NMB Arbitrator Survey

August 2009

Background

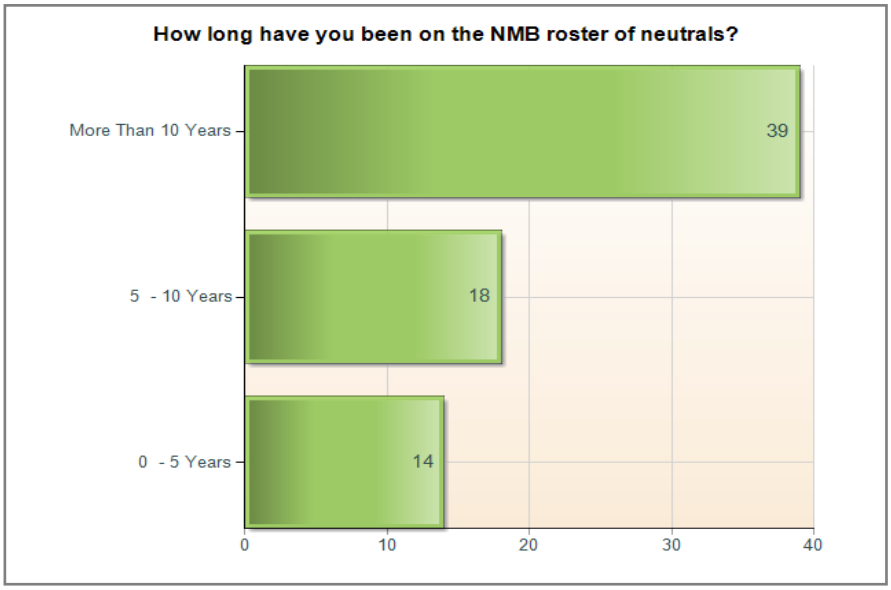
During the summer of 2009, the NMB asked arbitrators to respond to a series of questions about the arbitration process, submissions from the parties, and arguments presented by the parties.

All of the responding arbitrators have done railroad arbitration work under the RLA within the past two years.

This initial report on the results of the survey will be expanded into a "best practices" training program for the parties and will be made available as part of the NMB's distance learning program, accessible through the NMB web site (www.nmb.gov).

Responding Arbitrators

A total of 73 arbitrators responded to the survey questions, although all 73 did not respond to all of the survey questions. The responding group's tenure as NMB arbitrators is presented in the chart below.



Summary of Responses

Q. 1: What is the first thing you look for when you review case records or submissions from the parties?

The three top response categories were as follows:

1. Statement of Claim
2. A review of the Facts
3. Clarity and Completeness of the submissions

Other categories, in order of frequency were as follows:

4. A review of the Positions
5. Whether there are Procedural Issues
6. What Agreement Provisions are involved
7. How the submissions are Organized
8. Whether the Claimant is Out of Service

Comments from the arbitrators:

Clear, concise writing that accurately describes the issues and the argument. Long winded, multi-page quotes from a number of cases are not particularly helpful. A case or two that accurately supports the argument, accompanied by citation to other cases (without the long quotes) makes a submission much more readable. Insulting and demeaning descriptions of the opposing position are not helpful.

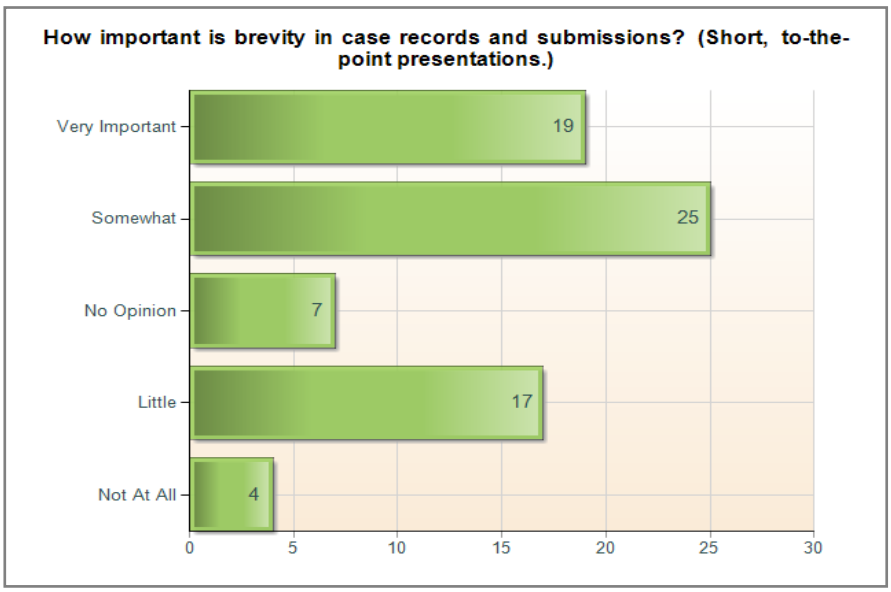
In discipline cases, I look for the purported procedural defects, if any. Then I look at the facts and see if the Carrier has met its burden of proof. In cases involving rules I look to see if the Organization has proven its case.

