

Oral Advocacy

Arbitration Lab – Summer Arbitration School

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CERVANTES-KNOX
ARBITRATION

Introduction

GAR Guide to Advocacy:

Advocacy is always tough. Throw in different languages, a matrix of (exotic) laws and differing cultural backgrounds – and you have advocacy in international arbitration.



Overview

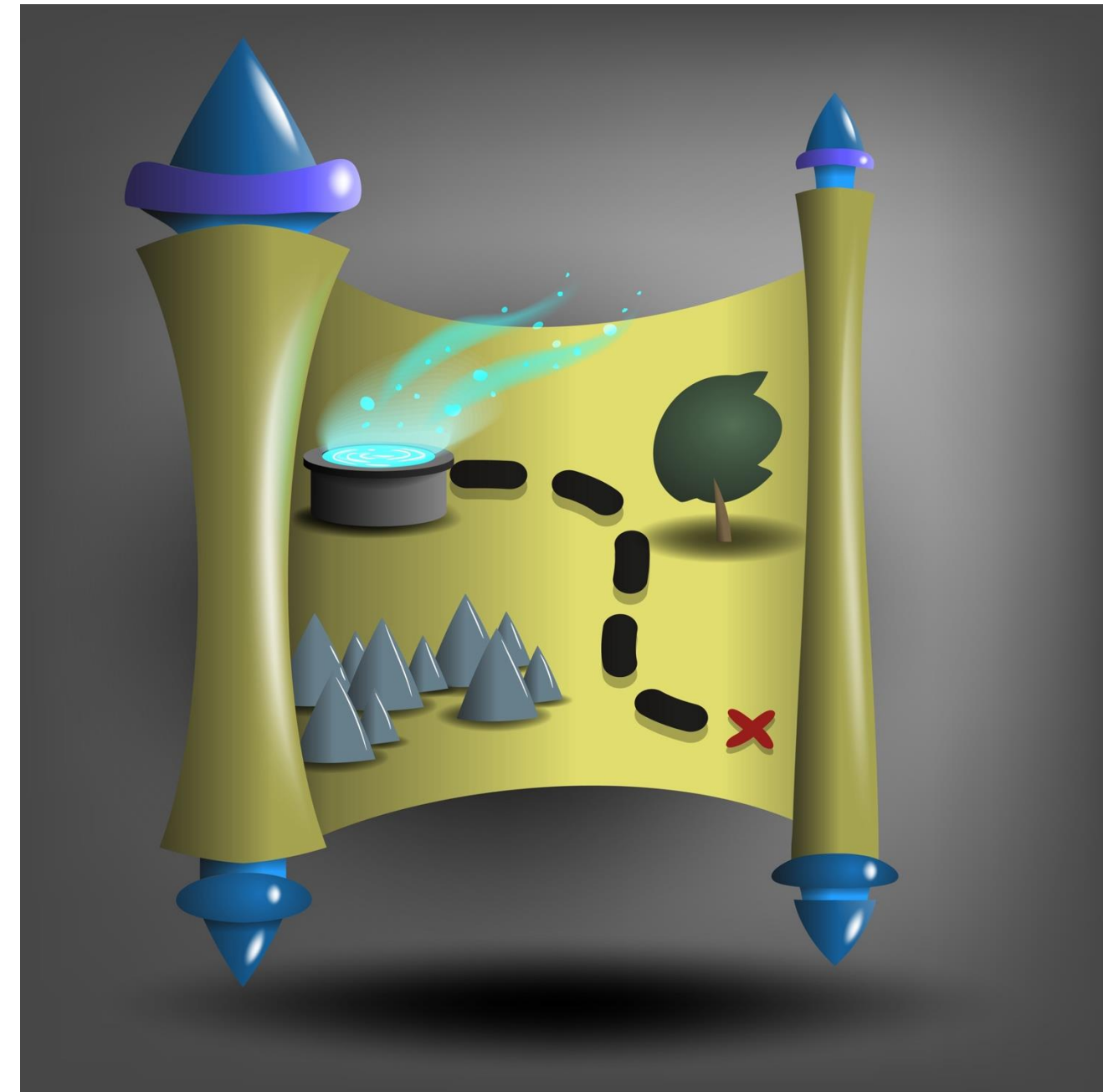
- Opening Statements
- Direct examination
- Cross-examination
- Re-examination
- Oral Closing
- Procedural Hearings



Opening Statements

“A good skeleton or opening should be a reliable road map for the tribunal’s drafting of an award in your client’s favour.”

– J William Rowley KC, Twenty Essex



Opening Statements

“Consider the road map to be your ‘elevator speech’: if you had to summarise your case in the time it takes to rise from the lobby to the penthouse, how would you boil it down to its essence? Try to give the tribunal a concise summary of what you wish it to remember about your case, and the building blocks you think it needs to write the award you wish to receive.

Then, having introduced the key elements, make sure to return to each as you address it in more depth – and revert to them in your conclusion, to help fix the critical steps even more securely in the arbitrators’ minds.”

