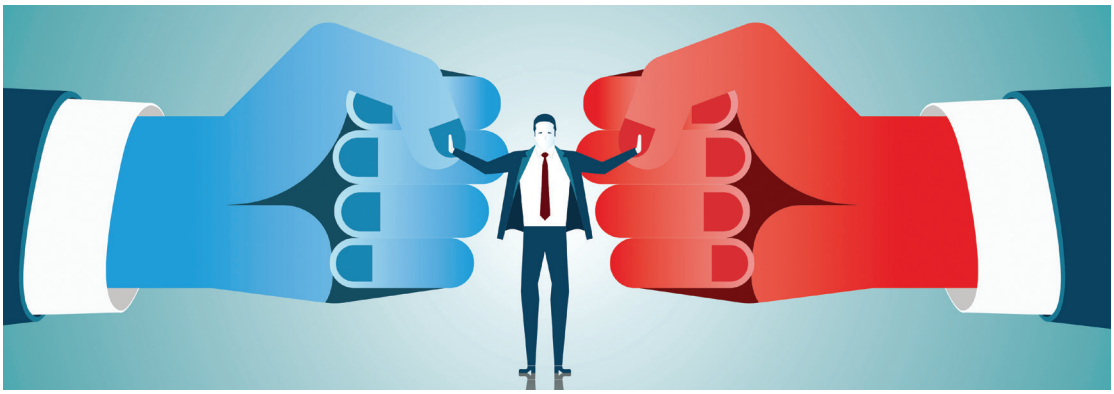

ADVOCACY and CIVILITY in ARBITRATION

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Litigations are notoriously hostile proceedings. All too often advocates come to arbitrations wanting to apply the same strategies and procedural maneuvers. In fact, they may backfire on the advocate. On October 3, 2017, the Alternative Dispute Resolution Committee of the WCBA will run a CLE entitled, "Advocacy and Civility in Arbitration – Do They Go Hand in Hand?" The course will take attendees through the timeline of an arbitration, examining advocates' ethical obligations and suggested strategic planning. Below, we outline just a handful of differences between arbitration and litigation. At the course, we will also examine how advocates can choose an arbitral forum, manage a variety of different types of hearings, from pro se to large, complex cases, and prepare their arbitrators to deliver the most effective award. We will also review the results of a survey conducted by the WCBA concerning attitudes toward arbitration.

Framing the Case

Best practices in arbitration advocacy differ greatly from those in litigation. A party seeking to commence an arbitration must file a Demand for Arbitration ("Demand"). Many institutional arbitral providers require only a simple form to initiate an arbitration. In addition, while arbitration is a contractual setting, the parties' arbitration clauses rarely set forth specific requirements for the substance of the pleadings. Parties, therefore, have to decide between filing a Demand that resembles a traditional court filing (i.e. complaint) or opting for a short description of the nature of the case (i.e. employment dispute between former executive and Fortune 500 company.)

Since motions to dismiss are rarely, if ever, utilized or granted in arbitration, it is tempting to opt for a vague, short Demand. In the majority of instances, however, counsel who choose this option miss the opportunity to educate the arbitral institution and the arbitrator about the dispute. Providing a detailed Demand may guide the administrator to a list of potential arbitrators who offer the most relevant expertise. In addition, a detailed Demand allows the potential arbitrator to conduct a thorough conflict check and ensure full disclosures are made before a significant investment of time and money is spent. Finally, a well-constructed Demand allows the advocate to make a first, and lasting, impression on the ultimate decision maker—the arbitrator. A vague Demand, on the other hand, cedes the playing field to the adversary, allowing it to take the lead on educating the arbitrator.

The same strategic considerations apply to answers and counterclaims in arbitration. While many arbitral providers do not require the filing of an answer, deeming silence to be a general denial, this option should rarely be utilized. Rather than keeping your case under wraps, silence can put respondent at a disadvantage in terms of the arbitrator's understanding of the case and how he/she conducts pre-hearing conferences. In addition, if complainant has already provided its version of events, respondent should file a detailed answer and spell out any counterclaims.

