Section of Litigation Woman Advocate

Successfully Arbitrating Your First (or Almost First) Case

By Gilda R. Turitz – December 16, 2014

An attorney new to arbitrating cases for clients needs to be attuned to the issues, challenges, and opportunities presented by the differences between traditional court litigation and arbitration, even if she has had trial experience. Being well-schooled in those differences is key to winning in arbitration.

Arbitration is intended to be a more efficient, streamlined, and final process of dispute resolution, with no appeals and limited bases to vacate an award. Generally, less prehearing discovery is permitted in order to keep the notoriously high pretrial discovery litigation costs down and get to hearing more quickly.

Attorneys venturing into their first arbitration need to adjust expectations about how much discovery and motion practice they will do. Recently, in response to criticism that arbitration has become far too much like court litigation, the major arbitration service providers and professional groups have promulgated new protocols and best practices to address the perceived problems. Counsel should expect arbitrators to be more managerial than laissez-faire, with flexibility but enforcement of the relevant rules to efficiently get to hearing. To prepare to win in her first arbitration, an attorney must fully understand how to best prepare for and position her client in the fluid environment of arbitration to have a successful outcome.

The Arbitration Clause and Governing Rules

The first step is understanding that the parties' contractual arbitration clause is the "constitution" that defines the scope and limitations of what will be arbitrated. Because arbitrators may not exceed their jurisdiction, it is critical to analyze the clause that may empower, limit, or even prohibit the arbitrator with respect to awarding certain categories of damages or other relief. The clause typically will dictate whether one or three arbitrators will decide the matter, with or without specified qualifications. It also typically will refer to an arbitration service provider or tribunal whose procedural rules will govern. The clause may also specify time periods by which the hearing must be held and discovery limitations or allowances, including whether any depositions will be permitted. The well-prepared attorney will have a thorough command of the governing rules and any statutes that may be referenced in the arbitration clause, and how they will affect the case strategy.

Arbitrator Selection

Selection of the arbitrators is possibly the most important decision counsel participates in, just as trial lawyers often say the case is won or lost with jury selection. Arbitrators typically are selected through either a party appointment system or a "strike and rank" method with respect to proposed arbitrators on a list provided by the tribunal administrator. Counsel also may ask the administrator for additional names or to list arbitrators with certain expertise, even if the clause does not require such qualifications. Stipulation with opposing counsel to one or more arbitrators should be considered if circumstances allow.

Due diligence on proposed arbitrators should be conducted as thoroughly as possible. Such efforts should go well beyond reviewing their résumés by consulting other attorneys, doing Internet and social media searches, and reviewing any published opinions or articles by the arbitrator if applicable. Arrangements to interview potential arbitrators with opposing counsel may be made through the case administrator. An interview is particularly important to learn about an arbitrator's style and views on procedural matters such as discovery and motions in arbitration. The object of this intelligence gathering is to ascertain, to the extent possible, whether the proposed arbitrators are likely to be neutral, fair, professional, and even-tempered in their handling of a case, and to assess whether they are likely amenable to being persuaded to the client's position.

Tell the Client's Story

It is not necessary in arbitration to write a complaint or an answer in the same manner as required in court. A narrative explanation of the facts and claims may suffice. Although a

respondent need not file anything in response to an arbitration demand, the best practice is to take the opportunity to respond by telling the defense's side of the story rather than simply making a general denial of the claims and listing affirmative defenses. This approach gives the arbitrators a better sense of what the case is about and helps inform the upcoming proceedings.

Start with the Award in Mind
Be clear about what relief to ask the arbitrator to order. At the outset, a valuable exercise is to draft a proposed final award that sets forth the remedies the client will seek, being mindful of any enforceable contractual restrictions (for example, no lost profits or punitive damages). Drafting the desired award helps clarify what evidence is needed to prove the claims and defenses, and will assist in planning discovery.