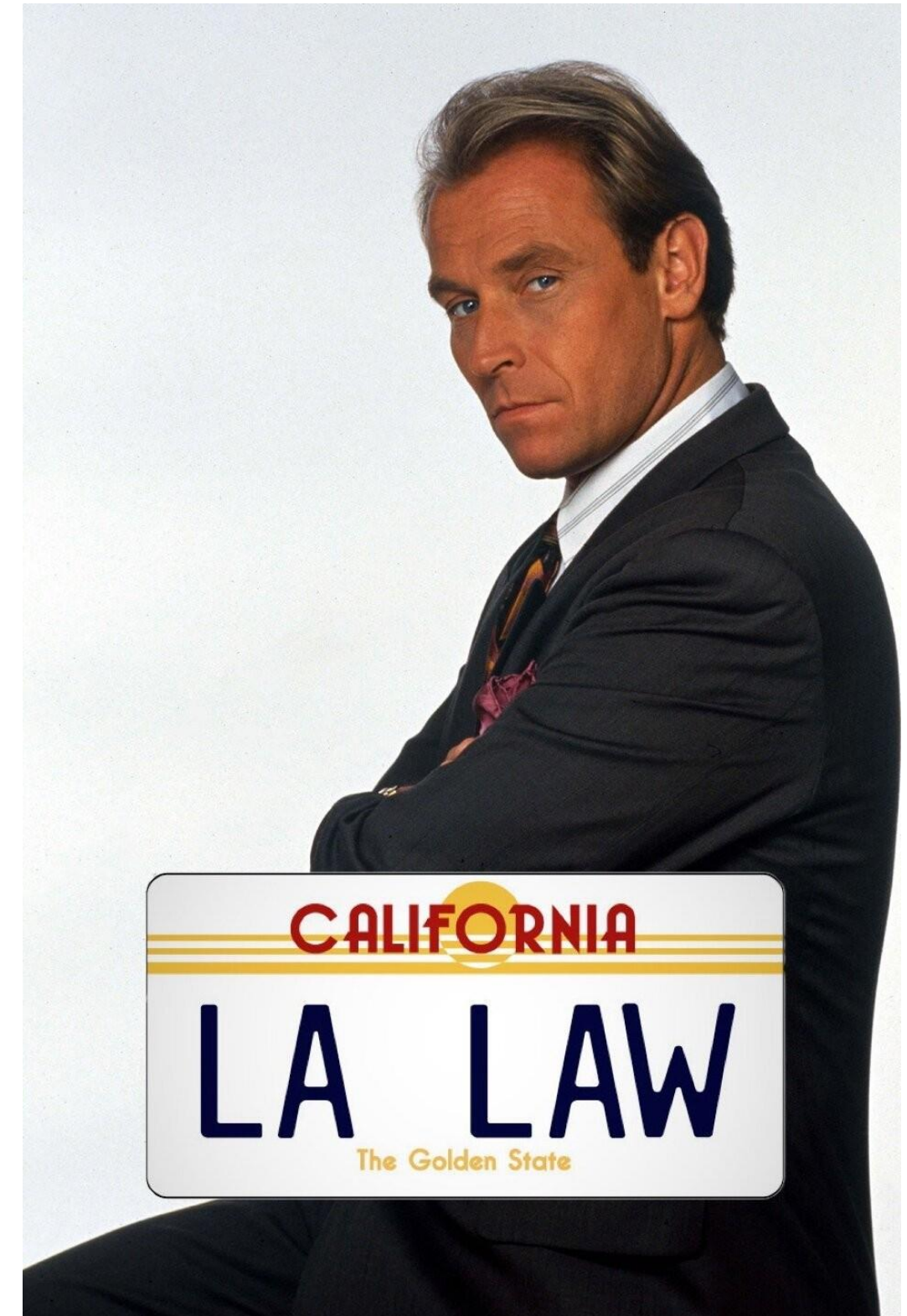
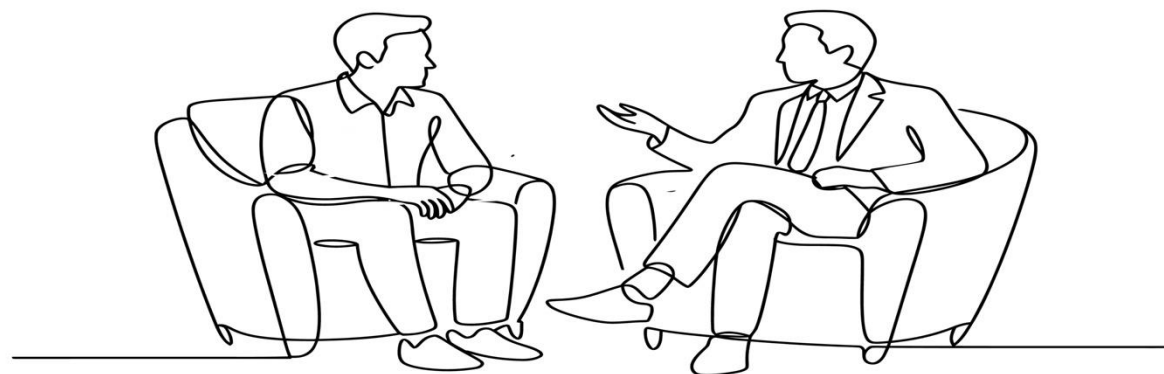
– Jean Kalicki, Arbitration Chambers