Clear and concise statement of the issue or issues, as well as the facts. Do not attach unrelated or unnecessary documents which contribute little to an understanding of the case.

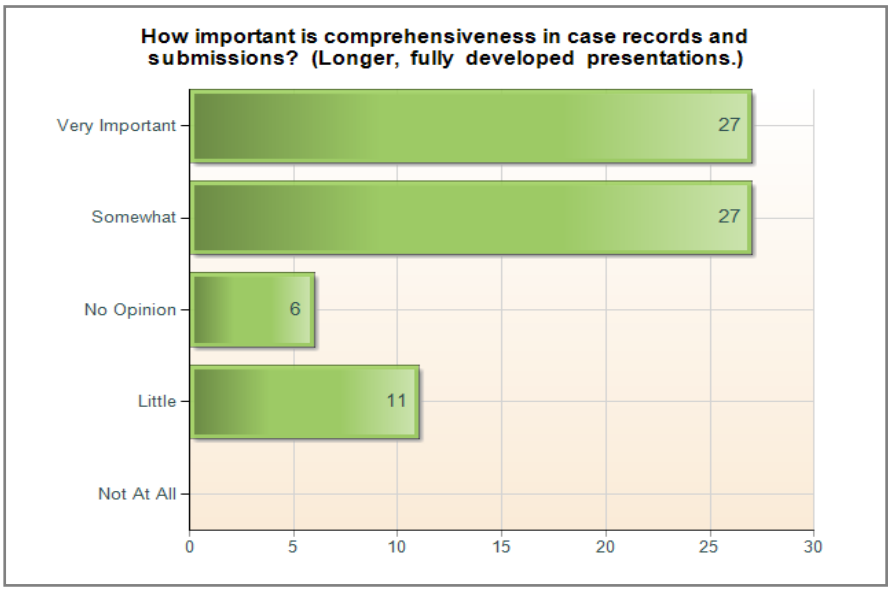
Is there a contents page and are all of the exhibits listed on the contents page in the packet to assure that I have what the party indicates is all of the record and exhibits?

Whether they address the claim as presented and/or the argument against the claim.

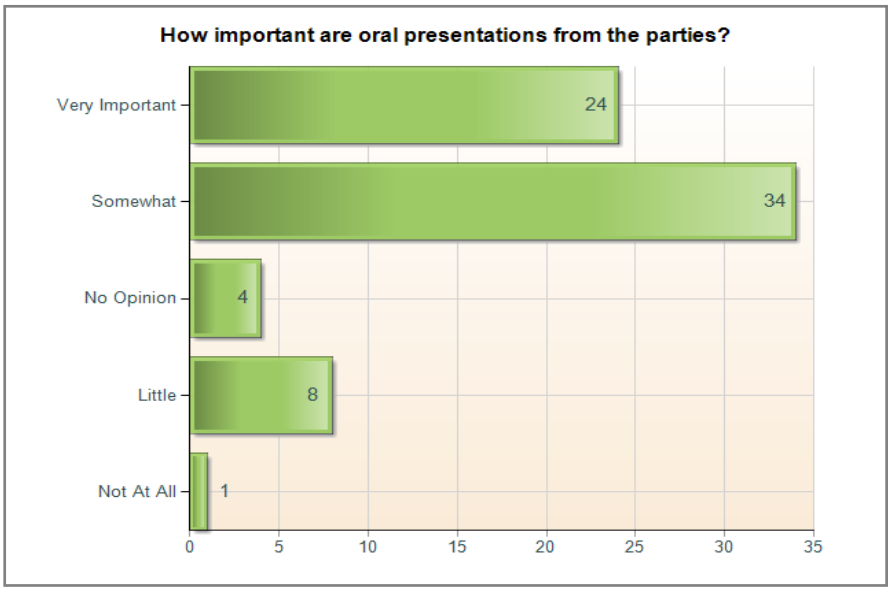
Q. 2


How important is brevity in case records and submissions? (Short, to-the-point presentations.)
Very Important
19
Somewhat
25
No Opinion
7
Little
17
Not At All
4
0
5
10
15
20
25
30