Discovery in Arbitration
In addition to any restrictions or allowances in the parties' clause, applicable tribunal rules will determine what discovery may be allowed. Such rules are generally less specific than those in federal and state court. In most cases, arbitrators have wide discretion on discovery. Arbitrators appreciate and will generally accede to the parties' stipulations concerning discovery, so negotiating a mutually agreeable discovery plan, if possible, is beneficial. In any event, it is critical to determine what discovery is necessary rather than desirable, the practicalities of getting information from third parties voluntarily or by subpoena, and whether the case warrants depositions and experts. Depositions may be allowed in limited number under some rules, or by stipulation. If they are strictly discretionary with the arbitrator, a good faith showing will be required as to their necessity, relevance, and how they will advance the case rather than just drive up costs.

In contrast to contemporary court rules and case law, e-discovery rules in arbitration are limited or nonexistent. Counsel should be prepared to negotiate reasonable e-discovery protocols and agreements with opposing counsel or to propose a well-reasoned scope of e-discovery to the arbitrators, to avoid entering burdensome and costly e-discovery orders.

The Prehearing Conference
The prehearing conference is often the single opportunity before the evidentiary hearing to educate the arbitrators about the case and help shape how it will be conducted. Counsel should be prepared to discuss all relevant procedural matters, including the length and time of the hearing, any motions that will expedite issues or deal with interim relief, and a discovery plan and e-discovery protocols. Counsel may consider proposing that the arbitration be conducted in phases to promote efficiency by early determination of potentially dispositive issues or of those issues that may limit further hearing (for example, statutes of limitation or existence of third-party beneficiary rights). Counsel should be sure to seek clarification on any ambiguities in the resulting scheduling order and ask for the arbitrators' guidance on matters not addressed. Counsel should also ensure that witness hearing protocols, including advance notice about when witnesses will be called, are included in the order to eliminate surprises at the hearing.

Presenting Evidence Effectively at Hearing
The scheduling order generally will set the arbitration hearing for a certain number of days based on discussion at the prehearing conference. A failure to complete the hearing within the designated timeframe may cause weeks or months of delay before the arbitration can be reconvened. Time at the hearing will therefore be at a premium. Counsel should obtain clarification about any time allocations between parties and how they will be monitored or enforced, and should not hesitate to ask the arbitrators about their practices and preferences at the hearing and to plan accordingly. Consider stipulations to certain facts, or limiting or waiving an opening statement if a detailed arbitration brief has been submitted, to save hearing time.

Most arbitrators will request, if not insist, on joint exhibits to the extent possible. Cooperation with opposing counsel to eliminate routine foundational testimony and admissibility issues on documents by stipulation is time well-spent. It will avoid using valuable hearing time on routine matters. Reduce duplication of exhibits by using only the fully executed copy of a document or the entire email string of a multi-email exchange, unless there is a compelling point to be made otherwise.

The attorney new to arbitration should tailor her evidentiary presentation with the understanding that the rules of evidence do not strictly apply, that objections are disfavored, and that arbitrators are generally sophisticated and experienced. Be prepared to have arbitrators allow some witnesses' direct testimony to be presented by affidavit, or to allow witnesses to appear by telephone or video services. Counsel should be flexible and accommodating about taking third-party witnesses and experts out of order, and they should expect arbitrators to allow cross-examination beyond the scope of the direct so such witnesses do not need to return. Counsel also should be prepared to have their client and allied witnesses called adversely by the other side. Arbitrators may cut off cumulative testimony, so counsel should be prepared to make offers of proof if the witness is needed for another point. Some arbitrators actively question and even take over examinations of some witnesses, which may reveal what issues the arbitrators are particularly focused on or troubled by. Further evidentiary presentation should be adjusted accordingly.

As in a jury or bench trial, an arbitration will have its share of surprises and exhilarating and aggravating moments. But the chances for success are enhanced through careful preparation and understanding of both the arbitration rules and the arbitrators' preferences for conducting the hearing.

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