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KNOW THE RULES!

Effective arbitration advocacy – attorney control

A QUICK-READ REFRESHER COURSE ON ARBITRATION PREPARATION AND SUCCESS

[*This article was written initially by the late Alex S. Polsky, a premier arbitrator and mediator and was published in the September 2014 Advocate. It has been updated by Hon. Joe Hilberman (Ret.) and attorney Andrea Niven.*]

Lawyers must treat the process and evidentiary burden of arbitration as they would a trial while simultaneously navigating the procedures unique to private contractual arbitration. Because of the significance of an arbitration award, a successful outcome is mired in counsel's knowledge of how best to navigate and influence all stages of the process.

Initiating the arbitration process

Front-end control of the arbitration processes

While arbitrators have greater leeway in the arbitration process than trial judges, counsel can address the rules to be applied at arbitration in their arbitration agreement. Without specific rules in the agreement, the arbitrator may apply the rules of the chosen tribunal or the provisions of California and federal law. Counsel should become familiar with the California Arbitration Act (CAA) (Code Civ. Proc., § 1280, et seq.), Ethics Standards for Neutral Arbitrators in Contractual Arbitration, and Federal Arbitration Act (FAA) (9 U.S.C. § 1, et. seq.).

Counsel must be aware of the rules of the chosen tribunal or whether the codes apply. In some cases, the arbitrator may have their own rules. The question of what rules will apply must be considered at the outset. Unless otherwise contracted or agreed by the parties, the CAA or FAA will control the arbitration.

Selection of the arbitrator

Selection of the arbitrator 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, without a stipulation, the arbitration provider will often generate a strike list and curriculum vitae to give the parties a choice. Thoughtful counsel should utilize the experiences of colleagues or listservs to evaluate who would be a good arbitrator for a particular type of case.

Our legal community has no lack of resources to call upon in choosing the arbitrator, including well-known providers and several well-respected and very qualified independent arbitrators. No one wants an arbitrator who "splits the baby," and in some cases, the arbitrator must be more accommodating rather than hard-lined. Identifying someone with

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expertise in the area in question is essential.

Pre-hearing activity

Arbitration is designed to be streamlined and cost-effective compared to trial. Therefore, limited discovery is important in proper preparation for the hearing. Counsel should clarify what is anticipated and allowed with the arbitrator and opposing counsel, including whether the parties' arbitration agreement incorporates discovery rights under Code of Civil Procedure section 1283.05.

If there are disputes, the "informal discovery conference" has become a popular and well-accepted procedure to avoid motion practice, most of which is unnecessary. If motion practice is necessary, be sure you ascertain from the arbitrator what rules and deadlines for submission apply.

The arbitration brief

Perhaps the most important submission is a thoughtful, concise, and accurate brief of the issues to be presented and how the evidence will support them.

A briefing schedule should be established, providing for the submission to the arbitrator well in advance and exchanged between the parties. Depending on the tribunal rules or those of the particular arbitrator, anticipate that there will be a joint witness list, a joint exhibit list, and a brief from each party.

Best practices suggest that there not be duplicate identification of the same exhibit by each side, and witness lists should set forth scheduling and the length of time expected for testimony. Counsel should have a meaningful meet-and-confer session to agree on the foundation of exhibits, identification and numbering of exhibits, and witness schedules.

Be judicious in selecting exhibits. There is no reason to submit three loose-leaf binders of medical records when you anticipate referring to a dozen or so pages.

Tips for the arbitration hearing

Prepare for the hearing just as you would a non-jury trial. Your clients expect your best advocacy, and the arbitrator expects a professional representation and civil presentation. The arbitrator's award is subject to court confirmation and has the same enforcement as any trial judgment. So, do not approach the arbitration proceeding as "only an arbitration," because it is an important proceeding and should be treated as such.