Selecting the Right Arbitrator

Unlike a court proceeding, in arbitration, the parties have the benefit of selecting their decision maker. Careful selection is one of the most important, if not the most crucial, decision advocates will make on behalf of the parties during the life of their case.

The starting point is the arbitration

contract. Some arbitration clauses may call for a panel of three arbitrators rather than a sole decision maker. In most cases, unless there are cogent reasons relating to the need for alternative skill sets of a three person panel or it is a large, complex case, a sole arbitrator is typically the better option to take advantage of the cost and time efficiencies of the arbitration process. American Arbitration Association studies show that using a single arbitrator rather than three is on average five times less expensive and results in faster case resolution.

Of course, the contract need not be the final word. At the time of contract, the parties may not have had sufficient prior knowledge and/or the opportunity or forethought to plan adequately. The parties can override a contractual provision through mutual agreement at the outset of the arbitration. An advocate should not be shy to raise the question of the size of the panel if he/she believes it serves the client's best interests.

The type of case and its factual setting are also factors for selecting an arbitrator. Will you need an arbitrator who has specific industry background or is a generalist sufficient? Will there be issues presented (i.e. motions made, discovery related or otherwise) that are better suited for a former judge's consideration rather than an attorney arbitrator? Is the case sufficiently simple legally that a non-attorney arbitrator may be the best choice? For example, would an architect, business broker, accountant, etc., best understand the facts at issue? Note that if a non-attorney arbitrator seems like the right choice, the parties' counsel should satisfy themselves that the potential arbitrator has sufficient experience and familiarity with ethical guidelines and rules covering neutrals, including provisions of the New York Rules of Professional Conduct relating to neutrals.

After determining the type of arbitrator you want, you can research those available or listed as potential options for your case. In addition to reviewing the arbitrator's resume, you can speak with colleagues who have appeared before that arbitrator in the past. Information via word of mouth can be vitally helpful. You can also look at the candidate's social media and Internet presence to glean his/her stance on certain legal issues. Finally, if there is good potential for a settlement, particularly at the last minute, you might consider arbitrator's cancellation fees in selecting a candidate.

Preliminary Hearing Behaviors

Following arbitration appointment, the arbitrator will call for a preliminary conference. The majority of them are conducted via phone to lessen costs. In some large, complex cases, the parties may request an in-person preliminary hearing. In either event, counsel should use the hearing to establish rapport and credibility with the arbitrator. Tone is as important as paving the way to debunk your opponent's case.

The New York Rules of Professional Conduct's competence requirements apply with equal force to arbitration. Parties should be well prepared for the preliminary conference to meet those standards and also to allow the arbitrator to set a realistic and manageable schedule for the proceeding. Arbitrators are trained to keep the matter moving forward, and they expect the parties to adhere to the schedules they set, absent justifiable circumstances. You do not want to come back and ask for an extension without good cause.

Accordingly, advocates should approach the preliminary hearing with a reasonable estimate of how many days are needed to present the case in chief, including defense of counterclaims and rebuttal. Arbitrators will typically ask advocates to defend these estimates. In addition, counsel need to remember that discovery in arbitration is much more limited than in litigation. Use the preliminary hearing to identify truly necessary discovery and forego the fishing expedition requests. Again, you should be prepared to justify your requests. If you cannot, you will lose credibility quickly with the arbitrator.

In general, document discovery will be limited to those documents needed to prove or defend the case. Discovery should almost never involve interrogatories. You will have the chance to ask questions of witnesses in hearings. Depositions are generally limited and only used in either large, complex cases or cases where time is of the essence with respect to obtaining testimony. In all cases, advocates should be prepared to explain to the arbitrator why discovery would streamline the hearing process. Similarly, motion practice is unusual in the arbitration setting with arbitrators reluctant to entertain motions unless they will result in a fair and expedited process for the parties.

For more about strategic approaches to arbitration and their ethical implications, we look forward to seeing you at the upcoming CLE.

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