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Effective arbitration advocacy – take control!

Counsel can control the arbitration process at the front end, the mid-point, and even the conclusion

Arbitration is a fact of life. Lawyers must treat the process and evidentiary burden just as they would a trial. Many do not, with serious consequences – for which they often blame the arbitrator. Who really controls the arbitration process? By ceding control to the arbitrator, counsel relinquishes a valuable benefit conferred by the private-arbitration process. The fact is, counsel can control the arbitration process at the front end, the mid-point, and even the conclusion.

Front-end control of arbitration processes

Attorneys typically draft arbitration agreements. By carefully spelling out the rules to be applied at arbitration, the parties to a dispute will know, in advance, the process that will be used. Failure to spell out the rules may leave the parties subject to the provisions of the Civil Code and the Codes of Civil Procedure and Evidence, at best, or the whim of an arbitrator at worst.

The growth in arbitration practice has resulted in thousands of solo arbitrators, as well as newly created or well established arbitration tribunals.

Arbitration tribunals, often covering multiple states, have developed comprehensive rules which will govern the proceedings if the specific tribunal is written into the contract, or the parties elect to voluntarily adopt the rules.

Most state statutes provide that, if no rules are spelled out in the arbitration

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agreement, the portion of the Civil Code relating to arbitration will control. The Civil Code generally provides that the Code of Civil Procedure and Evidence Codes will rule the day. Many arbitrators disregard these provisions and permit all evidence to be admissible, subject to the weight to be accorded it by the arbitrator. This sometimes includes the admission of surprise written testimony or reports, or unanticipated live witnesses. All of this is avoidable either through a carefully drafted arbitration agreement, or by reading further in this article…

The arbitration submission

Even before an arbitrator is selected counsel should meet and confer to create an arbitration submission. This submission could supercede the arbitration agreement by stipulation or, where there is no agreement, is used to avoid surprise and guide the arbitration process.

A well-crafted arbitration submission will accomplish the following:

(1) Identify the process that will be used to select the arbitrator.

(2) Set forth the rules that will govern the hearing. These could be the JAMS, AAA or other arbitration services rules; or the parties could rely on applicable state or federal arbitration acts; or agree that the parties will proceed pursuant to the rules given to them by the arbitrator.

(3) Determine the manner by which documents will be exchanged.

(4) Reach an agreement pertaining to the exchange of briefs.

(5) If possible, provide an estimate of the length of the arbitration hearing.

Many of the items listed above are generally not addressed until the actual commencement of the hearing. This leaves tremendous control in the hands of the arbitrator. It also produces significant misunderstandings and frustration when documents are either admitted unexpectedly, or rejected by the arbitrator. It must be remembered that, in the absence of specialized circumstances, the jurisdiction of the arbitrator is determined by the arbitration agreement if one exists, or by the arbitration submission. If counsel do not communicate, and do not create a formal agreement, there can be surprise and/or an undue waste of arbitration time.

Selection of the arbitrator

This is a critical step in client representation and process control. Even where an arbitration agreement specifies the provider organization, the identity of the arbitrator is typically not specified. Thus, in the absence of a stipulation, the arbitration provider will generate a strike list and curriculum vitae to provide the parties with a choice. If the parties are unable to choose, most private providers select an arbitrator at random, subject to local disclosure rules.

Arbitrators come in all shapes and sizes with varying demeanors and attitudes. Some are known to compromise, others are better at complex legal or technical issues, some better versed in substantive law than others. If the case needs a strong management hand to rigorously enforce the rules of evidence and insure the requisite timetables are met, the parties will want to work to select an arbitrator known for that level of management, as opposed to one who simply permits arbitrations to meander. If the lawyers want a full hearing, and do not want an arbitrator to "split the baby" they should work cooperatively to identify arbitrators in the community who are not known for their ability to compromise in the issuance of awards.

Pre-hearing activity – the mid-point

Pre-hearing discovery is a considerable source of frustration for parties. Remembering that arbitration is intended to be streamlined and cost-effective as compared to trial, legislation and private ADR rules generally limit the discovery process. Nonetheless, practitioners feel uncomfortable proceeding to hearing in significant cases without having engaged in meaningful discovery. Remember, if the parties can agree on a discovery plan, the arbitrator is obligated to comply with their intentions as expressed in the pre-arbitration submission. Even where there is no submission, disputes pertaining to discovery and admissibility of documents may be avoided through a pre-hearing conference or conference call between the arbitrator and the attorneys. This will result in an arbitrator's order pertaining to the same issues addressed in the pre-arbitration submission portion of this article. Again, counsel has control starting with selection and moving to establishing a conference call to set out guidelines.

The brief

Perhaps no single activity can demonstrate a lawyer's lack of commitment to the case than the failure to invest the time necessary to submit a meaningful brief to the decisionmaker.