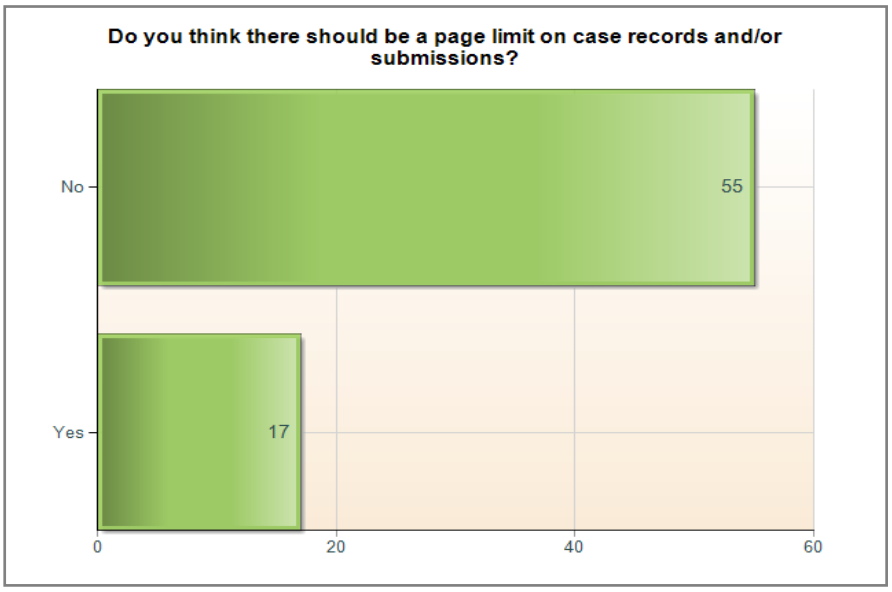
Q. 3


How important is comprehensiveness in case records and submissions? (Longer, fully developed presentations.)
Very Important
27
Somewhat
27
No Opinion
6
Little
11
Not At All
0
5
10
15
20
25
30