Take time to obtain a stipulation for the foundation of exhibits from opposing counsel, and if it is not available, bring it to the arbitrator's attention at the outset to determine admissibility. Demonstrative evidence is always helpful, and the foundation for it is essential.

Prepare witnesses as for trial, both to the content of their testimony and the nature of direct and cross-examination. Testifying at a hearing is stressful for lay witnesses, so prepare for direct and cross-examination. Stress that the testimony must be truthful and direct in response to any pending question and opposing counsel is not the enemy and should (generally) be treated with respect. The arbitrator is the sole judge of the credibility of the witnesses, so be mindful of the content and the manner of presentation of the testimony.

Use objections sparingly. 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 an objection will absolutely block inadmissible evidence, then be sure to object. Note that objections should be used and framed in a manner consistent with the arbitrator's personality.

Arbitrators appreciate qualified, prepared, and focused witnesses, particularly expert witnesses. When witnesses are calm, they lay the proper foundation. They will testify professionally, and a chance for a favorable interpretation is enhanced. When witnesses are unprepared, farfetched, arrogant, or take shortcuts, they severely undermine a case.

Nothing is better than live testimony. However, if there is an agreement between counsel to use portions of depositions to avoid calling a witness for a limited purpose, it should be discussed with the arbitrator. The arbitrator may have specific questions that arise from a transcript or video recording and may want to inquire. A better alternative would be to have the witness appear on a Zoom or other electronic platform.

Every case has problems, and a proffering attorney should identify existing problems with an explanation. It may be too late to mitigate the damage if the opposing party brings out the warts.

Without a record, the ability to challenge an award is very limited. Balance the time and expense of having a court reporter against the downside probability of challenging the award.

Avoid becoming too dramatic, and prepare a closing argument that is concise, focused, well-reasoned, and calm. Do not hesitate to tell the arbitrator what you feel is a fair recovery and the basis for the amount of recovery. Plaintiff's counsel should ask for a specific amount of money, and defendant's counsel should give the arbitrator options depending on potential findings.

After the hearing

Form of award

Be sure the award is enforceable. The required form and contents of an arbitration award are specified in Code of Civil Procedure section 1283.4. It requires an award to include a determination of all questions submitted and a decision determining the controversy. The arbitrator must decide what issues are necessary for the ultimate decision. (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 372.)

Interim award

To avoid an argument that the arbitrator lost jurisdiction upon issuing the award, counsel should request the arbitrator issue an interim award, or make a joint representation to the arbitrator

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that there are issues of Code of Civil Procedure section 998 application. The request should be *joint* to avoid the suggestion that one party feels it has prevailed.

Correction of the award by the arbitrator

Unlike court powers regarding an arbitrator's award, once a final arbitration award is issued, the arbitrator, with some exceptions, loses jurisdiction to consider any other issues, including post-arbitration motions.

The limited grounds for correction of an award by an arbitrator are to be made upon written application of a party. (*Be aware of the time limits for making the motion.*) They include errors in form (not affecting the merits), evident miscalculation of figures, or a mistake in the description of any person, thing or property referred to in the award. (Code Civ. Proc., § 1284.)

Attorney fees and cost requests

Costs of arbitration are customarily borne by the party incurring them unless the arbitration agreement or the rules incorporated therein provide otherwise. (Code Civ. Proc., § 1284.2.) The provisions of the Code of Civil Procedure for allocation of costs of suit (Code Civ. Proc., § 1032 et seq.) do not control arbitration awards. (See *Britz, Inc. v. Alfa-Laval Food & Dairy Co.* (1995) 34 Cal. App.4th 1085, 1105; *Austin v. Allstate Ins. Co.* (1993) 16 Cal.App.4th 1812, 1815.)

A party requesting attorney fees and costs incurred in the arbitration must make the request to the arbitrator during the course of the proceeding. Failure to do so is not a basis for a court to vacate or correct the award to include fees and costs. (*Corona v. Amherst Partners* (2003) 107 Cal.App.4th 701, 706; *Maaso v. Signer* (2012) 203 Cal.App.4th 362, 377-378.)