Opening Statements

Do's and Don'ts

- **Have a strong case theory - simplify the case**
- **Don't regurgitate**
- **Engage, establish rapport, create a dialogue**



Opening Statements

- **Be calm, respectful (to all), confident and authentic**

“The tone of an opening statement sets the stage for the arguments throughout the entire hearing. It is best to be respectful, not just of the tribunal (which should be a given), but also of the opposing party and their arguments.

Shrill protestations, accusatory rants and overheated rhetoric will not impress a tribunal. It is best to make one’s case using facts, logic and accurate application of the law.

Stringing together strong adverbs and adjectives – ‘grossly’, ‘outrageous’, ‘shocking’, etc. – typically obscures, rather than strengthens, arguments.”

– Stanimir A Alexandrov, Stanimir A Alexandrov PLLC



Opening Statements

- **Be calm, respectful (to all), confident and authentic**

“Overcomplicating the dispute or focusing on the personal angst between the parties is never of help to a tribunal. Excessive use of adjectives, adverbs and general exaggeration of the adverse parties’ alleged performance, actions and arguments will not assist the merits of the case.”

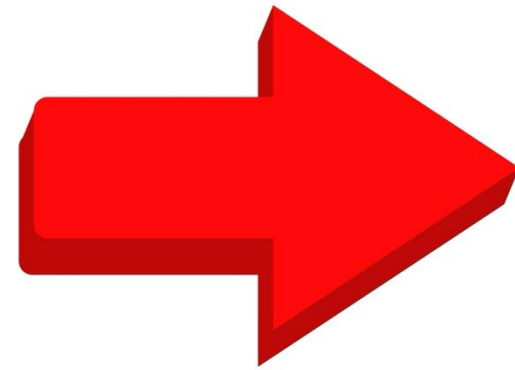
– Julian Lew KC, Twenty Essex



Opening Statements

- **Confront/anticipate weaknesses**

- **Don't do this**



Opening Statements

- **Be receptive to questions –they are opportunities not interruptions**

“Every question is a window into the arbitrator’s thinking. Welcome tribunal questions. You may find yourself baffled as to why an arbitrator would ask a particular question and you will almost certainly be irritated that he or she chose to ask it at precisely the moment that you were about to make an entirely different point. But welcome the question. Arbitrators very quickly conclude that advocates who squarely address the questions on their minds are the ones worth listening to.

– John F Townsend, Hughes Hubbard & Reed LLP



Opening Statements

- **Establish credibility**

- **Don't neglect quantum – it matters!**

“Take the rocket science out of quantum.

Quantum submissions are often extremely frustrating for the arbitral tribunal.

The parties devote hundreds of pages to factual and legal arguments and, once they come to quantum, their presentation is often limited to a few pages. They limit themselves to a reference to the expert reports, which, in many cases, are too technical and not easily understandable without further explanations by counsel. As they do for their other arguments, the parties should argue their quantum claims in a detailed and easily understandable manner, step by step, making it easy for the arbitral tribunal to understand the logic of their reasoning from A to Z.”

– Bernard Hanotiau, Hanotiau & van den Berg



Direct examination

- **Limited in international arbitration**
- **Confirm/correct/update**
- **Don't stray outside permitted scope**
- **No leading questions**



Cross-examination

- **Objective – to weaken or discredit your opponent’s evidence (fact or expert)**
- **Be selective and strategic**
- **Know the record back to front**
- **Keep control – leading questions**
- **Don’t ask for opinions or interpretations**
- **Don’t ask about matters outside their knowledge**
- **LISTEN – and be ready to improvise, but don’t be reckless**
- **Don’t quarrel or talk over the witness**
- **Don’t ask one question too many
or the same question in different (equally unsuccessful) ways**



Re-examination

- **Purpose – to allow witness to explain/clarify/
damage limitation**
- **Must be within the scope of the cross-examination**
- **No leading questions**
- **If in doubt, don't do it!**



Closing Statements

- **Not common in international arbitration (PHBs)**
- **Final opportunity for Tribunal to ensure it has understood your case**
- **Focus on your strongest points and favourable evidence**
- **Identify opponent's concessions and weaknesses that have emerged**
- **Expect plenty of questions**
- **Opportunity to re-enforce case theory (and repair any damage)**



Procedural Hearings

- **Consider carefully before you apply**
- **Consider the Tribunal's duties and objectives**
- **See e.g. LCIA Rules Article 14**
 - **Fairness**
 - **Reasonable opportunity to put case**
 - **Efficiency**
- **Enforceable award (vs. due process paranoia)**
- **Convince the Tribunal justice weighs in your favour and the relief sought will not create inefficiency**



Questions or Comments?