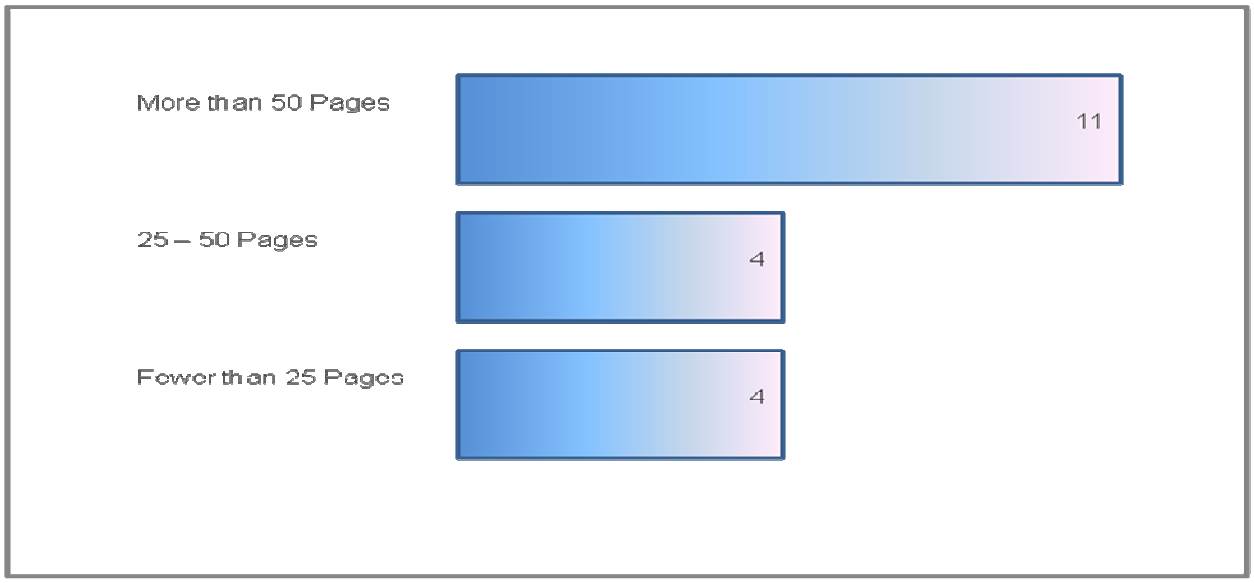
Q. 4


How important are oral presentations from the parties?
Very Important
24
Somewhat
34
No Opinion
4
Little
8
Not At All
1
0
5
10
15
20
25
30
35

Q. 5


Do you think there should be a page limit on case records and/or submissions?
No
55
Yes
17
0
20
40
60

Q. 6: If you think there should be a page limit, please suggest an appropriate page limit.



Comment from the arbitrators:

I answered no to page limits because only the parties know the information necessary in presenting their case as well as the significance of each case. However, if the case can be presented in 2 pages versus 10, that is what should happen. The submission should be thorough enough to address the claim and include the evidence/argument necessary to prove their positions. The contents rather than the length of the submission is what is important. It isn't necessary to rely on citations from other Awards if the issue is particular to the property and there is sufficient evidence for the position/argument presented by either side. Likewise, if the submissions are thorough, the significance of the oral presentations lessens. Oral presentations should highlight things either party wants to stress and not simply be a reiteration of the submissions.

Q. 7: What are the most important things you look for in case records and/or submissions?

The three top response categories were as follows:

1. Evidence and Facts of the case
2. Clarity – clear writing and presentation
3. Completeness of the record

Comments from the arbitrators:

Clear, concise writing that accurately describes the issues and the argument. Long winded, multi-page quotes from a number of cases are not particularly helpful. A case or two that accurately supports the argument, accompanied by citation to other cases (without the long quotes) makes a submission much more readable. Insulting and demeaning descriptions of the opposing position are not helpful.

I look for the parties' arguments in their most succinct statements of position - sometimes that is in the final submission, but sometimes there are on-property exchanges that are more succinct.

In contract cases, prior awards on the issues and past practice; awards on other properties are relevant especially when national agreements are involved. In discipline, past practice with regard to enforcement of rules and policies.

Regarding case records, all the documents which show that the CBA was followed on the property and up to arbitration. On the topic of submissions, the key arguments briefly restated, especially if certain arguments are abandoned by the parties as the appeal process moves forward.

Only issues that are germane...not a shotgun approach that tries to confuse the issue(s) with issues which need to be bargained.

Order and lack of redundancy. Too often "argument" includes new evidence. I appreciate a transcript and complete set of documents. I also appreciate accurate citation to and quotation of CBA, work rule, policy etc. provisions. Isolated pages are not helpful. Too many carriers have merged resulting in multiple contract provisions. It can be very challenging determining which CBA provisions apply, both by substance and date.

Documentary support for stated facts and the position or argument offered. Clear and relevant citation of contract rules at issue as cited in actual contract. Relevant citations of prior decisions, if any applicable to the dispute. Contractual procedural challenges to handling of the dispute. Pertinent, unchallenged statements and exhibits. If disciplinary, whether extent as imposed is fair and reasonable.

Q. 8: What advice would you give to carrier representatives that would make their presentations (oral or written) better?

The three top response categories were as follows:

1. Overwhelmingly, the responses were to be Succinct and to the point
2. Don't "fudge" or bend the facts
3. Organize and Stay On Point

Comments from the arbitrators:

Be prepared, well-organized and thorough. If you have a weak point in your case don't fudge the argument and testimony.

Do not lead your witnesses. Do not put words in their mouths. For example, do not ask such questions as: "As the result of such conversation did you conclude such and such to be the case.?" Instead ask, "What was said by each participant in the conversation?" or words to that effect. Regarding an important event, ask the witness to tell you in his or her own words what happened. If you feel that something important was left out in the answer, then, through additional non-leading questions, make sure that the point is covered in the record. Remember that any unchallenged factual statement will be accepted by the arbitrator as true. Therefore if you believe that fact to be untrue, you must be sure to have another witness give a version of the facts that you believe to be true. You therefore may have to recall a witness after the claimant has testified. In addition, when questioning a principal, do so respectfully. Often contempt or distrust comes across through the transcript. Your case will be that much more effective if the principal "hangs himself" by his answers to non-leading questions carefully thought out beforehand to disclose the facts. Remember, the hearing officer is not supposed to be an advocate for the Carrier. His or her role is to bring out all of the facts, and let the chips fall where they may.

