

TAKING THE 'BIND' OUT OF BINDING ARBITRATION:
CONDUCTING THE ARBITRATION HEARING

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Introduction

The arbitration of disputes has its roots as far back as ancient Greece.¹ In the 5th Century B.C., the goal of arbitrating disputes was to prevent or end war and stem the ill effects of prolonged battle. Today, the goal of arbitration is much the same. It seeks to minimize the costs of prolonged battle in the courtroom.

Arbitration is a modern day fact of life. Where once arbitration was mostly a voluntary procedure used primarily in resolving disputes over commercial transactions, it is becoming more and more a required element in litigation generally. California's mandatory judicial arbitration² and contractual arbitration requirements are two prominent examples of how arbitration is becoming a permanent fixture in consumer actions.³ As such, consumer attorneys must learn how to use arbitration as a tool for meeting client objectives.

This paper focuses on approaches to binding arbitration which is primarily a product of contract. The three areas most affected by binding arbitration include medical malpractice claims (e.g., Kaiser Permanente member arbitrations) uninsured and underinsured motorist (UIM) claims, and employment disputes.

As a short aside, note that non-binding arbitration requires different strategies for conducting the hearing than binding arbitration. For example, in California's judicial arbitration scheme, one has to weigh the advantages and disadvantages of

¹For a historical perspective of arbitration in ancient Greece, see King & LeForestier, *Arbitration in Ancient Greece* (Sept. 1994) *Dispute Resolution Journal*, at pp. 39-46.

²See Cal. Rules of Court, rule 1600 et seq.

³See Cal. Code Civ. Proc. § 1280 et seq. for mandatory requirements and default provisions for arbitrations conducted in California.

laying all the cards on the table. Because either party can easily seek a trial de novo after an arbitration award is made, judicial arbitration may simply be another discovery tool before trial. This is not a concern in binding arbitration.

It also must be remembered that although arbitration is designed to be an alternative to trial, it is an adversarial process. Arbitration is not a forum for seeking compromise. It is an adjudicative process that creates winners and losers. Arbitration is more informal than litigation, but the stakes are just as high as in the courtroom. It goes without saying that attorneys participating in binding arbitration must treat it as a mini-trial.

The following is a guide to conducting the arbitration hearing.

Arbitration Checklist

✓ **Know the Rules**

Arbitration is governed by federal and state law as well as by the rules of the arbitration authority under which the arbitration is conducted and by any applicable contract.⁴ The rules often govern how arbitrators are selected, which disputes must be arbitrated, how and what kind of discovery can be performed, timing and location of hearings.

Arbitration rules, particularly administrative requirements and timing questions, are often markedly different than for trials. Knowing the rules of the arbitration forum is critical to ensuring proper and thorough representation of your client.

✓ **Know the Arbitrators**

Selecting neutral and party arbitrators is an element of arbitration that cannot be overlooked. It is appropriate to

⁴See the Federal Arbitration Act (FAA) at 9 USC §§1-16 which applies to contracts that involve interstate commerce. An excellent summary of the applicability of the FAA can be found in CEB, Civil Litigation Reporter, Vol. 2, No. 6, Sept. 1999 at pp. 201-202. California law governing arbitration is found at Code of Civil Procedure, §§1280-1296 (arbitration pursuant to agreement) and Insurance Code §11580.2(f) (uninsured and underinsured motorist arbitrations). Institutional arbitration providers like JAMS have rules, as well.

telephone the potential arbitrator to ask for a C.V. and for a general description of his/her work history and experience.⁵ Contact other attorneys who have experience with potential arbitrators. If the issues in dispute are complex, then finding arbitrators with a working knowledge of the areas of law involved can be critical. Party arbitrators are expected to be advocates for the party who appoints them. Make sure they will be.⁶

✓ **Gather the evidence.**

Most arbitrations adopt federal or state discovery rules.⁷ Discovery in the arbitration setting is often less formal than in a trial setting. However, it remains a critical component of presenting a case. It is often a matter of arbitral discretion.⁸ In commercial disputes, one advantage to arbitration is that it offers the opportunity to minimize discovery. However, the commercial litigants are often interested in finding an efficient and cost-effective resolution to the dispute, in order to continue or resume their relationship.

Consumer actions are not usually driven by such business considerations. However, depending on the particular circumstances, minimization of discovery may be attractive in consumer actions.⁹ As will be discussed next, relaxed

⁵AAA Code of Ethics for Arbitrators in Commercial Disputes, Canon I, §§ B & C imply a need for parties to ascertain the willingness and availability of arbitrators to participate in the arbitration. This can only be done through direct contact with the potential arbitrators.

⁶AAA Code of Ethics, Canon VII, § A1 permits party appointed arbitrators to be "predisposed" toward the party who appointed them, subject only to general obligations of good faith, integrity and fairness.

⁷Rules for Kaiser Permanente Member Arbitrations (March 1999) rule 27(a) states, "Discovery shall be conducted as if the matter were in California state court."

⁸Code Civ. Proc. § 1283.05 grants arbitrators broad powers to manage the discovery process. Subsection (e) requires parties to gain prior approval of the arbitrator(s) to take depositions.

⁹Code Civ. Proc. § 1283.1(a) makes discovery provisions in § 1283.05 mandatory for all arbitrations involving personal injury

evidentiary standards in arbitration can by themselves make a party's discovery requirements less burdensome. Rarely, if ever, will an arbitrator apply the best evidence rule and arbitrators frequently limit the number of depositions.

Discovery is always a potential source of conflict. Unlike discovery motions in state court, however, discovery conflicts in arbitration are heard by the ultimate trier of fact. Attorneys should consider how a discovery hearing might impact the arbitrator in making the final award before pressing a discovery dispute.