Section 998 offers

As to the effect of a Code of Civil Procedure section 998 offer to compromise, the Supreme Court gave guidance in the case of *Heimlich v Shivji* (2019) 7 Cal.5th 350. In affirming that offers to compromise may be considered by the arbitrator in private arbitration, that request must be made *to the arbitrator* within 15 days of the issuance of the award.

Correction of the award by the court

In ruling on a petition to correct and confirm an arbitration award, the superior court must not consider the merits of the award (see, e.g. *Lindholm v. Galvin* (1979) 95 Cal.App.3d 443, 450), *and* the award may not be corrected unless a ministerial error occurred or the superior court determines pursuant to Code of Civil procedure section 1286.6, subdivision (b) that "[t]he arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision..."

Challenging the award in court

There are very limited grounds to challenge arbitration awards, generally only to correct numerical errors, and possibly for violations of disclosure act requirements, including:

- The award was obtained by corruption, fraud, or other undue means. (Code Civ. Proc., § 1286.2, subd. (a)(1).);
- An arbitrator was corrupt. (Code Civ. Proc., § 1286.2, subd. (a)(2).);
- A party's rights were substantially prejudiced by an arbitrator's misconduct. (Code Civ. Proc., § 1286.2, subd. (a)(3).);
- The arbitrators exceeded their powers, and the award cannot be corrected without affecting the merits of the decision on the controversy submitted. (Code Civ. Proc., § 1286.2, subd. (a)(4);also see *Harshad & Nasir Corp. v. Global Sign Sys., Inc.* (2017) 14 Cal.App.5th 523, 543; *Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 254-255.);
- A party's rights were substantially prejudiced by the arbitrator's refusal to postpone the hearing on sufficient cause being shown, refusing to hear evidence material to the controversy, or by other conduct that was contrary to the provisions of the California Arbitration Act. (Code Civ. Proc., § 1286.2, subd. (a)(5).);
- An arbitrator making the award failed to disclose a ground for disqualification of the arbitrator in a timely manner, of which the arbitrator was then aware. (Code Civ. Proc., § 1286.2, subd. (a)(6)(A), also see *ECC Capital Corp. v. Manatt, Phelps & Phillips, LLP* (2017) 9 Cal.App.5th 885, 901; *Baxter v. Bock* (2016) 247 Cal.App.4th 775, 783.);
- An arbitrator making the award was subject to disqualification under Code of Civil Procedure section 1281.91, but failed to disqualify themself on receipt of a timely demand for disqualification.

Conclusion

With ever-growing court congestion and delay, contractual arbitration is an increasingly favored method of resolving disputes due to its increased expedience, flexibility, and privacy. Adapting one's mindset from well-known court procedures to those applicable in arbitration is critical. From drafting an enforceable arbitration agreement to securing a valid and enforceable award, knowing how to influence and manage all stages of the arbitration is key.

Hon. Joe Hilberman (Ret.) is a former Los Angeles County Superior Court Judge, appointed after a 27-year civil litigation career. Since leaving the bench, Judge Hilberman has been a sought-after speaker on arbitration and mediation. Judge Hilberman has presented several times at CAALA and received the Judge of the Year award from ABOTA's Los Angeles chapter. He is a UCLA School of Law graduate, and has served as president of the Alumni Association. He is affiliated with ADR Services *as a full-time mediator and discovery referee. judgehilberman@adrservices.com*

Attorney Andrea Niven was admitted to the California State Bar in 1995. A DePaul University School of Law graduate in Chicago, she had a distinguished career as a Supervising Research Attorney for the Los Angeles County Superior Court (1996-2016). Attorney Niven now serves as a research attorney for ADR Services, Inc.

Attorney Alexander S. Polsky passed away in 2019. He was an effective JAMS mediator and arbitrator, as well as a highly respected professor and author on dispute resolution.