NOVEMBER 2007

The dark side of arbitration

Before you publish adverse comments about an arbitrator, look at all sides of the decision.

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The benefits of private arbitration are legion. When properly conducted, private arbitration is fast, cost-effective, confidential and may, if desired, permit issues to be decided by individuals with experience in the subject matter. The essential benefits of private arbitration are realized when (1) the lawyers agree in advance to the parameters and rules to be applied by the arbitrator, and (2) the parties select an arbitrator respected for neutrality and fairness.

The principles above embody the benefits of arbitration and appear to be working particularly well in the field of commercial arbitration and the arbitration of international business disputes. These principles are, regrettably, under attack particularly in the areas of personal injury and medical malpractice litigation. (This phenomena does not seem as prevalent in connection with arbitration of complex commercial matters.)

How is arbitration under attack? The answer is simple: ListServ and a refusal to take responsibility for outcome.

Organizations, large law firms and corporations utilize ListServs and internal e-mail to communicate impressions to their peers and constituents. Some companies request a review of the win-loss award statistics prior to determining whether a private arbitrator will be placed on an "approved list." An adverse award, or a series of adverse awards, could result in an arbitrator being labeled "plaintiff-oriented" or "defense-oriented." Because the linchpins of an arbitrator's reputation are *fairness* and *neutrality,* such a label can significantly impact an arbitrator's caseload, particularly if that arbitrator is not otherwise busy handling a blend of arbitration and mediation cases.

The chilling effect this phenomenon is having on private arbitration, particularly in medical malpractice and personal injury, is reaching crisis proportions in California. The list of dispute resolution professionals who are no longer accepting private arbitration cases in these subject areas is growing.

A true neutral arbitrator will follow the law and the evidence, not argument and inference. If the evidence does not justify a plaintiff's finding, these arbitrators will defense the case. If the evidence supports a plaintiff award, an award will be rendered based upon the evidence introduced and without regard to the issue of inferential blacklisting, or unsupported closing argument. Sadly, many "true neutrals have decided to leave arbitration rather than deal with "labeling". As the saying goes: "As a mediator, I generally make two friends; as an arbitrator, I risk making one friend and one enemy."

A number of steps could be taken to address this issue. Lawyers are often loath to admit to themselves or clients that their key witnesses testified poorly, or perhaps that the lawyer misevaluated the case. The easy target for blame is the arbitrator. Because we live in an age of instant communication, the following steps are useful if one intends to publish adverse comments about an arbitrator following a less than successful outcome at the hearing.

Things to consider

Before attacking the arbitrator, examine whether the key witnesses testified confidently, properly and effectively on the key issues necessary to establish a burden of proof or counter one that has already been established.

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If you are a defense attorney and are unhappy with the amount of a plaintiff 's award, examine whether you gave the arbitrator an option. Did you argue only for a defense award? Did you introduce *testimony* that would support an award different from that presented by plaintiff? If you presented the case for a defense award only, and did not present damage alternatives in the event your strategy did not succeed, you left the arbitrator with no place to go other than accept the testimony received.

If you are a plaintiff attorney, unhappy with the amount of the award, examine the above factors in reverse.

If you intend to publish negative comments via e-mail pertaining to an arbitrator following an adverse award, publish the award in its entirety. Permit the reader to review the findings tendered in support of the award so that the reader will fully appreciate the basis for the arbitrator's conclusions.

Always request that an arbitrator's award be supported by *detailed* findings. This is the only way you or your client will understand what was going through the arbitrator's mind at the time the award was prepared.

Conduct a post-arbitration analysis of the witnesses and testimony. Ask yourself if you really introduced *evidence* in support of the key elements of your *argument*.

Request that arbitrators issue preliminary findings and allow supplemental argument prior to a final award. Although no evidence will be introduced or accepted following the findings, these preliminary findings will permit the parties an opportunity to address issues that concern them, or to negotiate settlement prior to an ultimate determination by the arbitrator.

After the hearing is over, have a plan in place to make one last attempt at settlement. Now that the evidence is in, and has been digested by yourself and hopefully your client, this is your last opportunity to retain power over the outcome.

Conclusion

By paying attention to the steps outlined above while remembering to present competent evidence as to each element of a claim or defense, counsel are able to avoid surprises at arbitration.

That said: sometimes you will lose; sometimes you will be surprised. Review your case as a neutral might, and perhaps you will better understand the outcome. Just remember, an adverse award does not equate to a predilection by any particular arbitrator toward either a plaintiff or a defense orientation.

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