Don't attempt to avoid meritorious procedural objections by ignoring them and hoping the neutral will overlook them.

Leave out filler, boilerplate arguments. It is fine to raise an issue if it arguably rises to the level of the applicable burden of proof. Otherwise, don't burden the record with it -- it will diminish the arguments which have greater merit. Cut out the constant and unnecessary executive sessions in hope of changing awards you don't like.

There is too much repetition - it should be sufficient to say -- "in response to your letter of [date], we stand on the arguments previously presented in our letter dated [date]" without restating the arguments verbatim. In addition, there is occasionally too much pro forma name-calling.

Make a list of disputed points and provide a clear, concise position on each with support, contractual or past practice supported by awards. Remember who has the burden: carrier in discipline and organization in contract cases. If you don't carry the burden, you lose.

Generally, less is more. Don't pad the submission with redundant precedent or ancient awards. Start with your on-property precedent that is truly on point. Stop citing all the awards that go to the substantial evidence standard; we understand that. Same goes for the oral presentations. The record is the record under the RLA rules. If parties fear the neutrals will not read the record, pare it down to the essential paperwork and succinct correspondence. Discourage your hearing officers from holding hearings resulting in 300 page transcripts. The fishing expedition transcripts are very difficult to plow through especially when the neutral has 10- 20 cases on the docket and all the records are overly extensive.

Q. 8, cont.

Highlight the strengths with record citations, but deal with the weaknesses of the case head on - put the dispute in context for the Referee if s/he has not come up through the railroad industry, as well as explain what is happening on that particular property to focus why the dispute is arising and what needs to happen to deal with the underlying issues there.

Tell a direct, simple story. Provide a clear timeline and provide all elements needed to issue an award. Do not repeat arguments. One good argument is all that is needed. Tie the argument to the record. Provide a simple, clear roadmap through the record. Do not throw the kitchen sink in - it is very suspicious seeing every possible argument under the sun. Remember what our jurisdiction is. Eliminate trivial comments and attack words. Taking the high road is the most persuasive. Otherwise, there may be some suspicion raised with regard to the quality of your case.

In addition to support of your case, respond, based on prior grievance steps and history of Parties, to arguments of the other side. You always know more about your case than the Arbitrator. It is your first responsibility to educate the Arbitrator fully on the facts, and what you feel is the law of the contract and shop. If Parties are agreed or disagree on certain essential facts, both sides sides should so state, at least in argument or in response to any questions from the Arbitrator. Remember the Arbitrator is new to your current case; no matter how experienced the Arbitrator is generally or with prior cases with the Parties. Make a one to two page typed/keyboarded outline of your case for your use and use it to help you focus on the essentials of your case as you present it verbally or in writing. It also will help you adjust to more detailed facts that surface during the presentation. Remember the better Arbitrators do not decide any case while it is presented. All or nearly all questions from Arbitrators are to clarify something that is unclear at that moment to the Arbitrator, and do not reflect the Arbitrator's view of the merits. So do not be defensive in answering the question(s). Most of us do not ask any questions beyond small clarifications. Always treat the representatives of the other side with respect, especially when you feel they do not deserve it. It never helps your case to do otherwise.

Brief opening nature/scope of the dispute and overview of argument to be presented. Factual and reasonable argument as opposed to unsubstantiated assertions. Narrow the issues in dispute to those of principle concern. Factual citation of support decisions as opposed to statements taken from a citator, which are often beyond the wording of the arbitrator's decision or findings. Meaningful/relevant citation of past decisions.

Q. 9: What advice would you give to organization representatives that would make their presentations (oral or written) better?

NOTE: Some of the responses were repeat comments from the carrier advice (Q. 8).

The two top response categories were as follows:

1. Again, overwhelmingly, the responses were to be Succinct and to the point
2. Organize and Stay On Point

Comments from the arbitrators:

Be prepared, well-organized and thorough. If you have a weak point in your case, don't fudge the argument and testimony.