✓ **Use relaxed evidentiary rules to your advantage.**

Technically, rules of evidence are not applicable to most arbitration proceedings.¹⁰ Arbitrators handle admissibility questions based on their own sense of reasonableness and reliability. However, the rules of evidence are often applied because many arbitrators are lawyers. Arbitrators are familiar with the rules of evidence and are predisposed toward them.

Because rules evidence are not strictly applied, arbitration offers greater flexibility in presenting evidence. A few examples illustrate this point. First, hearsay is often admissible as long as it is necessary and reliable in the eye of the arbitrator. Remember that necessity and reliability are the underlying reasons for hearsay exceptions in most evidence codes. Second, arbitrators often do not require third-party authentication of evidence and instead allow the attorney to authenticate the source. Third, affidavits are often used instead of direct testimony by witnesses. It is always wise to err on the side of satisfying evidentiary foundations to ensure that your evidence is admitted.

or wrongful death claims. Subsection (b) allows parties to opt out the statutory discovery provisions in all other arbitrations.

¹⁰Code Civ. Proc. § 1282.2(d) explicitly states that rules of evidence and rules of judicial procedure need not be followed in arbitrations. For example, there is no requirement that testimony be given under oath, unless so requested by one of the parties. As a standard operating procedure, always request that testimony be given under oath. This will add solemnity to the hearing and make witnesses subject to the penalty of perjury.

The relaxed evidentiary rules can make hearing preparation and presentation more manageable. It provides an opportunity to present evidence more easily and potentially in different forms than would be required at trial. However, it should not be seen as an open invitation to drown the arbitrator in paper. Most arbitrators will only consider evidence that is relevant to key issues.

✓ **Simplify the issues.**

One of the main benefits of arbitration is that it allows parties to cut to the chase. Arbitrators control the arbitration hearing and will often limit evidence and arguments to the issues that are the crux of the matter. Getting to the heart of the matter in briefs, evidence and oral arguments will benefit both arbitrator and client alike.

✓ **Prepare witnesses.**

Where presentation of witnesses, rather than submission of affidavits, is essential, witness preparation should be undertaken with the same care as if going to trial. Unless specifically agreed to otherwise, traditional rules of discovery (See Code Civ. Proc. §§ 2016-2036) are applicable to arbitrations.¹¹ In many cases, expert witness disclosure pursuant to Code Civ. Proc. § 2034 will apply.¹² Because arbitrators have power to control testimony, including preventing direct testimony of experts, expert depositions and reports potentially are more significant.

✓ **Write a good brief.**

Arbitrators do not have the luxury of support staff or law clerks to help them with legal research and analysis. The less work needed by the arbitrator, the better. As such, briefs should be clear, concise and well-written. Attach key evidence as exhibits. Briefs should be submitted on time. Damages should be summarized and verified in the arbitration brief, as well.

¹¹See Code Civ. Proc. § 1283.1, *supra*, note 9.

¹²Code Civ. Proc. § 1283.1 requires the application of statutory discovery rules in personal injury and wrongful death cases.

✓ **Use exhibits.**

Use of exhibits (e.g., excerpts from depositions, photographs and other demonstrative evidence) helps complete the record. Arbitrators often want to review key portions of medical records and depositions for themselves. Use of a police report or photographs are easy and effective ways to establish facts. Do not underestimate the importance of using blow-ups because they explain evidence and keep it in view. They also help during argument.

✓ **Be brief in opening statements.**

Opening statements are beneficial for laying a road map for jury and arbitrator alike. However, most arbitrators only want a general idea of the case and prefer to focus on the evidence. They already have read your arbitration brief and have a basic understanding of the facts of your case. Do not forget that arbitrators generally have more training in the law and more experience in litigation than jurors. Therefore, they are less likely to be swayed by opening statements. Good, brief opening statements still play a role in arbitration, but spend more time on developing the evidence.

✓ **Give good closing arguments and briefs.**

In some instances, arbitrators will ask for closing briefs. These should be short and to the point. They should be submitted as early as possible. Most arbitration rules have strict deadlines for making awards. Any delay in submitting a closing brief could render it ineffective. Also, it never hurts to ask the arbitrator if there are particular issues that remain a concern at the end of the hearing process. Closing briefs can then be targeted to address these concerns. In your closing argument, focus on the compelling facts and the key supportive evidence to keep your remarks brief.

✗ **Don't leave it up to the arbitrator to fill in the blanks.**

Give the arbitrator what he/she needs to make a decision. Provide a complete record. As mentioned previously, most arbitrators do not have support staff to assist in the evaluation of a case. Thorough presentations with appropriate cites, exhibits and documentation will avoid putting the arbitrator in the position of making decisions on incomplete information. The worst scenario is for the

arbitrator to base his decision on an incomplete record. Only slightly better is forcing the arbitrator to conduct his or her own research without any input from the parties to the dispute.

- ⌘ Don't assume the arbitrator is familiar with the legal issues involved.

While both parties have some say in the selection of the arbitrator, it is not unusual for an arbitrator to be selected at random. Consequently, an arbitrator may have no background in the area of law that the arbitration involves. For this reason, be sure to outline and explain the legal issues and the applicable law.

- ⌘ Don't attack the arbitrator.

Although arbitration is more informal, treat the arbitrator with the same deference and respect as a judge receives at trial. This admonition is particularly appropriate where counsel was involved in the arbitrator selection process up front. If the attorney is thorough at the beginning, the need for criticism at the end can often be avoided altogether.

Conclusion

Binding arbitration is not mediation and do not confuse it with non-binding arbitration. It is a mini-trial and must be approached with the same care and preparation as a courtroom trial. In fact, a professional approach to the arbitration will help win the day because it may catch the opponent by surprise and will impress the arbitrator.

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