assist me in understanding something. Corporate organization charts are often handy.

I also find the full output of programs like DivorceMate and ChildView helpful. I like to see the assumptions on which calculations are based, as well as the full range of the results for quantum and duration. The programs' calculations of individual net disposable incomes are invaluable.

IV. Interim applications

At times, you will find it necessary to apply for procedural orders and awards in advance of the hearing. Procedural orders typically concern the appointment of experts, decisions about discovery and disclosure, and the adjustment of deadlines and due dates; interim awards usually address parenting arrangements, the payment of support, preservation orders and protection orders. However, the process to be taken to make such applications will not usually be discussed at the planning meeting unless the need for an application is apparent at the time.

If the process for interim applications has not been discussed and the need for an application arises, contact opposing counsel and the arbitrator immediately. The arbitrator will either provide directions at that time or, more likely, schedule a second planning meeting.

Do not prepare any materials until the process for the application is determined. Remember that the arbitrator will want to discuss the nature of the materials to be provided, and will consider matters such as page limits and the evidence to be produced with an eye toward efficiency and the minimization of time and cost. If you have already prepared your materials, you are potentially putting the arbitrator in the position of either allowing opposing counsel to prepare materials of a matching volume and length or requiring your client to bear the cost of a redraft.

V. The hearing

If arguments are to be provided in writing, a hearing will only be necessary if some or all evidence will be provided through the testimony of witnesses. The hearing day will usually start at 9:00am, with a short break in the morning, a 45- to 60-minute break for lunch and another short break in the afternoon, and conclude between 5:00pm and 6:00pm; we're not keeping court hours, we're trying to wrap the hearing up as soon as possible.

Ask the arbitrator if you may lead your witnesses through their evidence in direct if the question wasn't raised at the planning meeting. I rarely object, in fact I encourage, counsel to lead their witnesses. The circumlocutions required to do otherwise, and the inefficiencies which result, strike me as stodgy and unnecessary. You know what you need your witnesses to say. Go for it.

If there are limitations to the time available for oral examination, keep your eye on the clock. I usually provide warnings when you've got 30, 15 and 5 minutes left, but you need to think of the big picture and make sure you've got the parties' evidence on the most important issues, and haven't gotten sidetracked by rabbit holes.

VI. Final remarks

The bulk of the time I spend on a file as arbitrator is occupied by reviewing materials that have been submitted to me and drafting my award. In this paper, I have offered a number of bluntly self-serving tips and suggestions aimed at helping you help me through the reviewing and

drafting process. I will almost always appreciate anything you can do to make it easier for me to digest your evidence and your arguments. Coincidentally, your good organization and your excellent materials, combined with a position solidly based on the known law, will bolster the chances of your client's success.

VII. Resources

I highly recommend two books on legal writing which, I think, should be part of every law school's syllabus:

Robert J. Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2018)

Tom Goldstein & Jethro K. Lieberman, *The Lawyer's Guide to Writing Well*, 2nd ed. (Berkeley: University of California Press, 2002)

I also recommend the following books on arbitration. Neither book is going to equip you to work as an arbitrator, but both provide a good overview of how arbitrators manage their obligations to provide natural justice and remain unbiased, and how arbitrators think about the disputes they're asked to resolve.

Marvin J. Huberman ed., *A Practitioner's Guide to Commercial Arbitration* (Toronto: Irwin Law, 2017)

Ann C. Wilton & Gary S. Joseph, *Family Law Arbitration in Canada*, 4th ed. (Toronto: Carswell, 2020)

A number of other materials relevant to this discussion are available from the Library section of my firm's website at www.boydarbitration.ca.

"Handy tips and tricks for family law arbitrators" (written for new family law arbitrators), 2019

"How family law arbitrators make decisions and how to help them make the decision you want" (written for people without lawyers), 2019

"Designing rules of procedure for the arbitration of family law disputes," 2018

"A better alternative to family law rules of arbitration," 2019

"Suggestions for lawyers taking family law cases to mediation," 2022

Other relevant materials are available in the Participation Agreements section of the website, including a sample arbitration agreement and a simplified form of personal financial statement.