A briefing schedule should be established in the arbitration submission or conference. A brief should be submitted to the arbitrator in advance, and exchanged between the parties. It is often unnecessary to attach exhibits. In fact, unless the pre-hearing conference call established a protocol for joint introduction of exhibits, providing an arbitrator with exhibits before their admissibility has been determined could jeopardize the hearing or the ultimate award because an item that is objectionable may be reviewed prior to the objection being raised. Do not attach hundreds of exhibits to the brief. Instead, reference transcripts and reports by page number (or page and line), and attach a copy of the operative page, with the key information highlighted. At the hearing the entire transcript or report may be introduced. Remember, the purpose of an arbitration brief is "impact." The opening paragraph should be a clear statement of what the lawyer intends to tell the arbitrator concerning the nature of the case, and the remedy sought. This should be an impact paragraph. The brief should be clear, concise and thoroughly proofread. Meaningful photographic exhibits may also be attached.

The hearing

As counsel for a party, you have more impact upon the outcome than you realize. True, the outcome of arbitration is principally determined by the facts and the law. However, in arbitration counsel is presenting to a single individual, or a panel of three. Your professional conviction, the

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manner in which you present the evidence, and the testimony of the witnesses are key to obtaining a desired result. Lazy lawyering conveys disinterest and a lack of commitment in the claim. The inefficient or ill prepared lawyer will rarely overcome the challenges presented where the facts and/or law are in dispute, and opposing counsel is up for the task. There are steps that competent counsel will undertake in order to assist in obtaining the best possible result.

Exhibits: Professional exhibits are helpful. However, there is nothing wrong with handwritten chronologies or charts that are prepared in advance. An exhibit demonstrates to the arbitrator that you believe in your case and illustrates the evidence while concurrently providing an organized roadmap to focus both you and the arbitrator's attention.

Witnesses: It is hard to believe the number of witnesses who appear unprepared. Witnesses should not be coached, in the sense that their testimony is rehearsed as that will come out during cross-examination and impact credibility. However, counsel should take witnesses through a dry run of anticipated questions and assist your witness in understanding the most effective way(s) to respond to examination.

With the exception of forensic experts, most witnesses have not experienced skillful cross-examination. These witnesses tend to run on or become argumentative or defensive. Appropriate preparation is the key to avoiding these traps, and insuring that your witness will present the most effective testimony possible. Tell your witness not to argue, and not to explain unless an explanation is requested. Your steps to insure that your witness presents calm, accurate and truthful testimony will do more to assist you, as counsel, in obtaining your client's desired outcome than perhaps any other single action.

Objections: Use them sparingly. You're playing to an audience of one (or three in panel arbitration). If an objection will not totally block the receipt of evidence, the objection should probably be avoided and the issue addressed during cross-examination. If the arbitrator is repeatedly overruling objections, consider that as a sign that you are objecting too frequently. That said, when opposing counsel is leading the witness excessively, or the objection will absolutely block otherwise inadmissible evidence, then you should be sure to object but do so in a manner consistent with the arbitrator's personality.

Warts: Every case has problems. You should be the one to identify the problems that exist in your case, and deal with them. You control the impact the problems will have on the arbitration panel. If the warts are brought out through cross-examination and it appears counsel was hiding the ball, that could have a disastrous effect on the outcome of the hearing.

Do not over-reach: Arbitrators appreciate qualified, prepared and focused witnesses, particularly expert witnesses. When witnesses are calm, lay the proper foundation, and testify in a professional manner, your chance of a favorable interpretation of the testimony is enhanced. When they are not prepared, farfetched, arrogant or take short cuts, they severely undermine your case.

Introducing testimony through transcripts: Nothing is better than live testimony. Nuff said.

Closing argument: Avoid becoming too dramatic and prepare a concise closing argument that is focused, well reasoned and calm. Do not shy away from telling the arbitrator what you feel is a fair recovery, and why. If you are the plaintiff, ask for a specific amount of money, and if you are the defendant, give the arbitrator options depending on potential findings.

There is a trend toward submitting written closing arguments. The negative is that it delays the result and increases the costs of the process. In addition, a busy neutral is totally focused on the hearing at the time of the hearing. Evaluate whether you really want to break this focus. If not, give an oral closing argument.

After the hearing

Perhaps no area exists wherein counsel can have the greatest pre-hearing control than in consideration of the post-hearing remedy. When drafting the arbitration agreement, counsel can provide in the agreement for post-arbitration appeal. The Ninth Circuit Court of Appeals stated: *"The parties indisputably contracted for heightened judicial scrutiny of the arbitrator's award when they agreed that review would be for errors of fact or law."* The court went on to reject the notion that its review would be limited to the guidelines of the Federal Arbitration Act by holding that the primary purpose of the Act is to insure enforcement of private agreements to arbitrate, in accordance with the agreement's terms." (See *Lapine Tech. Corp. v. Kyocera Corp.* (9th Cir. 1997) 130 F.3d 884). In simple terms you, as the lawyer, may create an *appealable* and *reviewable* arbitration process either through specific contract drafting or by agreeing to a post-ruling remedy that is placed into the arbitration submission document. If you elect not to provide for this review, challenges to arbitration awards are very limited and generally exist only to correct numerical errors, possibly for violations of disclosure act requirements or a few other limited terms.

Conclusion

Consideration and action by counsel at the front end saves surprise at the back end. Participate in the drafting of pre-arbitration agreements and clauses for your clients and when a matter is being set for arbitration, work with opposing counsel to craft a fair and mutually beneficial pre-arbitration submission. In this manner you, and not the arbitrator, will set the ground rules.

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