You should refrain from asking leading questions and putting words in witnesses' mouths. You should object when the hearing officer asks company witnesses leading questions and point out in a respectful manner that we want the witness's version of the facts, not the hearing officer's. You should also object if the hearing officer appears to be brow- beating the principal or putting words in his mouth. But do so respectfully. As I noted in my answer to question No. 8, as a rule, any testimony about a fact that is not challenged by contrary testimony will be accepted by the arbitrator as true. Therefore, if you disagree with the fact you must present contrary testimony as to that fact. If the principal has something to say in mitigation of his conduct, especially in a dismissal case, you should encourage him to say it. You should always make a closing in which you point out the weaknesses of the other side's case and the strengths of your own. This, of course, will require preparation before the hearing.

Avoid getting into procedural arguments with hearing officers. Just state your objection and preserve it for review and determination by the neutral.

If you want me to consider reducing the discipline assessed, cite precedent on the property...or at least raise the issue in handling on the property; otherwise, I will not consider the quantum of discipline to be a contested issue. Mercy is not my prerogative.

Stick to the most important arguments. Do not make arguments, especially procedural ones, unless you believe that they can be determinative.

Less whining about procedural defects, get to the merits of the case.

Concisely lay out the facts, and reference the precise contract language which controls and why. State how more than one agreement provision might apply, rather than stating in a conclusory fashion that various, apparently unrelated provisions control. In discipline cases, specify the procedural issues believed to control.

Don't leave your best arguments for oral hearing. If they're not in your submission I may not remember them from oral hearing. Don't pad the investigation with pages of procedural argument. Make your objection and move on. Too much argument, where it is apparent it is simply a tactic, turns me against you and in a close case may make you lose.

Q. 9, cont.

Develop your arguments during the appeals process and don't wait until the submission, where the neutral may get the impression that this is the first time the union is serious about advocating the case. Don't make frivolous procedural arguments, especially during the investigation/trial/hearing because it unduly clutters up the record and by the time we get to your merit arguments, we have been worn down by the procedurals. Less is more in that regard, unless, of course, there really was a tangible due process breach. When an employee admits guilt, the technicalities fall by the wayside.

Dispute any discrepancies in facts. Clearly outline your position or why a claimant should not have been disciplined. Do not argue procedural issues in every case.

Make your strongest argument- too often the Organization wants to make every argument under the sun for example procedural arguments that are not relevant and they burden the arbitrator with many issues that are not important but they think they have to make them anyway. Lets throw everything at the Board and see what sticks. This is a bad mistake Focus on what is important for example seniority lack of rules severity of the penalty etc.

Do not read your presentations to the arbitrator. Do not make frivolous or pro forma arguments, especially regarding minor procedural points.

Utilize the language, practice or rule that addresses your claim. Do not include irrelevant arguments and/or evidence. Be cognizant of the Claimant's record in discipline cases and be prepared to draw distinctions between past behavior and the current situation if possible.

If there is an argument on the facts, compliance with the rules or agreement make it straight away...show how that either nullifies the carrier position or mitigates the carrier position. If there is no argument as to the above acknowledge that and get on with the argument for mitigation.

I think it would be very helpful if the parties develop a joint statement of the facts. Neutrals have to expend considerable time figuring out exactly what the facts are before considering the issues and arguments.

If procedural due process arguments are not the real concern (although raised on the property and in the submission) say so, and focus the Referee on what should be decided in the case. I appreciate when you make known when you understand that you have a loser, and do not lead the Referee down the garden path with arguments that will only wreck havoc on the operation on the property.

Don’t use charge of unfair or biased hearing, etc. in every case. Reserve it fir instances where procedural violations are as important as merits of case.

Be genuine - acknowledge shortcomings. Clearly support your case. Understand the jurisdiction of the arbitrator and the burden of proof - whose is it and how has it been satisfied or not. Point to unrefuted evidence which supports your case. A history of the relationship would be helpful in many cases - there have been many mergers. It is also helpful to provide a short primer on terminology and processes - ask if it would be helpful or suggest that you know the arbitrator may have some awareness and point out what might be unique in the case. Sometimes there are long lapses between similar cases - a refresher usually harms no one.

On the oral presentation, if there is a serious procedural defect, do not make it what it is not. Stick to the substance or withdraw it. On the written, after the factual summary, emphasize what the case turns on.

Focus on factual rather than perceived and unsubstantiated procedural rights issues. Strong affirmative defense on the merits of case, with relevant argument and exhibits. Avoidance of overly repetitious or extraneous argument that goes beyond issues in dispute.